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780 P.2d 1148

STATE of New Mexico, ex rel. Hal STRATTON, Attorney General, Petitioner,

v.

Hon. Patricio SERNA, District Judge, Respondent,

and

Chief Public Defender, Intervenor.

No. 18638.

Supreme Court of New Mexico.

Oct. 12, 1989.

Hal Stratton, Atty. Gen., Stephen Westheimer, Deputy Atty. Gen., Elizabeth Major, Asst. Atty. Gen., Santa Fe, for petitioner.

Billy R. Blackburn, Albuquerque, Jim D. James, Santa Fe, for real parties in interest.

Jacquelyn Robins, Chief Public Defender, Sheila Lewis, Asst. Appellate Defender, Santa Fe, for intervenor.

Jones, Snead, Wertheim, Rodriguez & Wentworth, Jerry Wertheim, Steven L. Tucker, Lorenzo F. Garcia, Santa Fe, for Chama Land & Cattle Co. amicus curiae.

OPINION

BACA, Justice.

In 1989 the legislature enlarged the pool of prospective jurors in New Mexico by amending NMSA 1978, Section 38–5–3(A) (Repl.Pamp.1987) to add driver's license holders to the existing pool of registered voters. The question before the court is when did the legislature intend the broadened jury pool to take effect; ninety days after the adjournment of the legislature when laws generally are implemented or ninety days after the next general election as *specified in the statute?* We find that the broadening of the jury pool is mandated ninety days after the next general election. We therefore find for the state.

NATURE OF THE ACTION

This action is before the court on an original proceeding of superintending control. N.M. Const. art. VI, § 3. The issue of superintending control arose within the criminal case of *State v. Mitchell, Shoemaker & Bella,* No. SF 88–376(CR). On August 11, 1989, defendant Mitchell filed a motion to quash the jury panel as invalid because it did not include prospective jurors drawn from the driver's license list. Defendant argued that the amended Section 38–5–3(A) took effect June 16, 1989, and therefore, the jury pool should have been expanded as of that date. The New Mexico Constitution provides that, unless there is an emergency provision, laws "go into effect ninety days after the adjournment of the legislature enacting them." N.M. Const. art. IV, § 23. District Judge Patricio Serna granted the motion to quash. The state, through the attorney general's office, petitioned this court for a writ of superintending control, naming the Honorable Patricio Serna as respondent. The state asked this court to quash Judge Serna's order of August 14, 1989, and direct him to proceed to trial with the existing jury panel. The state argued that the statute specifically dictates delaying the expansion of the jury pool until ninety days after the next general election.

ISSUES

One question alone exists at the heart of this controversy—*when* did the legislature intend its enlargement of the prospective jury pool to have practical application statewide. It is helpful to analyze this question in three sub-parts:

1) What was the legislature's purpose in enacting this amendment and what was the language used to achieve this purpose?

2) How is this case distinguished from *State ex rel. Maloney v. Neal,* 80 N.M. 460, 457 P.2d 708 (1969)?

3) What constitutional implications, if any, result from the court's interpretation of the amendment?

PRACTICAL PURPOSE AND PLAIN LANGUAGE OF THE AMENDMENT

The practical purpose of amending Section 38–5–3(A) was to enlarge the jury pool to ensure that a broader cross section of New Mexico citizens sit in jury panels across the state. Requiring immediate selection from lists that do not yet exist would negate this goal and hobble the judi-

cial system. The ultimate result would be a complete shutdown in jury selection throughout the state until such lists were created. This is contrary to the legislative intent, exemplified by specific language in the statute mandating a longer time to prepare these lists.

The language of the amended statute reads:

> **38–5–3. Poll books; driver's license holders; source for juror selection.**
>
> A. Each county clerk shall preserve and make available to the district courts, until no longer needed for this purpose, the poll books from the general election last held in the county. *The motor vehicle division of the taxation and revenue department shall make available to the district courts a list of the driver's license holders in the county.* The clerk of the district court for each county **within ninety days following the general election,** shall select from the names of voters enrolled on the poll books of every voting division in the county *and from the list of driver's license holders* the persons to serve as potential jurors for grand jury and petit jury service during the **following two years.** [Amended language underlined, emphasis added.]

NMSA 1978, § 38–5–3(A) (Cum.Supp.1989).

The plain language in this statute is clear. Statutory language should be interpreted literally. Where there is no ambiguity, there is no room for alternative interpretation. *State v. Elliot,* 89 N.M. 756, 757, 557 P.2d 1105, 1106 (1977). This statute was amended, not repealed. The amended language must be read within the context of the previously existing statute. Taken as a whole the old and the new language comprise the presently controlling statute and manifest the legislative intent. *Atencio v. Board of Educ.,* 99 N.M. 168, 171, 655 P.2d 1012, 1015 (1982).

The statute indeed took effect on June 16, 1989; however, there was no language that invalidated the existing jury pools at that time. The legislature did not amend the effective date for ninety-day, post-election jury pool selection. This clearly expresses the legislature's intent that jury pool selection continue to be renewed ninety days after every general election.

DISTINGUISHED FROM MALONEY

Respondent argues that *State ex rel. Maloney v. Neal,* 80 N.M. at 460, 457 P.2d at 708, demands an immediate expansion of the jury pool. This argument misconstrues the historical and legal basis for that decision. The underlying situations in *Maloney* and this case are quite different.

Maloney dealt with the repeal of the jury pool in 1969. The new replacement statute had language similar to the statute now at issue. The statute directed the court clerks to select prospective jurors within ninety days following the general election; however, **it also contained an effective date of July 1, 1969.** The court in *Maloney* found that the new statute must be put into effect on the specified effective day of July 1, and that the ninety-day language should have future application. Two strong characteristics distinguish *Maloney* from this situation:

> 1) The previous statute was repealed, leaving a void if the new statute was not put into effect;
>
> 2) An effective date of July 1, 1969, was specified in the legislation.

In *Maloney* the legislature completely repealed the previous jury pool selection statute. Prior to *Maloney* the jury pool was composed of jurors selected individually and deliberately by commissioners from specific groups of **active** registered voters. The legislature found this to be discriminatory and repealed it. It enacted a new statute that used all registered voters selected randomly as the pool. The new statute stated in part: "The method of selection shall be at random and in a manner to provide that no discrimination is exercised * * *." NMSA 1953, § 19–1–3.

Because the prior jury pool was invalidated, the court found that the new jury selection pool must go into effect at the specified effective date, July 1, 1969. The repeal of the statute created a void that had to be filled, or no juries could have been

selected at all. The legislative intent was plain—the statute had to take effect on this date, despite the statutory language directing jury pool selection ninety days after each subsequent general election. The court in *Maloney,* in an effort to give effect to both dates mentioned, found the ninety-day language to be directory and to have only **future application.**

The ninety-day language must logically be applied now. In *Maloney* there was no valid pool from which to select jurors when the statute took effect. In the present situation, a valid jury pool was simply expanded; this is a very different situation from *Maloney.* A valid jury pool existed prior to the 1989 amendment and still exists. Following the legislature's directory language by continuing to renew jury lists ninety days after every general election will continue the logical, sequential method the legislature has specified for selecting jury pools. That language cannot be disregarded and *Maloney* itself directs that it be applied in future cases.

CONSTITUTIONAL ISSUES

The Constitution of the United States guarantees the right to an impartial jury. U.S. Const. amend. VI. This jury should be made up of a fair cross section of the community. Three elements are necessary to establish a prima facie violation of the fair cross-section requirement. They are:

1) The group excluded from the jury pool is a *distinctive* group in the community;

2) The underrepresentation of this distinctive group is unreasonable and unfair in proportion to the number of such a group in the community; and

3) The underrepresentation is due to systematic exclusion.

Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); *State v. Lopez,* 96 N.M. 456, 459, 631 P.2d 1324, 1327 (1981).

Citizens who have driver's licenses but who do not vote are not a distinctive group in the community. A distinctive group must possess some quality or attribute which defines and limits the group. The group must have a cohesiveness of philosophy which distinguishes it from the general population, and finally, the group must possess a community of interest which may not be represented by other segments of society. *Id.* at 459, 631 P.2d 1324; *United States v. Test,* 550 F.2d 577 (10th Cir.1976). Driver's license holders that are not registered to vote do not fall within this definition of a "distinctive group"; they are a vast array of people whose only cohesive characteristic lies in their possession of a driver's license. Having found no distinctive group, we need not concern ourselves with the last two elements in the *Duren* criterion.

In *State v. Barnett,* 85 N.M. 404, 512 P.2d 977 (1973), the New Mexico Court of Appeals found that a wait of two years to enlarge the jury pool to include newly enfranchised persons between the ages of eighteen and twenty-one years did not deprive defendants of their due process rights. Similarly, following the legislature's intent to enlarge the jury pool ninety days after the next general election does not violate defendants' constitutional rights. A valid jury pool exists.

We reverse the order of the trial court quashing the jury panel and direct the trial to proceed.

IT IS SO ORDERED.

LARRABEE, J., concurs.

RANSOM, J., specially concurs.

RANSOM, Justice (specially concurring).

I agree with the result reached by the majority. Given the difference in purpose of the fundamental reform effected by the 1969 replacement law considered in *Maloney,* as compared to the minor changes effected by the 1989 amendments to that law, I believe the Court correctly has concluded that the plain meaning of the statute should control the outcome of this case. I file this special concurrence only to express certain views not entirely in accord with those of the majority.

There has been no factual showing that, had the state promptly implemented the statute as urged by intervenors, the judicial system would have been hobbled. In any event, had the legislature intended implementation ninety days after adjournment (i.e., June 16, 1989), this Court would be bound to give effect to that intent. I agree the legislature did not intend immediate implementation.

At oral argument, counsel for intervenors stated that, had she not read *Maloney* in briefing the issues on the petition before us today, she would have concluded that the statute was to be implemented as provided by its express terms—within ninety days of the next general election. Nonetheless, intervenors argued strenuously that the legislature must be presumed to have read and understood *Maloney*. They urge a rule of statutory construction that would subordinate the "plain meaning" of the statute to the "special meaning" supplied by *Maloney*. We are asked to presume that the legislature considered *Maloney* to require immediate implementation of the statute despite its plain meaning.

As noted by Karl Llewellyn many years ago in a famous article, in almost every case it is possible to juxtapose with a given canon of statutory construction a counterpart that would lead to the opposite result. For every thrust there is a parry. Llewellyn, *Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,* 3 Vand.L.Rev. 395 (1950). It follows that we must be guided by our practical understanding as well as by formal rules when construing legislation. Without evidentiary support, it strains credulity to believe the legislature studied *Maloney* and concluded that, despite the general election provision, any intent to implement the amendment immediately would be carried out absent a clear and simple statement to that effect.

Finally, as I understand intervenors' constitutional argument, once the legislature has set up a jury selection system, there exists a constitutional right to have one's jury selected in accordance with that system. Without venturing an opinion on the merits of this argument, I note that it logically depends on our interpretation of when the legislature intended that the statute under consideration be implemented. Having decided that the legislature did not intend for clerks to be required to select driver's license holders for jury lists until ninety days after the next general election, we need not reach the constitutional issue raised.

780 P.2d 1152

Deborah SANDOVAL,
Plaintiff–Appellant,

and

Safeco Insurance Companies,
Involuntary Plaintiff,

v.

Urbano MARTINEZ, d/b/a Martinez Trucking, and Orlando Sena,
Defendants–Appellees.

No. 10020.

Court of Appeals of New Mexico.

May 18, 1989.

Certiorari Denied July 27, 1989.

Paul S. Wainwright, Lisa E. Jones, Robinson & Wainwright, P.A., Albuquerque, for plaintiff-appellant.

James P. Sullivan, Mariana (Mimi) G. Geer, Felker & Ish, P.A., Santa Fe, for defendants-appellees.

Bradford V. Coryell, Montgomery & Andrews, P.A., Santa Fe, amicus curiae, New Mexico Defense Lawyers Ass'n.

William H. Carpenter, Chairman, Amicus Committee, New Mexico Trial Lawyers Ass'n, Carpenter & Goldberg, Michael B. Browde, Albuquerque, amicus curiae, New Mexico Trial Lawyers Ass'n.

OPINION

HARTZ, Judge.

The district court dismissed plaintiff's complaint with prejudice because she lied in answers to interrogatories. She appeals. Because of the implications of this case for litigation in New Mexico, we requested amicus briefs from the New Mexico Trial Lawyers Association and the New Mexico Defense Lawyers Association. Both submitted learned briefs that were of great assistance to the court. We hold that SCRA 1986, 1–037(D) (Cum.Supp.1988) authorized the dismissal and we affirm the district court.

Plaintiff sued defendants for personal injuries to her neck, back, and legs allegedly suffered in an automobile accident. In January 1986 defendants served plaintiff with interrogatories and a request for production. Plaintiff served answers to the interrogatories three weeks late. She produced documents almost a month later, after defendants had filed a motion to compel production; the district court ordered plaintiff to pay defendants $100 for attorneys' fees incurred in securing compliance with the request. Three of the interrogatories asked plaintiff whether she had ever been in a prior auto accident (No. 11), whether she had suffered any physical injury in such an accident (No. 13), and whether she had undergone any surgical operations prior to the accident in question (No. 17). To each question plaintiff responded "N/A." During her deposition on April 1, 1986, she was asked if she had received any traffic citations in the last five years. She responded "No." At the deposition plaintiff agreed to supply defendants with an authorization to obtain her medical records. Plaintiff's counsel forwarded the authorization to defense counsel on May 1. In January 1987 defendants requested plaintiff to supplement her answers to interrogatories Nos. 11 and 13. Plaintiff responded that her answers were unchanged.

With records obtained through the medical authorization, defendants' counsel discovered that plaintiff had suffered injuries in automobile accidents in 1974 and 1976, the one in 1974 requiring surgery. The injuries in the two accidents included injuries to her cervical spine and head. Defendants' counsel also discovered that plaintiff had received two tickets for speeding in 1985. Based on these discoveries, defendants moved for sanctions. The district court dismissed the complaint with prejudice, stating:

> [I]n light of NMRCP 1–011 and 1–037, the court finds that the Plaintiff failed to meet her discovery obligations and did, in bad faith, provide false answers to interrogatories and that dismissal is an appropriate sanction therefor.

RULE 1–037(D) SANCTIONS MAY BE IMPOSED FOR INTENTIONAL FALSE ANSWERS TO INTERROGATORIES [1]

Rule 1–037 is entitled, "Failure to make discovery; sanctions." Following Federal Rule of Civil Procedure 37, it sets forth the procedures governing imposition of sanctions for violation of the rules of discovery. Paragraph A provides for motions to compel discovery and permits the party prevailing on such a motion to recover expenses incurred in prevailing on the motion. Paragraph B deals with sanctions, including dismissal and default, that the court may impose for violation of discovery orders. Paragraph D states, in pertinent part:

> D. * * * If a party * * * fails[:]
>
> * * * * * *
>
> (2) to serve answers [or] objections to interrogatories submitted under Rule 1–033, after proper service of the interrogatories; or
>
> (3) to serve a written response to a request for inspection submitted under Rule 1–034, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Subparagraphs (a), (b) and (c) of Subparagraph (2) of Paragraph B of this rule [which includes the sanction of dismissal].

The paragraph of Rule 1–037 applicable in this case is 1–037(D). Rule 1–037(B) does not apply because the district court did not base the dismissal on violation of any order. Rule 1–037(D), however, authorizes the sanction of dismissal even when there has been no court order. *See* 4A J. Moore, J. Lucas & D. Epstein, *Moore's Federal Practice* ¶ 37.05 (2d ed. 1988); 8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2291 (1970 & Supp.1988).

Dictum in *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 208, 629 P.2d 231, 284 (1980), *appeal dismissed and cert. denied,* 451 U.S. 901, 101 S.Ct. 1966, 68 L.Ed.2d 289 (1981), suggested that the district court could impose sanctions for false answers to interrogatories. The court cited four cases as authority for the proposition, *id.*, note 87: *Evanson v. Union Oil Co. of Cal.*, 85 F.R.D. 274 (D.Minn. 1979), *appeal dismissed,* 619 F.2d 72 (Temp.Emer.Ct.App.), *cert. denied,* 449 U.S. 832, 101 S.Ct. 102, 66 L.Ed.2d 38 (1980); *Hunter v. International Sys. & Controls Corp.*, 56 F.R.D. 617 (W.D.Mo. 1972); *Life Music, Inc. v. Broadcast Music, Inc.*, 41 F.R.D. 16 (S.D.N.Y.1966); and *Buehler v. Whalen,* 15 Ill.Dec. 852, 70 Ill.2d 51, 374 N.E.2d 460 (1977). Yet in none of those cases, nor in any other case that we have found or that has been brought to our attention, has a court granted a dismissal or default judgment under Federal Rule 37(d) solely on the basis of false responses to discovery requests. *But cf. Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585 (9th Cir.1983) (upholding default judgment under Federal Rule 37 for lies to the court and in discovery responses and for violation of discovery orders; Federal Rule 37(d) not specifically cited). Also, *United Nuclear* did not address specifically whether a default or dismissal under

1. It is unnecessary to our result to determine whether SCRA 1986, 1–011 provides an alternative ground for the dismissal in this case.

Rule 1–037(D) is appropriate for a false answer to an interrogatory. Therefore, before affirming such a sanction here, we must approach the matter from a more general perspective.

Rule 1–037(D), if read literally, does not apply to false interrogatory answers. It speaks of the *failure* of a party to serve answers or objections to interrogatories. Such language suggests the complete absence of any interrogatory answer.

Nevertheless, an answer can be so useless as to be equivalent to no answer. In *Minnesota Mining & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256 (Fed.Cir.1985), defendant argued that a default judgment pursuant to Federal Rule 37(d) was inappropriate because it had in fact served a response to discovery requests. The response stated: " 'Defendant, Eco–Chem, Inc. [ECI] is an inactive Minnesota corporation with no employees and with no operations in Minnesota or elsewhere. Consequently, Defendant is unable to respond to Plaintiff's First Set of Interrogatories and First Request for Production of Documents.' " *Id.* at 1258. We agree with the following comment by the court:

> If we were to accept appellants' argument, the full force of Rule 37(d) could be rendered virtually meaningless. A party could simply send its opponents a letter refusing to comply with a discovery request, confident that it would face no more serious sanction than a court order directing compliance. This result is plainly inconsistent with the purpose of Rule 37(d), *i.e.*, to allow the courts to punish a full and wilful noncompliance with the federal rules on discovery, and to deter such conduct in the future.

Id. at 1260. The court stated that ECI's action "amounted to a 'total failure to respond.' " *Id.* at 1261 (quoting *Laclede Gas Co. v. G.W. Warnecke Corp.*, 604 F.2d 561, 565 (8th Cir.1979)). Other courts also have applied Federal Rule 37(d) when a response was tantamount to no response. *See, e.g., Equal Employment Opportunity Comm'n v. Sears, Roebuck & Co.*, 114 F.R.D. 615, 626–27 (N.D.Ill.1987) (incorrect, incomplete, and misleading data), *aff'd*, 839 F.2d 302 (7th Cir.1988); *Fautek v. Montgomery Ward & Co.*, 96 F.R.D. 141, 145 n. 5 (N.D.Ill.1982) (false denial that party did not have certain records); *Bell v. Automobile Club of Mich.*, 80 F.R.D. 228, 232 (E.D.Mich.1978) (misleading and deceptive answers), *appeal dismissed*, 601 F.2d 587 (6th Cir.), *cert. denied*, 442 U.S. 918, 99 S.Ct. 2839, 61 L.Ed.2d 285 (1979); *Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F.2d 145, 155 (7th Cir.1976) (evasive and incomplete answers). *Cf. Hilmer v. Hezel*, 492 S.W.2d 395 (Mo.Ct.App.1973) (untruthful or evasive answer is equivalent to refusal to answer under Missouri rules).

In *Doanbuy Lease & Co. v. Melcher*, 83 N.M. 82, 488 P.2d 339 (1971), our supreme court adopted a similar approach. The court said that the conduct of plaintiff's president at his deposition was so obstructive and unproductive that it could "only be equated with a refusal to appear." *Id.* at 85, 488 P.2d at 342. Although in that case the district court had ordered the witness to appear at his deposition, the supreme court affirmed the default judgment as arising under Rule 37(d). (Basing the sanction on Rule 37(d), rather than on Rule 37(b), may have resulted from the language of the rules at that time. Although the then Rule 37(b) provided for sanctions for failure to obey an order requiring a deponent to answer designated questions, it did not address orders simply to appear at depositions. Thus, it was Rule 37(d) that had to be the source for sanctions for a failure to obey a court order to appear at a deposition. *See Independent Prods. Corp. v. Loew's, Inc.*, 283 F.2d 730, 733 n. 2 (2d Cir.1960); C. Wright & A. Miller, *supra*, § 2291 n. 4).

An interrogatory answer that falsely denies the existence of discoverable information is not exactly equivalent to no response. It is *worse* than no response. When there is no response to an interrogatory or the response is devoid of content, the party serving the interrogatory at least knows that it has not received an answer. It can move the court for an order to compel a response pursuant to Rule 1–037(A). If the response is false, however,

the party serving the interrogatory may never learn that it has not really received the answer to the interrogatory. The obstruction to the discovery process is much graver when a party denies having had a prior accident than when the party refuses to respond to an interrogatory asking if there have been any prior accidents.

APPROPRIATENESS OF THE SANCTION OF DISMISSAL

Having concluded that a false interrogatory answer may be subject to Rule 1–037(D) sanctions, we next address the appropriateness of the sanction of dismissal.

The purposes of Rule 1–037 are (1) to enable a party to obtain the discovery to which it is entitled; (2) to compensate a party for expenses incurred because of violation of the discovery rules by another party; and (3) to deter infractions of the rules and of court orders enforcing them. The rules provide a hierarchy of sanctions.

The customary sanctions are "remedial" in nature. The typical court order dealing with failure to comply with the discovery rules is an order compelling compliance. *See* R. 1–037(A). The party serving proper discovery requests is entitled to at least the required response. In addition, when the responding party's lapse was not substantially justified, the district court may order the party that violated the discovery rules to reimburse the other party for expenses incurred in obtaining the order to compel. *See* R. 1–037(A)(4). The expenses that a party may be required to pay are expanded yet further if its rule violation is a failure to respond to discovery. Rule 1–037(D) states that the court may award "the reasonable expenses ... caused by the failure [to provide discovery responses]." For example, if an interrogatory answer falsely denied the existence of discoverable information, the other party probably will have suffered expenses substantially beyond the cost of moving for sanctions after discovery of the falsehood. The injured party likely would have incurred expenses not only to discover the falsehood, but also to pursue, in preparation for trial, factual and legal avenues that it would not have pursued if truthful responses had been provided. A court order requiring reimbursement of such expenses may be appropriate. *See Equal Employment Opportunity Comm'n v. Sears, Roebuck & Co.*

In contrast, providing "remedial" relief is not the principal purpose of the sanction of dismissal. It is not designed to make the injured party whole. Ordinarily, a court cannot justify dismissal as putting the injured party in the same position it would have been in if there had been no violation of the discovery rules. In other words, dismissal, in general, constitutes a penalty. Mere negligence does not warrant such a penalty. *See Moore's Federal Practice, supra,* ¶ 37.03[2.–5]. Dismissal under Rule 1–037(D) is appropriate only when a party's misconduct meets the minimum requirements set by our supreme court in *United Nuclear* for defaults under Rule 1–037(B). The court stated, "[Default] sanctions are to be imposed only in extreme cases and only upon a clear showing of willfulness or bad faith." 96 N.M. at 241, 629 P.2d at 317. " '[A]n appellate court's review should be particularly scrupulous lest the district court too lightly resort to this extreme sanction....' " *Id.* at 203, 629 P.2d at 279 (quoting with approval *Emerick v. Fenick Indus., Inc.,* 539 F.2d 1379, 1381 (5th Cir.1976)). *See Lopez v. Wal Mart Stores, Inc.,* 108 N.M. 259, 771 P.2d 192 (Ct.App.1989).

Nevertheless, "[w]hen a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants." *United Nuclear Corp. v. General Atomic Co.,* 96 N.M. at 241, 629 P.2d at 317. District courts have a *duty* to enforce compliance with rules of discovery, and they should not shirk from imposition of the sanction of dismissal. As the United States Supreme Court wrote in *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 642–43, 96 S.Ct. 2778, 2780–81, 49 L.Ed.2d 747 (1976):

> There is a natural tendency on the part of reviewing courts, properly employing

> the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
>
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts. [Emphasis in original.]

The similar attitude of our supreme court was clear when it affirmed the spectacular default judgment in *United Nuclear.*

We do not diminish the duty to order dismissal for misconduct when we point out that the district courts still must guard against a degeneration of litigation into the pursuit of a dismissal or default. We are impressed by the expressions of concern by both amicus briefs. This is not a matter of plaintiffs' bar versus defendants' bar. The Trial Lawyers' brief said:

> [T]he discovery process, like the entire civil litigation process, remains a human enterprise, and allowances must be made for different interpretations of questions and answers alike. Were this Court's resolution of these appeals to result in a perception by the bar that every apparently-less-than-truthful answer provided in discovery may give rise to a motion for Rule 37(D) sanctions, then an avalanche of pro forma motions for sanctions will bury the district courts with tenuous charges that every perceived discovery discrepancy requires immediate, severe sanctions. Such a practice would also transform the discovery rules into something they are not and should not become—a sidestep of the normal procedures for dealing with false responses through the remedies of contempt and perjury. Such a practice would also undermine the essential purposes of discovery—to insure full access to information to make more fair the process of judicial resolution of disputes on their merits. [Citation omitted.]

The Defense Lawyers were in accord:

> The greatest concern that amicus sees in the *Doanbuy* approach is the danger that litigants might well seize upon such a rule to attack every supposedly unsound discovery response as "amounting to no response at all," and thus demand not merely an order compelling discovery under Rule 1–037(A), but entry of sanctions under Rule 1–037(D). This concern is not a small one because, in the long shadow of the *United Nuclear* case, there is a reality in New Mexico that many cases get litigated from the first ring of the discovery bell as a project to achieve a default sanction. Rule 1–037 was never intended to become a tool that the skillful litigator, if he's just persistent enough, can utilize to achieve a victory that the merits of the case might never sustain. Moreover, trial courts' adjudication of discovery motions will only be complicated, and the resources consumed by the parties in the discovery process will be needlessly inflated, if every motion to compel under Rule 1–037(A) finds a need to contemporaneously demand entry of sanctions under Rule 1–037(D).

Yet despite these concerns, both amici state that dismissal may be an appropriate sanction for lying in interrogatory responses. We examine the specifics of this case to evaluate the district court's dismissal. We base our analysis on the district court's finding, which is supported by the record,

that plaintiff's false answers were made in bad faith.

In our view, two critical aspects of the falsehood in this case relate to the subject matter of the interrogatory answers. The answers (1) were not direct assertions of material elements of a claim or defense and (2) *did* deceive defendants about the existence of discoverable information that could be critical to preparation for trial. Obviously, whether an interrogatory answer satisfies these conditions is a matter of degree. A hypothetical example, however, may illustrate the distinctions being drawn and why they are material to the propriety of sanctions under Rule 1–037. Consider an interrogatory answer in which a party in an automobile accident case states that he was attentive and driving within the speed limit at the time of the crash. In that hypothetical situation, to determine that the answer was false, the court would have to preempt the trial itself and make a finding on a matter that would be essential to the claim or defense. In the absence of grounds for summary judgment, that task ordinarily should not be performed in response to a pretrial motion to dismiss or default a party, although perhaps a court properly could impose sanctions on the liar after trial. *Cf.* R. 1–037(C) (permitting court to order party to pay opposing party for reasonable expenses incurred to prove a matter that party did not admit in response to Rule 1–036 request for admission). In addition, in the hypothetical situation the party that served the interrogatory was not prejudiced in its *preparation* for trial by the false answer; on the contrary, the answer served the purpose of informing the interrogating party of contentions it needed to prepare to meet at trial. (In fact, because the answer did not conceal the existence of discoverable information, Rule 1–037(D) may not even apply, although we need not decide here whether in some cases a false answer is not tantamount to a failure to answer.)

In contrast, in this case the district court's determination that plaintiff lied did not preempt the fact-finding role of the trial in any substantial measure. The *existence* of the discoverable information was not an element of a claim or defense. Moreover, plaintiff's false answer could have undermined seriously defendants' preparation for trial by denying them a legitimate avenue of investigation into matters that were relevant, perhaps even dispositive, on the questions of causation and damages. Because the chief purpose of interrogatories is to facilitate preparation for trial, the imposition of sanctions should be guided by the extent to which that purpose has been obstructed. In short, the district court proceeding in this case (1) did not violate the policy in favor of deferring certain fact findings until trial and (2) did advance the policy in favor of facilitating trial preparation.

Another important consideration is that a false response to a discovery request, unlike other violations of the discovery rules, is a clandestine violation. Unresponsive answers, vague answers, and improper objections are all violations that are plain on their face. One who engages in such violations cannot reasonably expect to evade sanctions. If our district courts are vigilant to enforce the discovery rules and to fully compensate parties injured by violations, sanctions beyond compensation for expenses ordinarily will not be necessary for adequate deterrence. On the other hand, one whose false response conceals the existence of discoverable information may expect to evade sanctions. It is not enough to say that such a party will gain no advantage if the lie is uncovered. The sanction must be harsh enough that despite the low probability of getting caught, the risk of punishment outweighs the prospect of competitive advantage through lying. Although the possibility of a prosecution for perjury could be a major deterrent, we doubt that busy prosecutors will be interested often enough to make that sanction effective in encouraging veracity in discovery responses. The court also might impose a fine or even imprisonment as punishment for contempt; but we do not see why that penalty is preferable to a dismissal. A dismissal is directed more precisely at the advantage the liar hoped to gain by his falsehood. In addition, contempt penal-

ties may be inadequate to protect the party who received a false response; we must consider the possibility that the injured party, even though it has uncovered some falsehoods, may be disadvantaged by other lies still concealed by its adversary. "We are not only concerned with the constitutional right of the defaulted party to an opportunity to be heard on the merits, but also, with the equally fundamental constitutional right of the party who seeks discovery to a hearing which is meaningful." *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. at 241, 629 P.2d at 317.

Finally, we address whether some penalty short of dismissal could act as a sufficient deterrent. Although lesser sanctions need not first be employed before a dismissal can be imposed, the district court must consider them if it is to be certain that dismissal is appropriate. *Id.* at 239, 629 P.2d at 315. If, for example, a party's violation of the rules of discovery was for the purpose of acquiring an advantage in just one aspect of the case, dismissal or default on only that issue might suffice as a sanction. Plaintiff's lies, however, obstructed discovery on the focal issues of causation and damages. Moreover, as the supreme court stated in *United Nuclear*, "A party cannot approach its obligation to make good faith discovery however it chooses as to certain matters, and at the same time expect to have the case proceed in a normal fashion as to other issues." *Id.* at 241, 629 P.2d at 317. This proposition is particularly appropriate when the party violated the discovery rules by lying, because one cannot be sure that all lies have been detected. The district court properly could have decided that no intermediate type of default would have been appropriate in this case.

We will not reverse a dismissal under Rule 1–037 unless, after reviewing the full record and the reasons the district court gave for its order, we are left with a " 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' " 96 N.M. at 203, 629 P.2d at 279 (quoting *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 506 (4th Cir.1977), quoting *Finley v. Parvin/Dohrmann Co.*, 520 F.2d 386, 390 (2d Cir.1975)). After conducting the required review in this case, we cannot say that the district court committed such an error.

ALLEGED PROCEDURAL DEFECTS

We next consider whether there were any procedural defects in the district court's dismissal of the complaint. Plaintiff argues that the dismissal had no factual basis because, contrary to Rule 26 (1st Dist.1986), N.M.Loc. & Fed.R.Hnbk. (1988), no affidavit verified the prior traffic citations and medical records upon which defendants relied in their motion for sanctions. We reject that argument. Plaintiff did not object in district court to consideration by the judge of the documents proffered by defendants. Moreover, plaintiff's briefs in district court admitted the accuracy of the documents. Thus, plaintiff not only has waived any right to object to the documents, *see State v. Silver*, 83 N.M. 1, 487 P.2d 910 (Ct.App.1971), she also has provided an independent ground for their admissibility by her judicial admissions.

Plaintiff also complains that the district court ordered a dismissal on the briefs alone, without a hearing before the court. Ordinarily such a hearing would be the best procedure before ordering such a severe sanction. In this case, however, there was no error. Plaintiff did not seek a district court hearing prior to this appeal, even in her motion for reconsideration after the district court ordered the dismissal. The failure to request a hearing may well have been a tactical decision. The only factual contentions made by plaintiff were (1) her failure to disclose the citations was not intentional, (2) she had cooperated in discovery by executing a medical release (which led to discovery of the prior accidents), and (3) she thought she had testified about the prior accidents at her deposition (a contention that turned out to be incorrect). Plaintiff may have thought that an evidentiary hearing on those matters would not be helpful, or even would be harmful, to her cause. In any event, plaintiff offered no excuse for her failure to answer

truthfully the interrogatories concerning prior accidents and surgeries. *United Nuclear* held that due process does not always require an evidentiary hearing before imposition of the sanction of default. 96 N.M. at 236–37, 629 P.2d at 312–13. *See Margoles v. Johns,* 587 F.2d 885 (7th Cir.1978). We believe that in the circumstances of this case the district court's failure to conduct a hearing was not such a fundamental violation of plaintiff's rights that she can raise the issue for the first time on appeal. *See* SCRA 1986, 12–216.

CONCLUSION

We affirm the dismissal of the complaint with prejudice. We grant the motion to sever Cause Nos. 10,020 and 10,505. Oral argument is unnecessary.

IT IS SO ORDERED.

BIVINS, C.J., and APODACA, J., concur.

780 P.2d 1160

Ron OLGUIN, Bernalillo County Manager, Plaintiff–Appellee,

v.

COUNTY OF BERNALILLO, New Mexico, The Board of County Commissioners of Bernalillo County; Lenton Malry, Chairman, Orlando R. Vigil, Vice Chairman; Patricia D. Cassidy, Member; Henry Gabaldon, Member; and Jacquelyn Schaefer, Member, Defendants–Appellants.

No. 11167.

Court of Appeals of New Mexico.

June 13, 1989.

Joe C. Diaz, Bernalillo County Atty., J. Edward Hollington, Asst. County Atty., Albuquerque, for defendants-appellants.

Phillip A. Martinez, Albuquerque, for plaintiff-appellee.

OPINION

DONNELLY, Judge.

Does the failure of a cross-appellant to file a timely notice of cross-appeal, as required by SCRA 1986, 12–201(A) and (B), deprive this court of jurisdiction to entertain the cross-appeal? We hold that it does and dismiss the cross-appeal.

Plaintiff, Ron Olguin, the former county manager of Bernalillo County, sued the county and its commissioners after they passed a resolution requiring commission approval of any terminations or hirings of management level personnel. Olguin's complaint sought a declaratory judgment determining that the resolution was null and void and also sought issuance of a writ of mandamus requiring the commission to rescind any actions taken pursuant to the resolution. The district court entered the declaratory judgment and writ on November 7, 1988, granting Olguin the requested relief but denying his request for attorney fees. Defendants filed a notice of appeal on December 6, 1988, in the district court but failed to timely serve a copy on Olguin. Olguin filed a notice of cross-appeal on February 20, 1989, seventy-six days following the date of the filing of defendant's appeal.

This court entered an order directing the parties to appear for a hearing to determine whether this court possesses jurisdiction to entertain the merits of the cross-appeal, and whether defendants' appeal should be dismissed as a sanction under SCRA 1986, 12–312, for their failure to timely serve Olguin with the notice of appeal. We dismiss the cross-appeal for lack of jurisdiction based on the untimely filing of the notice of cross-appeal and decline to dismiss defendants' appeal. We assess, however, reasonable attorney fees and costs related to Olguin's failed cross-appeal against defendants as a sanction under Rule 12–312.[1]

The certificate of service on the notice of appeal filed by defendants fails to contain any indication of the date service was made. The certificate was filed in the court of appeals on January 17, 1989. Olguin's trial attorney has filed an affidavit with this court indicating that she spoke with Olguin on December 6 and 8, 1988, and informed him that no notice of appeal had been filed. The affidavit of Olguin's trial attorney also states she did not move to formally withdraw from the case prior to the date of defendants' appeal because she had not received notice that an appeal had been filed. She was first notified of the fact that defendants had filed an appeal on or about January 4, 1989, when she received a copy of defendants' motion to extend the time to file their docketing statement.

Olguin's trial counsel obtained a copy of defendants' notice of appeal on January 5, 1989, after she had contacted defendants' counsel and requested that he send her a copy. That same day she mailed a copy of the notice of appeal with a letter to Olguin, informing him that she was filing a formal notice of withdrawal and that there are procedural deadlines in the appellate process which could affect his rights but which she had not reviewed. Olguin received but did not open this letter. At oral argument Olguin asserted he did not personally know of the notice of appeal until his new attorney informed him of the notice on February 12 or 13, 1989, in part because he neglected to open his mail from former counsel. His notice of cross-appeal was filed on February 20, 1989.

Rule 12–201(A) provides in applicable part: "If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period last expires."

Under the above rule, Olguin had ten days from the date the notice of appeal

1. We do not dismiss defendants' appeal for lack of jurisdiction based on late service of their notice of appeal, since that notice was timely filed. *See Russell v. University of New Mexico Hosp.*, 106 N.M. 190, 740 P.2d 1174 (Ct.App. 1987) (late service of notice of appeal does not deprive appellate court of jurisdiction to entertain appeal).

was served by defendants to file his notice of cross-appeal. Although Olguin did not request an extension of time to file his notice of cross-appeal from the district court, we note the district court was without authority to grant any request after sixty days from the date the judgment and writ were entered. R. 12–201(E)(4). Since the judgment and writ were entered on November 7, 1988, Olguin would have had only one day from the date of service on his counsel of record to request and obtain an order granting his motion. Although Olguin argues on appeal that the late filing was caused by excusable neglect, he cites to no authority authorizing this court to extend the time for filing notices of appeal or cross-appeal. *Cf.* R. 12–201(E)(1) & (2) (authorizing the district court to extend the time for filing).

The issue of whether the failure to file a timely notice of cross-appeal is jurisdictional is an issue of first impression in this jurisdiction, although several prior decisions have discussed the necessity for filing a separate or cross-appeal in order to obtain appellate review of issues sought to be raised by a cross-appellant. *See, e.g., State ex rel. State Highway Dep't v. Yurcic,* 85 N.M. 220, 511 P.2d 546 (1973) (no cross-appeal taken on issue of attorney fees; therefore, nothing for court to consider although raised by appellee); *Reynolds v. Ruidoso Racing Ass'n,* 69 N.M. 248, 365 P.2d 671 (1961) (court would not consider issues raised in answer brief denominated cross-appeal). *Cf. In re Application No. 0436–A Into 3841 to Change Point of Diversion and Place and Purpose of Use of Surface Waters,* 101 N.M. 579, 686 P.2d 269 (Ct.App.1984) (untimely filing of proof of service of notice of appeal was not a jurisdictional defect).

A review of analogous federal decisions indicates that federal courts adhere to the general rule that untimely filings of notices of cross-appeal will result in a loss of jurisdiction to entertain the cross-appeal. *See* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 204.11[5] (2d ed. 1989). *See, e.g., IUE AFL–CIO Pension Fund v. Barker & Williamson, Inc.,* 788 F.2d 118 (3d Cir.1986) (cross-appeal filed five days late dismissed where party made no attempt to explain delinquency nor to obtain an extension); *Rodriguez v. VIA Metro. Transit Sys.,* 802 F.2d 126 (5th Cir.1986) (no jurisdiction to hear cross-appeal filed three days after time had run and where no extension had been granted); *In re Interstate Agency, Inc.,* 760 F.2d 121 (6th Cir. 1985) (court of appeals had no jurisdiction to entertain cross-appeal filed one day late); *Art Janpol Volkswagen, Inc. v. Fiat Motors of N. Am., Inc.,* 767 F.2d 690 (10th Cir.1985) (cross-appeal for attorney fees dismissed for lack of appellate jurisdiction where original notice, filed while motion still pending in district court, was not renewed after final order denying attorney fees). *See also Richland Knox Mut. Ins. Co. v. Kallen,* 376 F.2d 360 (6th Cir.1967) (court could not acquire jurisdiction over belated cross-appeal merely because appeal by opposing party was perfected).

In this case, Olguin's attorney of record received the notice of appeal on January 5, 1989, and sent a copy of the notice of appeal to Olguin the same day. The notice of cross-appeal was not filed until February 20, 1989, well after the time for filing had expired. R. 12–201(A); SCRA 1986, 12–308. Because the notice of cross-appeal was not filed within the time required, we determine this court is without jurisdiction to hear the merits of the cross-appeal. *IUE AFL–CIO Pension Fund v. Barker & Williamson, Inc.*

Defendants admitted at oral argument that they failed to serve their notice of appeal in a timely fashion and that they had no explanation for their failure to serve opposing counsel of record with a copy of the initial appeal until January 5, 1989. *See* SCRA 1986, 12–202(D)(3), 12–307(B). *See also* SCRA 1986, 1–005. Under these circumstances, defendants must therefore be deemed to bear some responsibility for the untimely filing of the notice of the cross-appeal. As a sanction for violating the appellate rules noted above, we assess against defendants a fine of $750 and Olguin's costs and attorney fees of $750 incurred in relation to his

cross-appeal. *See* R. 12–312(D). *See also Miller v. City of Albuquerque,* 88 N.M. 324, 540 P.2d 254 (Ct.App.1975) (award of reasonable attorney fees may be assessed against a party as a sanction for failure to comply with rules of discovery).

In order to address the merits of defendants' appeal we will issue a calendar notice on the appeal pursuant to SCRA 1986, 12–210. *See Schleft v. Board of Educ.,* 107 N.M. 56, 752 P.2d 248 (Ct.App.1988).

The cross-appeal is dismissed for lack of jurisdiction, and costs and attorney fees related to the cross-appeal are assessed against the defendants in accordance with this opinion.

IT IS SO ORDERED.

BIVINS, C.J., and ALARID, J., concur.

780 P.2d 1163

Guadalupe J. MARTINEZ, Claimant–Appellant,

v.

WOOTEN CONSTRUCTION COMPANY and Mountain States Mutual Casualty Company, Respondents–Appellees.

No. 11530.

Court of Appeals of New Mexico.

Aug. 31, 1989.

G. Greg Valdez, Las Cruces, for claimant-appellant.

Paul Maestas, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, for respondents-appellees.

OPINION

DONNELLY, Judge.

Claimant appeals the hearing officer's disposition order in a workers' compensation case that found him only temporarily

totally disabled. The disposition order was filed April 12, 1989. Claimant's notice of appeal was filed pro se with the Workers' Compensation Division (Division) on May 10, within thirty days of the filing of the disposition order. The notice of appeal was not timely filed with this court and the time to obtain an extension of time to file the notice of appeal with the court of appeals has expired. *See* SCRA 1986, 12–201 and 12–601. Due to claimant's failure to file his notice of appeal in this court, respondents filed a motion to dismiss. Our calendar notice proposed to find that this court has jurisdiction over the merits of the appeal and to affirm the hearing officer's order. Claimant has not filed a memorandum in opposition to our calendar notice but respondents have filed a memorandum in response requesting that we dismiss the case for lack of jurisdiction. Not being persuaded by respondents' memorandum, we determine that this court has jurisdiction over the instant appeal and affirm the disposition order.

Respondents rely on the provisions of Rules 12–201(A) and 12–601, which require that the notice of appeal shall be filed within thirty days "with the appellate court clerk." *See* R. 12–601(A). Similarly, NMSA 1978, Section 52–5–8(A) (Repl.Pamp. 1987) provides that in workers' compensation cases a notice of appeal shall be filed with the court of appeals, "within thirty days of mailing of the final order of the hearing officer." Respondents also rely upon *Tzortzis v. County of Los Alamos*, 108 N.M. 418, 773 P.2d 363 (Ct.App.1989), *Chavez-Rey v. Miller*, 99 N.M. 377, 658 P.2d 452 (Ct.App.1982), and *Brazfield v. Mountain States Mut. Casualty Co.*, 93 N.M. 417, 600 P.2d 1207 (Ct.App.1979), which hold that failure to file a notice of appeal within thirty days of the entry of a final order is jurisdictional. These cases, however, focus upon the timeliness of the filing of a notice of appeal, not whether the notice of appeal was filed with the proper court. The notice of appeal in the instant case was filed with the Division within thirty days of the final order sought to be appealed and a copy of the notice was timely served upon respondents.

We hold that the failure to file a copy of the notice of appeal with this court under the circumstances herein did not deprive this court of jurisdiction to review the appeal on the merits. Claimant's failure to file a copy of the notice of appeal with this court, although constituting a technical violation of SCRA 1986, 12–202, did not prejudice the rights of respondents. *See* SCRA 1986, 12–312(C). Rule 12–312(C) provides that "[a]n appeal filed within the time limits provided in these rules shall not be dismissed for technical violations of Rule 12–202 which do not affect the substantive rights of the parties." Since the notice was filed with the Division within thirty days of the order appealed from, and respondents received a copy of the notice of appeal on the same day it was filed with the Division, no prejudice resulted to respondents. Notices of appeal, even where technically defective, should be liberally construed to allow consideration of the case on the merits. *See James v. Brumlop*, 94 N.M. 291, 609 P.2d 1247 (Ct.App.1980); *see also Sleeper v. Ensenada Land & Water Ass'n*, 101 N.M. 579, 686 P.2d 269 (Ct.App. 1984) (reviewing court favors that interpretation which permits a review on the merits). Additionally, the legislature, in enacting NMSA 1978, Section 52–5–1 (Repl. Pamp.1987), has declared that it "is the specific intent of the legislature that benefit claims cases be decided on their merits."

In *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974), the court addressed an analogous issue. In that case the appellants failed to file their notice of appeal with the clerk of the district court as required by Fed.R. App.P. 3(a). Appellants believed the district court's order granting a stay of suit pending arbitration and refusing to grant a motion for a preliminary injunction against arbitration was interlocutory and instead filed a petition for leave to appeal with the court of appeals. *See* 28 U.S.C. § 1292(b) (1970). The court of appeals denied the petition but docketed the appeal under Section 1292(a). The court in *Cobb* held that the requirement of filing the notice of appeal was satisfied although mistakenly filed by appellants in the court of appeals.

In so holding, the court concluded that the mistake in filing was a mere irregularity in the form or procedure for filing the notice of appeal—not a jurisdictional defect. We apply the same rationale to the instant case. *See also* R. 12–312(C); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 203.09 (2d ed. 1989). Similarly, the legislature, under NMSA 1978, Section 34–5–10 (Repl.Pamp.1981), has enacted legislation providing that "[n]o matter on appeal in the supreme court or the court of appeals shall be dismissed for the reason that it should have been docketed in the other court."

Our calendar notice relied on *Weeks v. Chief of Washington State Patrol,* 96 Wash.2d 893, 639 P.2d 732 (1982) (En Banc) (notice of appeal otherwise timely filed but filed in the wrong court held not to be jurisdictional where the opposing party had notice of the appeal). Respondents seek to distinguish *Weeks* from the instant case, arguing that the issue in *Weeks* was whether the court of appeals properly granted the appellant's motion to extend the time for filing the notice of appeal because the notice had been filed in the court of appeals rather than in the district court. We believe this is a distinction without a difference. In Washington, there is no appellate rule providing for the appellate court or district court to extend the time for filing the notice of appeal. *See* Wash.Rev.Code, R.A.P. 5.1 to 5.5 (1987). *Weeks* held that filing the notice of appeal in the wrong court is a procedural defect, not a jurisdictional one. *But see Collins v. Boulder Urban Renewal Auth.,* 684 P.2d 952 (Colo. Ct.App.1984) (filing of notice of appeal with the wrong court held to be jurisdictional). We determine under the facts herein, the error in filing of the notice of appeal with the Division rather than the court of appeals was not jurisdictional.

We next address the merits of the issues raised by claimant on appeal. In our calendaring notice we addressed each issue raised by claimant and proposed summary affirmance of the hearing officer's decision finding claimant to be temporarily totally disabled. Claimant failed to file a memorandum in opposition to our proposed summary disposition. For the reasons stated in our calendar notice we affirm the disposition order entered by the administrative hearing officer.

The order of the hearing officer is affirmed.

IT IS SO ORDERED.

BIVINS, C.J., and APODACA, J., concur.

780 P.2d 1165

State of New Mexico, ex rel. Human Services Department, Petitioner–Appellee,

In the Matter of the TERMINATION OF PARENTAL RIGHTS OF MELVIN B., SR., With Respect to Melvin B., Jr., Child, Respondent,

JoAnne Voelkel, Petitioner–Appellant for Intervention.

No. 11122.

Court of Appeals of New Mexico.

Sept. 12, 1989.

Jennifer A. Salisbury, Gen. Counsel, Peter Klages, Ass't Gen. Counsel, Children's Court Atty., New Mexico Human Services Dep't, Office of Gen. Counsel, Albuquerque, for petitioner-appellee.

David L. Plotsky, Albuquerque, for petitioner-appellant for intervention.

OPINION

BIVINS, Chief Judge.

JoAnne Voelkel appeals the denial of her motion to intervene in a matter concerning an adjudicated neglected and abused child. We affirm.

In 1985, petitions alleging neglect and abuse were filed against Karen and Melvin B., Sr., with respect to four children of their marriage. The case before us concerns only the youngest of the children, Melvin B., Jr. At the hearing on the petition, Karen and Melvin Sr. did not contest the allegations of the petition. The children were placed in the legal custody of the Department of Human Services (the Department). The Department placed Melvin Jr. in a foster home. Karen and Melvin Sr. were ordered to follow the treatment plan of the Department. Periodic review of the disposition indicated that they were having difficulties complying with the treatment plan.

In 1987, the Department filed a petition to terminate the parental rights of Karen and Melvin Sr. A default judgment was entered when neither party responded. Melvin Sr. thereafter successfully moved to set aside the default judgment as to him, arguing that he had not received notice. A hearing on the merits of termination was held.

Melvin Sr. relinquished his parental rights to two of the children. After a hearing, the court determined that it would not be in the best interests of the remaining two children to terminate the parental rights of Melvin Sr. Therefore, the court denied the petition to terminate the parental rights and consolidated the matter with the prior abuse and neglect petitions.

During this time, Melvin Sr. had divorced Karen and married Ms. Voelkel. In April 1988, based on the efforts made by Melvin Sr. to comply with the Department's treatment plan, the two children, including Melvin Jr., were placed in the physical custody of Melvin Sr. He and Ms. Voelkel took the children to Ohio, where they then lived. Ms. Voelkel, as a stepparent, assisted in caring for Melvin Jr.

In June 1988, Melvin Sr. disappeared, leaving Melvin Jr. with Ms. Voelkel. Ms. Voelkel initiated divorce proceedings in Ohio; she was awarded temporary custody of Melvin Jr. The Department learned that Melvin Sr. had abandoned Melvin Jr. in Ohio. In August 1988, it removed him from Ms. Voelkel's care and returned him to the foster home in New Mexico where he had lived prior to the court order placing him in the physical custody of Melvin Sr.

A periodic review hearing regarding the disposition of Melvin Jr. was scheduled. Ms. Voelkel moved to intervene. As grounds for the motion, Ms. Voelkel stated that she had developed a strong bond with Melvin Jr. and believed it would be in his best interests to remain in her custody. After a hearing on the motion, the court denied Ms. Voelkel's motion and entered an order whereby the Department would pursue the relinquishment of parental rights with regard to Melvin Jr.

The Children's Court Rules and Forms provide for intervention in neglect and abuse proceedings, SCRA 1986, 10–108(D)(2). Under this rule, the court may permit intervention of a parent, guardian, or custodian who is not alleged to have neglected or abused the child. The commit-

tee commentary on the rule suggests that the motion to intervene in such proceedings would be similar to an application for permissive intervention under SCRA 1986, 1–024. Intervention may be allowed in cases where a statute confers a conditional right to intervene or where an applicant's claim or defense and the main action have a common question of law or fact. The trial court has a good deal of discretion in determining whether to allow intervention. We will not reverse the decision of the trial court absent a showing of abuse of that discretion. *See Apodaca v. Town of Tome Land Grant,* 86 N.M. 132, 520 P.2d 552 (1974).

Ms. Voelkel correctly argues that intervention under Rule 10–108 should be analyzed in terms of the two qualifications set out in Rule 1–024(B). She argues that she should have been permitted to intervene in this case because she met both qualifications. First, she argues that Rule 10–108 gives her a conditional right to intervene, as she was a person in loco parentis to Melvin Jr. The rule, however, speaks in terms of a parent, guardian, or custodian, not a person in loco parentis.

There is no question that Ms. Voelkel is not the parent of the child. Although she argues that she was the guardian of the child, it is clear that she was not. *See* NMSA 1978, § 32–1–3(G), (H) (Repl.1986) (defining guardianship under the Children's Code). We understand her argument to be that she is a custodian of the child *because* she was a person in loco parentis. A person stands in loco parentis when he puts himself into the situation of a lawful parent by assuming obligations incident to the parental relationship without going through the formalities necessary to a legal adoption. *Fevig v. Fevig,* 90 N.M. 51, 53, 559 P.2d 839, 841 (1977). The person must intend to assume toward the child the status of a parent.

Even if we were to agree that under the facts of this case Ms. Voelkel was the custodian of Melvin Jr., we cannot say that the trial court abused its discretion in refusing to allow her to intervene in this proceeding. The judge does not appear to have acted unreasonably or arbitrarily under these circumstances by denying Ms. Voelkel's motion. *See Richins v. Mayfield,* 85 N.M. 578, 514 P.2d 854 (1973). This was a six-month review of the disposition of a child who had been adjudicated neglected and abused several years earlier. Since that time, he has been in the legal custody of the Department. Except for the short period of time he spent with Melvin Sr. and Ms. Voelkel, Melvin Jr. has been in the physical custody of the same foster parents. Melvin Jr. was in Ms. Voelkel's care for only several months.

Second, Ms. Voelkel argues that she is concerned with the best interests of the child and that she has relevant information regarding those interests. Therefore, she argues, her claim and the main action have common questions of fact and law. She argues that the trial court abused its discretion by denying her motion because it closed the door on relevant and important testimony regarding the best interests of the child. Under the facts of this case, we do not agree. Ms. Voelkel was allowed to testify regarding her interest in the child and her belief that she could best promote the interests of the child. The trial court considered that evidence in determining that it would be in the best interests of the child to remain in the legal and physical custody of the Department. We find no abuse of discretion in this case.

For the reasons stated herein, we affirm the denial of the motion to intervene. Ms. Voelkel shall pay the costs of appeal.

IT IS SO ORDERED.

HARTZ and CHAVEZ, JJ., concur.

781 P.2d 293

STATE of New Mexico,
Plaintiff–Appellee,

v.

Jerry ISIAH, Defendant–Appellant.

No. 17789.

Supreme Court of New Mexico.

Oct. 18, 1989.

Hal Stratton, Atty. Gen., Margaret McLean, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Sheila Lewis, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

LARRABEE, Justice.

This is an appeal from a first-degree murder conviction, NMSA 1978, Section 30–2–1(A) (Repl.Pamp.1984), and attempted first-degree murder, NMSA 1978, Sections 30–2–1(A) and 30–28–1(A) (Repl.Pamp. 1984). Defendant-appellant, Jerry Isiah, pleaded not guilty by reason of insanity. Defendant had killed Jackie Saunders and injured Yadira Salinas while travelling through Lordsburg, New Mexico on a bus from Arizona to Texas. Following a jury trial defendant was found guilty but mentally ill on both counts. He was sentenced to imprisonment for life on count one and to a period of nine years followed by two years of parole on count two. The sentences were to run concurrently. We affirm.

On appeal defendant raises the following issues: (1) the prosecutor's direct comment on defendant's exercise of his right to remain silent constituted fundamental error; (2) the trial court abused its discretion by barring probing voir dire questions on the issue of race; (3) two prospective jurors who could not be impartial should have been excused for cause; (4) the trial court abused its discretion in failing to grant a directed verdict on the first degree murder and attempted first degree murder charges; (5) the jury instructions when taken as a whole injected an intolerable quantum of confusion into the case; and, in the conclusion of the brief in chief, defendant contends that the errors in the trial in the aggregate denied him a fair trial.

The first three issues and the one on cumulative error in the conclusion of defendant's brief in chief were not included in defendant's docketing statement and no motion to amend the docketing statement was filed. We stated recently in *Gallegos v. Citizens Insurance Agency,* 108 N.M. 722, 779 P.2d 99 (1989), "While the docketing statement required under SCRA 1986, 12–208 remains mandatory for perfecting appeals to this Court, it is not jurisdictional. It is within our discretion to consider error preserved below and presented in appellant's brief after having been omitted from the docketing statement." *Id.* 108 N.M. at 731, 779 P.2d at 108. We will review each of these issues.

1. *Comments on Defendant's Post–Arrest Silence*

Defendant claims that on three occasions during the trial, the prosecutor specifically asked police officers who were involved in or observed Isiah's arrest whether he made a statement at the time. Defendant maintains that these questions contravened his fifth amendment right to remain silent and constituted fundamental error.[1]

On the first occasion, the prosecutor asked Officer Darnell if defendant made any statements during the booking procedure. Defense counsel objected. An extensive bench conference followed and the objection was sustained. Thereafter, the prosecutor rephrased the question, "Is there anything else that you observed about his demeanor during the booking?"

Later, when Deputy Schneider was describing the arrest of defendant, the following colloquy took place:

Prosecutor: As you were observing him and before and during arrest, can you describe this individual's demeanor?

Deputy Schneider: Very controlled and normal.

Prosecution: Do you recall him saying anything to you at that time?

Deputy Schneider: No, he did not.

1. Defendant mischaracterized his claim in his brief as "plain error." The plain error doctrine, SCRA 1986, 11–103(D), pertains only to errors in evidentiary rulings of the trial court. *State v. Wall,* 94 N.M. 169, 171, 608 P.2d 145, 147 (1980). The doctrine applicable to defendant's claim is fundamental error. *See State v. Escamilla,* 107 N.M. 510, 515, 760 P.2d 1276, 1281 (1988); *State v. Sanchez,* 58 N.M. 77, 84, 265 P.2d 684, 688 (1954).

Prosecution: Was he moving about? Standing still?

Deputy Schneider: He was walking when I first observed him, just in a normal pace toward me.

Defense counsel made no objection to these questions. During cross-examination, defense counsel inquired, "During this time, did the defendant say anything to you?" Schneider answered, "No, he did not."

The third instance occurred after Deputy Sheriff Kramer had fully described defendant's demeanor at the time of his arrest. The prosecutor asked, "Do you recall his saying anything at this time?" The witness responded, "No, sir." Again, defense counsel did not object and during cross-examination, he posed the question, "During that time, he didn't say anything to you, did he?" Deputy Kramer responded, "No, sir."

The State claims the inquiries into defendant's post-arrest silence did not directly implicate defendant's fifth amendment rights. The State posits that the purpose of these questions was to determine defendant's demeanor during the time of commission of the crimes and immediately thereafter; the state argues that his demeanor was highly probative of his mental condition, which was at issue because of his defenses of insanity, mental illness, and inability to form specific intent.

Improper comments on a defendant's fifth amendment right to remain silent violate the privilege against self-incrimination guaranteed by the fifth and fourteenth amendments. *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *see State v. Molina,* 101 N.M. 146, 147, 679 P.2d 814, 815 (1984); *State v. Ramirez,* 98 N.M. 268, 269, 648 P.2d 307, 308 (1982); *State v. Lopez,* 105 N.M. 538, 545, 734 P.2d 778, 785 (Ct.App.), *cert. quashed,* 105 N.M. 521, 734 P.2d 761 (1985), *cert. denied,* 479 U.S. 1092, 107 S.Ct. 1305, 94 L.Ed.2d 160 (1986). The fifth amendment provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, ... nor shall he be compelled in any criminal case to be a witness against himself, ... without due process of law...." U.S. Const. amend. V; *see also* New Mexico Const. art. II, § 15. Upon arrest fifth amendment warnings, which include an individual's right to remain silent, must be given to the individual. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The protection of the fifth amendment forbids a prosecutor to comment on an accused's silence, and a judge to give jury instructions that such silence is evidence of guilt. *Griffin,* 380 U.S. at 615, 85 S.Ct. at 1233. Not all improper remarks, however, are harmful or require automatic reversal. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see United States v. Espinosa,* 771 F.2d 1382 (10th Cir.), *cert. denied, Foreman v. United States,* 474 U.S. 1023, 106 S.Ct. 579, 88 L.Ed.2d 561 (1985).

In *State v. Clark,* 108 N.M. 288, 772 P.2d 322 (1989), we adopted a test for evaluating allegedly improper prosecutorial comments on an accused's failure to testify. *Id.* at 302, 772 P.2d at 336. Because we see no difference in principle in the exercise by defendant of his constitutional right not to testify and his constitutional right to remain silent when taken into custody, we hold this test is applicable in both situations. To evaluate allegedly improper prosecutorial comments we must determine "whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment" on the accused's invocation of his fifth amendment rights to remain silent after arrest. *See id.* We must also look to the context in which the statement was made to determine the manifest intention that prompted the remarks, as well as the natural and necessary impact upon the jury. *Id.* at 293, 772 P.2d at 337.

Although it is generally error for the prosecutor to elicit the fact of a defendant's post-arrest silence, under the circumstances of the present case, the first remarks, if error, were harmless beyond a reasonable doubt. The questions posed by

the prosecutor were intended to determine defendant's general demeanor and mental state at the time of the crimes. Because defendant's mental state and degree of culpability rather than his guilt were at issue, the jury would have taken these remarks within the context in which they were made. The fact that the trial court sustained the objection supports our conclusion that no harm or prejudice resulted. In addition, defendant never requested a curative instruction and the prosecutor rephrased the question. Based on these reasons, we believe that the prosecutor's remarks here were not such as to influence the jury to render a verdict on the grounds beyond the admissible evidence presented.

As to the second and third set of statements, the record reveals that not only were no objections made, but defendant's attorney elicited the same testimony on cross-examination. "Where the defendant fails to object and chooses instead to await the verdict, his silence is waiver of the improper comments by the prosecutor." *Id.* at 293, 772 P.2d at 337; *cf. State v. Sanchez,* 58 N.M. 77, 84, 265 P.2d 684, 688 (1954) (the right against self-incrimination is a fundamental right that may be waived or lost). The general rule bars review of issues not properly reserved at trial. *See State v. Tafoya,* 94 N.M. 762, 764, 617 P.2d 151, 153 (1980); *State v. Ruffino,* 94 N.M. 500, 502, 612 P.2d 1311, 1313 (1980). An exception to this general rule, however, applies in cases that involve fundamental error. *Clark,* 108 N.M. at 396, 772 P.2d at 330. The doctrine of fundamental error is always available to the court on behalf of the accused. *Sanchez,* 58 N.M. at 84, 265 P.2d at 688. "It should, however, be resorted to only under exceptional circumstances, 'if the innocence of the defendant appears indisputable, or if the question of his guilt is so doubtful that it would shock the conscience to permit the conviction to stand.'" *State v. Gomez,* 82 N.M. 333, 335, 481 P.2d 412, 414 (1971), (quoting *State v. Torres,* 78 N.M. 597, 435 P.2d 216 (Ct.App.1967).

We are not persuaded that these comments rise to the level of fundamental error. The remarks were not motivated by the prosecutor's intention to comment on defendant's right against self-incrimination, but were made to elicit information concerning the defendant's mental state. Our conclusion is further bolstered by defendant's cross-examination of the officers eliciting the same testimony. Because evidence presented against defendant was substantial, we conclude there is no reasonable probability that the remarks were a significant factor in the jury's deliberation in relation to the rest of the evidence before them. The prejudicial or harmful effect of the inference the jury might have drawn from the comments is minimal with respect to the overwhelming evidence presented. Under the circumstances existing in this case, we do not believe that the prosecutor's comments rise to the level of fundamental error requiring reversal.

2. *Scope of Voir Dire*

Defendant argues the trial court abused its discretion by limiting the scope of voir dire on the issue of race. Included in this point is defendant's argument that venue should have been changed from Hidalgo to Grant County because of the nature of the crime. Defendant argues that he is a large black homeless person from out of state with no connection to the area other than the crime; and, as it is difficult to uncover covert racial prejudice in prospective jurors, the trial should have been moved to another location with a larger jury pool so as to provide more fair and impartial jurors. Although defendant did raise the issue of change of venue in his docketing statement, defendant has failed to include any authority for this argument. This court has long held that issues raised in appellate briefs without support by cited authority will not be reviewed by us on appeal. *Doe v. Lee,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984); *Lee County Fair Ass'n v. Elkan,* 52 N.M. 250, 197 P.2d 228 (1948).[2]

2. Additionally, the trial court possesses broad discretion in dealing with motions for change of venue. Its decision on the issue will not be disturbed on appeal absent a showing of an

Defendant claims he was denied the right to a fair and impartial jury because the trial court did not permit him to voir dire jurors on racial attitudes before the State had the opportunity to prepare them for questions on race, and because he was denied the right to pose questions that would have elicited honest responses indicative of any racial prejudice. Defendant maintains that based on *Ham v. South Carolina,* 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1974) and *Rosales-Lopez v. United States,* 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981), he was denied the right of a meaningful and effective voir dire. We disagree.

It is unquestioned that a defendant has the constitutional right to a trial by a neutral and impartial jury. *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez,* 451 U.S. at 188, 101 S.Ct. at 1634. Criminal convictions have been reversed when the limitations on voir dire have unreasonably infringed the exercise of this right. *E.g., Aldridge v. United States,* 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931).

There are constitutional requirements with respect to questioning prospective jurors about racial or ethnic bias. *Rosales-Lopez,* 451 U.S. at 189, 101 S.Ct. at 1634–35. The "special circumstances" under which the Constitution requires questioning on racial bias exist when racial issues are " 'inextricably bound up with the conduct of the trial.' " *Id.* (quoting *Ristaino v. Ross,* 424 U.S. 589, 597, 96 S.Ct. 1017, 1021, 47 L.Ed.2d 258 (1976)). A fact pattern involving a confrontation between persons of different races or origins, however, does not create per se a need of constitutional dimensions to question the jury concerning racial or ethnic prejudice. *Rosales-Lopez,* 451 U.S. at 189–90, 101 S.Ct. at 1634–35. "Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion." *Id.* at 190, 101 S.Ct. at 1635.

Thus, in *Ristaino,* the Court held that a black defendant convicted in state court of violent crimes committed against a white security guard was not constitutionally entitled to a question specifically directed to racial prejudice. Similarly, in *Rosales-Lopez,* the Court held that the trial court did not violate the constitutional rights of an individual of Mexican descent accused of conspiring to bring three illegal Mexican aliens into the United States by refusing to voir dire the prospective jurors as to any prejudice they might have had against persons of Mexican descent.

The Supreme Court utilized the opportunity in *Rosales-Lopez* to further refine the rules governing the voir dire of jurors on racial and ethnic prejudice. The Court, laying down a nonconstitutional requirement, held that even in cases not involving "special circumstances" trial judges should exercise their discretion in determining "if the external circumstances of the case indicate a reasonable possibility that racial or ethnic prejudice will influence the jury's evaluation of the evidence." *Id.* at 192–93, 101 S.Ct. at 1636. The trial court is vested with broad discretion to determine the scope of the prospective jurors' voir dire and whether to accede to a request to have those jurors questioned as to racial or ethnic prejudice. *Id.* at 190, 101 S.Ct. at 1635; *see also State v. Espinosa,* 107 N.M. 293, 296, 756 P.2d 573, 576

abuse of that discretion. *State v. Martin,* 101 N.M. 595, 607, 686 P.2d 937, 949 (1984). Defendant's motion for change of venue contained merely allegations of racial bias and prejudice without any evidentiary proof in support of his claim. Moreover, the record does not indicate that defendant submitted any proposed findings of fact, nor did the court enter its own findings. In the absence of findings or requested findings, denial of a motion to change venue is not open for appellate review. *State v. Clark,* 104 N.M. 434, 440, 722 P.2d 685, 691 (Ct.App.), *cert. denied,* 104 N.M. 378, 721 P.2d 1309 (1986). Defendant has not properly preserved this issue for appeal.

(1988) (trial court did not abuse its discretion by prohibiting inquiry during voir dire into issues of pure law); *State v. Fransua,* 85 N.M. 173, 176, 510 P.2d 106, 109 (Ct. App.1973) (no abuse of discretion in limiting voir dire on questions of prejudice with regard to alcohol abuse).

The trial court in this case permitted general voir dire in groups of eighteen people. Following the general voir dire, each group of eighteen was divided into groups of six for more specific questioning by both the prosecution and defense in the areas of racial bias and mental illness. The prosecution asked, "Can you all affirm to me that the fact that [defendant] is a black man will play no part in your deliberations? Can you all say that?" Defense counsel posed the following specific questions about racial attitudes:

> Are any of you sports fans? Do you remember just recently here when Jimmy the Greek made the comment that Black people are good in sports, but they could never be managers or manager level. Would you agree or disagree with that? And at this time I guess we have Jesse Jackson running for President. Could you vote for Jesse Jackson? You could do that? So then, the fact that Jesse Jackson is Black is of no significance to you? How do you feel, sir, about America's foreign policy toward South Africa? Do you think we ought to apply sanctions against them because of apartheid? We shouldn't do that? Do you want to tell us why?

In ruling that defense counsel's questions about race were irrelevant and beyond the scope of the case, the court said,

> These six people have already said that the fact [defendant] is black is not going to have any effect on their decision. Now if you can find something to go into with that, that's fine. But I'm not going to sit here and listen to a discussion of whether Secretary of State Schultz is doing the right thing or not. I don't think that has anything to do with it.

Prior to the conclusion of the voir dire, each final jury member affirmed that the racial background of defendant would have no bearing on his/her deliberations in determining defendant's guilt or innocence.

Based on the standards set forth by the United States Supreme Court, we conclude that our first inquiry should be whether racial overtones or prejudices were so "inextricably bound up with the conduct" of defendant's trial that the court denied defendant a fair trial with an impartial jury. Although defendant and the victims are of different races, there were no "special circumstances" of constitutional dimension in this case. The incident was not characterized as a racial one. Bald assertions by defendant of racial tension or prejudice in Lordsburg, New Mexico is not enough to require that specific questions designed to discover racial prejudice are to be asked of prospective jurors. A defendant is entitled to such questions when circumstances show he is a special target of racial bias. Otherwise, there is the risk that these questions may be counterproductive, because "such questioning may activate latent racial bias in certain prospective jurors or may insult others, without uncovering evidence of bias in [persons] who refuse to acknowledge their prejudice." Annotation, *Racial or Ethnic Prejudice of Prospective Jurors as Proper Subject of Inquiry or Ground of Challenge on Voir Dire in State Criminal Cases,* 94 A.L.R.3d 15, 21 (1979). The circumstances of this case do not suggest a significant likelihood that racial prejudice might have infected the trial.

Absent such "special circumstances," the court must then determine whether the trial court's refusal to allow the specific questions constituted an abuse of discretion because the factual underpinnings of the case indicated a "reasonable possibility" that racial prejudice might have influenced the jury. *Rosales-Lopez,* 451 U.S. at 192, 101 S.Ct. at 1636. A court need not approve every question defendant desires to ask on voir dire. The questions asked by the prosecution were sufficient to probe racial bias and it was not error for the trial court to disallow defendant's specific questions. The scope of voir dire rests within the discretion of the trial court and is governed

by the need for such inquiry as is disclosed by a factual analysis of a particular case. Something more than the mere fact that an accused is of a different race than the victims or prospective jurors must be present in order for a judge's refusal to permit defendant's questions on racial prejudice to be denominated as an abuse of discretion. *See Rosales-Lopez,* 451 U.S. at 188–90, 101 S.Ct. at 1634–35; *Ristaino,* 424 U.S. at 594–95, 96 S.Ct. at 1020–21. Defendant's race by itself did not create a "reasonable possibility" that racial prejudice would affect the jury so that denial of the defendant's requested voir dire questions was an abuse of discretion.

3. *Defendant's Right of Peremptory Challenges*

In point three, defendant asserts that the trial court improperly failed to dismiss the two jurors, Cataro and Adams, for cause. During the exercise of challenges, defense counsel challenged Cataro for cause; the court denied the request; defendant then used a peremptory challenge. Defendant argues that, even though a defendant is not entitled to claim prejudice in the court's failure to dismiss prospective jurors for bias when he has not used all of his twelve statutory challenges, *State v. Smith,* 92 N.M. 533, 540–41, 591 P.2d 664, 671–72 (1979), under the facts in the present case, the reasoning behind that requirement is not applicable. Defendant claims that, because the challenges were exercised after each group of eighteen prospective jurors had been examined, defendant never had sufficient information to use effectively his challenges. Defendant sets forth the following example to clarify his point: when defense counsel learned that the court would not strike Juror Cataro, he recognized he had to hoard his challenges and use them judiciously in case the remaining panel members proved to be unwilling to consider the defense of insanity. Defendant relies on *Fuson v. State,* 105 N.M. 632, 735 P.2d 1138 (1987) in support of his position, and asks this court to apply the *Fuson* holding to the facts herein. The panel from which jury members were selected were divided into groups of eighteen potential jurors. These eighteen were seated in the jury box. The remainder of the panel sat in the courtroom. Those seated in the box were questioned while the rest of the panel members listened without responding to the questions and answers. After a general voir dire of the eighteen potential jurors was completed, the entire panel was removed from the courtroom. Of the eighteen prospective jurors, six at a time were brought back to the courtroom for additional voir dire. After all eighteen had been examined completely, the parties exercised their challenges for cause and peremptory challenges. This process was repeated until the requisite number of jurors and alternates was selected.

Defendant raised as a defense not guilty by reason of insanity. During the voir dire defense counsel asked panel members if they felt that people should be relieved of the responsibility of their actions because of their mental state. The following exchange took place between Juror Cataro and counsel:

> [Defense Counsel]: Miss Cataro, what's your feeling about a person who does something that they're unaware of?
>
> Cataro: I have a problem dealing with someone who commits a criminal act and then have that person, or have the counselor come back and say, well, he committed it by reason of insanity.
>
> [Defense Counsel]: You have a problem?
>
> Cataro: I think that so often they do commit criminal acts and insanity shouldn't have anything to do with that.
>
> [Defense Counsel]: But.
>
> Cataro: I feel very strong about this.
>
> [Defense Counsel]: Would that preclude you from coming back with a verdict of not guilty by reason of insanity?
>
> Cataro: I would have to—They would have to prove [insanity] to me without a reasonable doubt.
>
> [Defense Counsel]: So the burden then would be on the defense to prove to you that. Is that what you're saying?
>
> Cataro: I think so.
>
> [Defense Counsel]: It's the defense burden?

Cataro: [inaudible]

[Defense Counsel]: The judge is going to instruct you that it's the state's burden to prove [sanity] to you beyond a reasonable doubt. That's what the judge is going to instruct you. Can you follow that instruction, or are you going to have a hard time with that?

Cataro: Yes, I understand that.

[Defense Counsel]: Okay, but you are not precluded from coming back with a verdict if the evidence so shows, correct? Is there a particular reason.

Cataro: I think that so often that, now this is just an opinion.

[Defense Counsel]: Sure, I agree.

Cataro: Our judicial system, to me, in this day and age it seems that so often the criminal is let free for one reason or another and a lot of times it's because of the declaration of insanity. I don't know that he's insane, she's insane, whoever is. But I have a real hard time dealing with that because I think too often that they are let free to go out and commit crimes again and then they're back right in the judicial system, and here we go again.

[Defense Counsel]: So you think that society is kind of coddling the criminal these days?

Cataro: Sometimes.

[Defense Counsel]: Okay, Could you set aside that particular, it's obviously a prejudice, that's your personal opinion. That's how you feel about the judicial system. Everyone, of course, is entitled to their opinion, and I'm happy that you were forthright with us on what your opinion is. Is there a, can you put that aside and deal with this case, or is that prejudice going to be there?

Cataro: I don't know if I honestly can.

During the exercise of challenges, defendant challenged the juror for cause. The court denied the request and defendant used a peremptory challenge to strike the juror.

At another point in the voir dire, defense counsel questioned Juror Adams. The following took place:

[Defense Counsel]: How do you feel about that [mental illness]?

Adams: I've never been in contact with anybody who was mentally disturbed [inaudible]. I find it hard to believe that somebody could move from state to state, be lucid one minute and then the next minute not have any idea of what they are doing or the consequences entailed in their actions.

[Defense Counsel]: So, what you would consider mentally ill is somebody who was in psychosis seven days a week, 24 hours a day, 365 days a year?

Adams: I'm not an expert in mental illness, but I think that they would necessarily have to be in some sort of psychotic state 24 hours a day for them to be mentally ill. I just find it difficult to believe that somebody could move from one state to the next in rapid succession. Like I've said, I've never been in contact with it before so I really don't know.

[Defense Counsel]: So you would be willing to listen to the psychologists and see what they have to say?

Adams: I believe so.

[Defense Counsel] And if they were to tell you that that was the case, that people can move in and out of a psychotic episode just as you say from moment to moment, would you be able to believe that?

Adams: [no response]

[Defense Counsel]: Would you weigh that?

Adams: I think I would weigh that.

Again, defendant moved to challenge the juror for cause and the court refused. Although defendant had remaining at the time two peremptory challenges, he accepted this juror.

The right to a fair trial by an impartial jury is guaranteed in our federal and state constitution. U.S. Const. amend VI; New Mexico Const. art. II, §§ 14 & 18. An impartial jury is one in which each and every juror is "totally free from any partiality 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." *Fuson*, 105 N.M. at 633, 735 P.2d at 1139. The

trial court has a great deal of discretion in dismissing a juror for cause and on appeal its decision will not be disturbed absent manifest error or clear abuse of discretion. *State v. Padilla,* 91 N.M. 451, 453, 575 P.2d 960, 962 (Ct.App.1978); *see State v. Sutphin,* 107 N.M. 126, 129, 753 P.2d 1314, 1317 (1988). In *Fuson,* we recognized that manifest error did occur and the juror should have been excused for cause. Under the circumstances therein, petitioner's right of peremptory challenge was impaired by the trial court's failure to excuse the potential juror for cause, because the names of some jurors were called after petitioner had exercised his final peremptory challenge. We held in that case prejudice is presumed where 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. *Fuson,* 105 N.M. at 634, 735 P.2d at 1140.

Because defendant did not exercise all of his peremptory challenges, the holding in *Fuson* is inapplicable to the case at bar. We decline to accept defendant's invitation to extend *Fuson* to the facts in this case. The present case is more closely akin to *State v. Smith,* 92 N.M. 533, 591 P.2d 664 (1979). In *Smith,* defendant exercised only eight of his twelve statutory peremptory challenges. We held that, where a defendant fails to exercise available peremptory challenges, he cannot claim prejudice for failure to dismiss prospective jurors. *Id.* at 540, 591 P.2d at 671.

Although we believe it would have been better had the trial judge excused Juror Cataro for cause, under the facts herein the failure to do so is not reversible error. Not only did defendant have two peremptory challenges remaining, but Juror Cataro affirmed during the voir dire that she could follow the court's instructions and apply the law to the facts of the case. In addition, if defendant had wished to dismiss Juror Adams, he had one peremptory challenge available at the conclusion of the voir dire. Defendant chose to accept Adams. Accordingly, the trial court's denial of defendant's challenge for cause of Adams was soundly within its discretion.

4. *Directed Verdict*

Next, defendant argues the trial court should have granted his motions for a directed verdict on the premeditated murder and attempted premeditated murder charges because the record is devoid of any evidence of a deliberate intention to kill. Defendant maintains that the State failed to prove the element of deliberation, and on the contrary, all of the evidence presented supports an inference that the defendant was impaired.

The trial court denied defendant's motions for a directed verdict at the close of the state's case in chief and at the close of defendant's case. "In ruling on a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the state at that particular point in the trial proceedings," *State v. Johnson,* 99 N.M. 682, 685, 662 P.2d 1349, 1352 (1983), "with all conflicts resolved and all permissible inferences indulged in [the state's] favor." *State v. Garcia,* 95 N.M. 260, 261, 620 P.2d 1285, 1286 (1980). Moreover, a verdict of not guilty should be directed only when there are no reasonable inferences or sufficient surrounding circumstances from which the requisite intent may be inferred. *State v. Robinson,* 94 N.M. 693, 696, 616 P.2d 406, 409 (1980). Where there is substantial evidence to support a conviction, a directed verdict is not proper. *Johnson,* 99 N.M. at 685, 662 P.2d at 1352. Substantial evidence is that evidence which is acceptable to a reasonable mind as adequate support for a conclusion. *Robinson,* 94 N.M. at 696, 616 P.2d at 409.

The element of intent involves the state of mind of the defendant and is seldom, if ever, susceptible to direct proof; it may be proved, however, by circumstantial evidence. *Id.* A deliberate intention necessary to support a conviction of first degree murder is defined in our jury instructions as follows:

> A deliberate intention refers to the state of mind of the defendant. A deliberate intention may be inferred from all of the

> facts and circumstances of the killing. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.

SCRA 1986, 14–201. We have also held that this requisite intent for first degree murder may be formed in a short period of time. *State v. Blea,* 101 N.M. 323, 326, 681 P.2d 1100, 1103 (1984); *State v. Lucero,* 88 N.M. 441, 443, 541 P.2d 430, 432 (1975).

Viewed in this context, the evidence supports the following conclusions and inferences. The defendant had the murder weapon, a knife, in his possession from Phoenix, Arizona to Lordsburg, New Mexico. As the bus on which he was a passenger approached Lordsburg, defendant took the knife out and placed it on his lap. The two stab wounds inflicted in each victim tended to show some deliberateness rather than random action by the defendant. And, testimony from two witnesses established that the defendant said, "I'm going to kill you" to the victims.

Under these circumstances, the issue of deliberate intent was a question for the jury. *Garcia,* 95 N.M. at 262, 620 P.2d at 1287; *State v. Aubrey,* 91 N.M. 1, 569 P.2d 411 (1977). No error resulted from the trial court's failure to grant defendant's motions for a directed verdict on the premeditated murder and attempted premeditated murder charges.

5. *Jury Instructions*

Defendant argues that the jury instructions when viewed as a whole were confusing and inconsistent. Defendant states that the "step-down instruction" did not offer any direction or insight into how or when the defense of insanity was to be considered; the jury verdict forms directed the jury first to find defendant guilty of the crime and then to find that he was insane; the court's instructions defined insanity by reference to a mental disease; the difference was not clarified between the mental disease of insanity and a finding of mental illness; and the instruction on intent was given before the elements of second degree murder were given and not given on the lesser included offense of aggravated battery. On this basis, defendant contends he is entitled to a new trial.

The trial court followed the Uniform Jury Instructions and refused only three of defendant's requested instructions. The trial court disallowed defendant's requested instructions on (1) the order in which to consider the degrees of murder, which modified Uniform Jury Instruction (UJI) 14–250, SCRA 1986, 14–250; (2) the defense of insanity, which modified UJI 14–5101, SCRA 1986, 14–5101; and (3) the defense of mental illness, which modified UJI 14–5103, SCRA 1986, 14–5103. In their place, the court gave these instructions: SCRA 1986, 14–2801 (attempt to commit second-degree murder); SCRA 1986, 14–250 (procedure for determining culpability for first and second-degree murder); SCRA 1986, 14–5101 (procedure for alternate verdict forms regarding the issue of a mental condition); and SCRA 1986, 14–5103 (definition of mentally ill).

The trial court must give the jury instructions promulgated by this court; noncompliance may be reversible error. *State v. Privett,* 104 N.M. 79, 81, 717 P.2d 55, 57 (1986); *State v. Chavez,* 101 N.M. 136, 139, 679 P.2d 804, 807 (1984). A trial judge has a duty to instruct the jury on all questions of law essential for a conviction of the crime with which the defendant is charged. *Jackson v. State,* 100 N.M. 487, 489, 672 P.2d 660, 662 (1983). There is no error, however, in refusing tendered instructions that incorrectly state the law applicable to the evidence, *State v. Johnson,* 103 N.M. 364, 374, 707 P.2d 1174, 1184 (Ct.App.), *cert. quashed,* 103 N.M. 344, 707 P.2d 552 (1985), or where the subject matter has been adequately covered by other instructions. *State v. Sparks,* 102 N.M. 317, 324, 694 P.2d 1382, 1389

(Ct.App.1985). Under the facts in the present case, the trial judge properly refused defendant's requested instructions. When viewed as a whole, the jury instructions given were correct on the degrees of the crimes, the order and manner in which to consider each count, and the applicable defenses of insanity, mental illness, and failure to form specific intent.

State v. DeSantos, 89 N.M. 458, 553 P.2d 1265 (1976), on which defendant relies for the proposition that the jury instructions were confusing and denied defendant a fair trial, is distinguishable from the case at bar. In *DeSantos,* the jury instructions given were inconsistent with the evidence presented during the trial, and thus, injected an intolerable quantum of confusion. *Id.* at 462–63, 553 P.2d 1265. The trial court in this case considered carefully all tendered jury instructions by both the defense and the prosecution, evaluated any objections to the instructions, and gave jury instructions consistent with the Uniform Jury Instructions mandated by this court and with the evidence presented during the trial.

6. *Cumulative Error*

The final point relied on for reversal is defendant's claim that the errors committed by the trial court, in their aggregate denied him his right of a fair trial. In New Mexico the doctrine of cumulative error is strictly applied. *State v. Martin,* 101 N.M. 595, 601, 686 P.2d 937, 943 (1984). Such error requires reversal when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial. *Id.* Because defendant has not established any reversible error in the issues presented, it follows that there has been no accumulation of irregularities warranting a new trial. *See State v. Stephens,* 99 N.M. 32, 38, 653 P.2d 863, 869 (1982).

For the foregoing reasons, we affirm the trial court on all issues.

IT IS SO ORDERED.

BACA, J., and STEVE HERRERA, District Judge (sitting by designation), concur.

[redacted]

781 P.2d 306

STATE of New Mexico,
Plaintiff-Appellee,

v.

Christopher Lincoln MARTINEZ,
Defendant-Appellant.

No. 10591.

Court of Appeals of New Mexico.

June 1, 1989.

Certiorari Denied June 15, 1989.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Linda Yen, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

DONNELLY, Judge.

A jury found defendant guilty of three counts of assisting escape of inmates from the State Penitentiary, contrary to NMSA 1978, Section 30-22-11 (Repl.Pamp.1984). Defendant has raised nine issues on appeal which we have consolidated and discuss as follows: (1) whether the charges of assisting escape were improperly filed; (2) whether defendant's convictions and sentences on three counts of assisting escape violate federal and state prohibitions against double jeopardy; (3) claim of error as to the admission of evidence; (4) sufficiency of evidence; and (5) whether the

trial court erred in denying defendant's motion to dismiss. We affirm.

FACTS

This case arose out of the July 4, 1987, escape by Jimmy Kinslow, William Wayne Gilbert, and David B. Gallegos from the State Penitentiary. After obtaining a gun the three inmates breached the prison's perimeter fences and made their way without detection to the city of Santa Fe where they hid in a storage shed. Three weeks later, on July 25, 1987, defendant was contacted by one of the escapees, his brother-in-law, David Gallegos, and was asked to travel to Santa Fe and drive the three to Albuquerque. Defendant agreed and took the escapees to Albuquerque and checked them into a motel.

On subsequent nights defendant drove the escapees to several different motels, paid for their rooms, and provided them with food and beer. On July 29 Kinslow left the group in Albuquerque and, without notice to defendant or his other companions, took defendant's car. Defendant's car was subsequently found broken down and abandoned at a rest stop in Arizona. Thereafter, defendant borrowed a car from a friend and drove Gallegos and Gilbert to Garden Grove, California. Defendant and each of the three escapees were subsequently arrested by authorities in California.

Defendant was charged with two counts of harboring and aiding a felon, contrary to NMSA 1978, Section 30-22-4 (Repl.Pamp. 1984), and three counts of assisting escape. Following his indictment, defendant moved to have the charges of assisting escape dismissed, contending that the charges were improper and that only the charges of harboring or aiding a felon were applicable under the facts herein. The court denied the motion, holding that despite the three-week interval between the inmates' initial escape and the time that defendant was alleged to have provided assistance, the charges were appropriate because the crime of escape was a continuing offense. At the conclusion of defendant's trial, the trial court directed a verdict in favor of defendant on the two counts of harboring or aiding a felon but declined to dismiss the charges of assisting escape. Following deliberation, the jury found defendant guilty of each of the three counts of assisting escape.

I. PROPRIETY OF CHARGES

Defendant contends that he was improperly charged with the offenses of assisting escape, arguing that he had no involvement in the actual breakout from the penitentiary, that any assistance which may have been given by him to the inmates occurred several weeks after the escape had been completed, and that the trial court erred in ruling that escape was a continuing offense.

Assisting escape as defined in Section 30-22-11 consists of

> A. intentionally aiding any person confined or held in lawful custody or confinement to escape; or
>
> B. any officer, jailer or other employee, intentionally permitting any prisoner in his custody to escape.
>
> Whoever commits assisting escape is guilty of a third degree felony.

The Uniform Jury Instruction propounded by our supreme court states the elements of the offense as follows:

> 1. (name of prisoner) was in [custody of (name of peace officer)] [confinement at _____];
>
> 2. (name of prisoner) escaped;
>
> 3. The defendant aided the escape of (name of prisoner);
>
> 4. This happened in New Mexico on or about the _____ day of _____, 19—.

SCRA 1986, 14-2224 (footnotes omitted).

To answer the question of whether the offense of escape is a continuing offense, we examine the nature and elements of the offense of escape. NMSA 1978, § 30-22-9 (Repl.Pamp.1984). Specifically, we consider whether escape constitutes a continuing offense so that an escapee continues to commit the offense as long as he voluntarily remains at large, or whether the offense is complete once the escapee has successfully breached the place where he was

jailed or confined and reached a point of temporary safety beyond immediate active pursuit. Concomitantly we also inquire whether charges of assisting escape of inmates may properly be brought against one who aids and assists inmates after they have broken away from confinement and are hiding from law enforcement authorities. These issues are matters of first impression in this jurisdiction.

Defendant argues that escape is not a continuing offense and, therefore, the trial court erred in allowing the prosecutor to indicate during jury selection that escape is a continuing offense and instructing the jury that escape constitutes a continuing offense. He also argues that the charges of assisting the escape of prisoners were improper and that the applicable charges, if any, which properly could be brought against him were restricted to charges of harboring or aiding a felon or felons.

We disagree with each of defendant's contentions. The crime of escape does not end at the prison door, nor at a point in time when a prisoner successfully eludes immediate pursuit or reaches temporary sanctuary. At the time defendant picked up the three inmates in Santa Fe and drove them to Albuquerque, intensive search operations were being carried out by law enforcement officials in the area where the escapees were hiding. Despite the actions of law enforcement officials, the three inmates herein managed to elude detection and make their way to a hiding place in Santa Fe. Three weeks later defendant picked up the three inmates, drove them to Albuquerque, and later took Gallegos and Gilbert to California.

The crime of escape as defined in Section 30–22–9 constitutes a second degree felony. This statute provides in part,

> Escape from penitentiary consists of any person who shall have been lawfully committed to the state penitentiary:
>
> A. escaping or attempting to escape from such penitentiary; or
>
> B. escaping or attempting to escape from any other lawful place of custody or confinement and although not actually within the confines of the penitentiary.

When interpreting penal statutes, a court must consider the objectives and purposes sought to be accomplished by the legislature and give effect to the legislative intent. *State v. Owens*, 103 N.M. 121, 703 P.2d 898 (Ct.App.1984); *State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct.App.1976).

In an analogous case the Alaska Court of Appeals in *Wells v. State*, 687 P.2d 346 (Alaska App.1984), considered the question of whether the crime of escape constituted a continuing offense under Alaska law. The court observed,

> Alaska courts have long recognized that a major risk generated by an escape is potential harm caused by the escapee while at large. *See, e.g., Alex v. State*, 484 P.2d 677, 685 (Alaska 1971). In *Alex*, the court rejected an equal protection challenge to the statutory scheme imposing greater penalties on felons who escape than on misdemeanants. The court said: "The legislature could reasonably have believed that persons convicted of felonies which are generally more serious crimes than misdemeanors, present a greater threat to the public. Thus, a greater effort to deter their escape may reasonably be made." *Id.* ...
>
> We therefore conclude that escape under Alaska law is a continuing offense.

Id. at 350.

Similarly, in *Campbell v. Griffin*, 101 Nev. 718, 710 P.2d 70 (1985), the Nevada Supreme Court, in considering the duress defense to a charge of escape from the Nevada State Prison, noted,

> *because* escape is by its nature a continuing offense that the escapee must show a bona fide effort to return to custody as soon as the claimed duress has lost its coercive force. *See generally United States v. Bailey* [444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980)] * * * * If the crime of escape occurred only during the course of the escapee's initial departure from custody, and did not continue thereafter, there would be no duty for the escapee to report to the authorities after the duress had terminated. *Cf.*

United States v. Chapman, 455 F.2d 746 (5th Cir.1972). [Emphasis in original.]

Id. at 72. *See also State v. Burnett,* 292 Minn. 484, 195 N.W.2d 189 (1972); *Parent v. State,* 31 Wisc.2d 106, 141 N.W.2d 878 (1966). *See generally* Annotation, *Duress, Necessity, or Conditions of Confinement as Justification for Escape from Prison,* 69 A.L.R.3d 678 (1976).

In *United States v. Bailey,* 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980), the United States Supreme Court also considered the nature of the offense of escape from federal custody. There defendants contended that they could not be convicted of escape because the conditions of their confinement were so intolerable as to validate their defense of duress. The Supreme Court, however, held that the duress defense sought to be raised by defendants was not applicable, because defendants failed to offer evidence justifying their failure to surrender during the weeks following their escape. The Court wrote,

> *we think it clear beyond peradventure that escape from federal custody * * * is a continuing offense* * * Given the continuing threat to society posed by an escaped prisoner, "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States,* 397 U.S. 112, 115 [90 S.Ct. 858, 860, 25 L.Ed.2d 156] (1970). Moreover, every federal court that has considered this issue has held, either explicitly or implicitly, that § 751(a) defines a continuing offense. [Emphasis added.]

Id. 444 U.S. at 413, 100 S.Ct. at 636.

After *Bailey* was decided, our supreme court adopted a duress instruction, SCRA 1986, 14–5132, permitting a defendant to assert the defense of duress in an escape case. This instruction provides that a defendant, relying upon duress as a defense to the charge of escape, must report "immediately to the proper authorities when he attain[s] a position of safety from the immediate threat." The Committee Commentary to the instruction cites *Bailey,* including its requirement that "there must be evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress has lost its coercive force." We conclude the adoption of this duress instruction, similar to the rationale articulated by the Supreme Court in *Bailey,* also indicates that our escape statute constitutes a continuing offense. *See also State v. Norush,* 97 N.M. 660, 642 P.2d 1119 (Ct.App.1982).

The trial court, over defendant's objection, instructed the jury that "[e]scape is a continuing offense. That is, it commences at the time an inmate flees from lawful custody or confinement and continues until he is apprehended or surrenders." The instruction is a correct statement of the law. The district court may give additional jury instructions not contained in the Uniform Criminal Jury Instructions if the instruction is brief, impartial, and free from hypothesized facts and is not prohibited by the UJI, does not alter or conflict with an approved instruction, and goes to definitions not covered by the approved instructions. SCRA 1986, UJI Criminal General Use Note; *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985). Viewing the plain language of the provisions of Section 30–22–9 and the stated seriousness of the offense together with the clear legislative purpose of deterring escape, we conclude that the statute indicates a legislative intent that escape constitutes a continuing offense. Thus, an individual who intentionally aids a person to avoid recapture, who he knows has escaped from lawful custody, may properly be charged with the offense of assisting escape. § 30–22–11.

Defendant claims that the proper charges for the acts he allegedly committed are harboring or aiding a felon. The offense of harboring or aiding a felon is declared to constitute a fourth degree felony and, as defined in Section 30–22–4, provides in applicable part that the crime is committed when "any person ... knowingly conceals any offender or gives such offender any other aid, knowing that he has committed a felony, with the intent that he escape or avoid arrest, trial, conviction or punishment."

Defendant asserts that the legislature by enacting two separate offenses, assisting escape and harboring a felon, intended to attach greater culpability to one who assists individuals who have been confined to break out of the penitentiary than to one who gives assistance to a fugitive who has already completed his escape from custody or confinement. Defendant also argues that under the facts of this case, if both statutes are interpreted to cover the same type of conduct, Section 30–22–4 must be deemed to be the controlling statute because the latter section specifically addresses the criminal liability for accessories after the fact. A review of the legislative history of the crime of harboring or aiding a felony, however, dispenses with this argument.

Section 30–22–4 "grew out of the common law of accessories after the fact." *State v. Mobbley,* 98 N.M. 557, 558, 650 P.2d 841, 842 (Ct.App.1982). It follows closely a similar earlier statute enacted by 1949 N.M. Laws, Chapter, 53, entitled, "An Act Defining an Accessory After the Fact" which was compiled as NMSA 1953, Section 40–1–9. The 1949 enactment "defined such accessories in words similar to what now appears as § 30–22–4." *Id.* Given that escape is a continuing offense, it would be illogical that one who assists an escapee while he is at large is an accessory *after* the escape. Thus, examination of the legislative history of Section 30–22–4 indicates that the offense of harboring or aiding a felon was not meant to supersede the crime of assisting escape in the context of this case.

Defendant relies upon *Orth v. United States,* 252 F. 566 (4th Cir.1918), and cases which are the progeny of *Orth,* for his argument that harboring statutes have been used to prosecute those who assist escapees after they have placed themselves beyond immediate pursuit. *See United States v. Vowiell,* 869 F.2d 1264 (9th Cir. 1989). In *Orth* the court based its holding on the proposition that "[w]hen the physical control has been ended by flight beyond immediate active pursuit, the escape is complete." *Id.* at 568. We have rejected that proposition and believe that the United States Supreme Court has also. Modern federal cases in which persons have been prosecuted for harboring escapees, *e.g., United States v. Eaglin,* 571 F.2d 1069 (9th Cir.1977), are founded on a federal statute, 18 U.S.C. Section 1072 which specifically speaks of harboring or concealing "any prisoner after his escape." *State v. Brown,* 8 Wash.App. 639, 509 P.2d 77 (1973) arises out of a similar statute.

Finally, we are buttressed in our conclusion by the New Mexico statutory scheme. NMSA 1978, Section 30–22–7 (Repl.Pamp. 1984) defines "Unlawful rescue." NMSA 1978, 30–22–12 (Repl.Pamp.1984) defines "Furnished [Furnishing] articles for prisoner's escape." If the crime of "Assisting escape" defined in Section 30–22–11 were limited as defendant argues, its scope would be consumed almost totally by those two offenses. Defendant's construction of the statute must be rejected.

Under the record before us, we find no error in the charges filed by the state, which are the subject of defendant's appeal, or in the remark of the prosecutor or instructions given by the court.

II. CLAIM OF DOUBLE JEOPARDY

Defendant next asserts that the charges of assisting in the escape of Gallegos, Gilbert, and Kinslow violate the prohibition against double jeopardy, contrary to the United States Constitution, amendments V and XIV, and the New Mexico Constitution, Article II, Section 15. In advancing this argument defendant reasons that the state has split one criminal offense into three separate prosecutions, resulting in multiple punishment for one offense in violation of the federal and state interdictions against double jeopardy.

Evidence adduced at trial indicated that defendant drove to a storage locker located on Airport Road in Santa Fe and met the three inmates. Thereafter he drove Gallegos, Kinslow, and Gilbert to Albuquerque. Defendant, relying on *Bell v. United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), contends that since there was only one act of transportation, this could

constitute but one offense. In *Bell* appellant was charged under the Mann Act, 32 U.S.C., Section 84, with illegally transporting two women across state lines on the same trip and in the same vehicle. The Court held that defendant's action constituted one offense for the purposes of punishment, not two.

The state argues that both public policy considerations and determination of legislative intent are critical factors in the determination of whether multiple prosecutions should be permitted under the facts of the present case. In *State v. Smith,* 94 N.M. 379, 610 P.2d 1208 (1980), the supreme court considered an analogous argument. Smith was arrested and charged with four separate counts of trafficking with intent to distribute narcotics. Law enforcement officers seized a bag containing approximately ten pounds of various types of pills separated into smaller bags. Smith contended that there could be but one offense of trafficking in drugs and that the transaction constituted the "same offense," not four. The supreme court rejected this argument, observing that there is no violation of the prohibition against double jeopardy because the same evidence rule does not bar prosecution on each of the drug counts and that "[T]he public interest and the intent of our drug laws militate against * * * permitting * * * the merger of the four counts of trafficking in the four separate drugs." *Id.* at 381, 610 P.2d at 1210. Similarly, in *State v. Johnson,* 103 N.M. 364, 707 P.2d 1174 (Ct.App.1985), this court held that the act of firebombing a residence occupied by six people could constitute multiple offenses. There defendant's convictions on four counts of attempted first degree depraved mind murder, two counts of attempted second degree murder, and negligent arson were upheld. The question of whether multiple punishments run afoul of the double jeopardy clause is in part, governed by legislative intent. *State v. Ellenberger,* 96 N.M. 287, 290, 629 P.2d 1216, 1219 (1981).

Viewing the public policy considerations of deterrence evinced by the legislature, we find defendant's claims of double jeopardy inapplicable herein.

III. ADMISSIBILITY OF EVIDENCE

We consider under this point defendant's contentions that the court erred in admitting evidence and testimony concerning events which occurred after July 25, 1987; defendant's claim that oral statements given by him to FBI Agents William Wright and John Kinard should have been suppressed; that the pistol and bullets introduced into evidence at defendant's trial were improperly seized; and that oral and written statements given by Jimmy Kinslow and testified to by State Police Officer David Osuna at defendant's trial were hearsay and violated defendant's right to confront witnesses called against him.

(a) Defendant argues that the trial court erred in admitting into evidence a .38 caliber pistol, cartridges, a motel registration card, three birth certificates, and an article on cosmetic surgery which were seized on July 30 at the time he was arrested in California with Gallegos and Gilbert. Additionally, defendant asserts that there was no evidence linking these exhibits to his alleged acts of picking up the three escapees in Santa Fe and transporting them to Albuquerque, that the exhibits were irrelevant and prejudicial, and that since the trial court instructed the jury that the charges of assisting escape occurred in Santa Fe County, the admission of testimony and exhibits relating to events after July 25, 1987, and outside Santa Fe County, was prejudicial and denied him due process of law and a fair trial.

At the time of defendant's arrest a pistol was found under the front seat of the car he was driving and several pistol cartridges were found in the clothing he was wearing. The record indicates that defendant consented to the search of his car and the cartridges were obtained following a search of his person incident to his arrest.

The exhibits in question were admissible and relevant to defendant's intent and overall plan to assist the inmates with their escape and to defendant's defense of duress. *See* SCRA 1986, 11-401 and 11-404(B). Here, under the language of the

instructions the jury was limited, in each of the elements instructions for assisting escape, to acts of defendant which occurred on or about July 25, 1987. *See* UJI Crim. 14–2224. However, the jury could properly consider acts and conduct of the defendant occurring after July 25 as they may have related to his intent or overall plans to assist the inmates in making their escape successful. Moreover, in relation to the gun, the trial court specifically cautioned the jury that although the pistol was admitted into evidence, the defendant was not charged with any weapons offenses. Since we have held that the evidence was relevant to the charges against defendant, we find no error in the admission of the exhibits.

(b) After defendant's arrest in Garden Grove, California, on July 31, 1987, he gave an oral statement to FBI Agents Wright and Kinard. In his statement defendant admitted driving from Albuquerque to Santa Fe and taking food to Gallegos, Gilbert, and Kinslow who were hiding in Santa Fe. Defendant also admitted transporting the three inmates from Santa Fe to Albuquerque and securing a motel for them and thereafter driving Gallegos and Gilbert to California.

Defendant acknowledges that Agent Wright advised him of his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that he signed a waiver of rights form prior to the time he gave his statement, and that he told the agents that he understood his rights. Defendant does not argue on appeal that any threats or promises were made to him in order to obtain his statements. The trial court determined that defendant's statements were voluntary, and the jury was instructed that before it could consider defendant's statements for any purpose, it must determine that the statements were voluntarily given. Under the facts herein, we find no error in the admission of defendant's statements.

(c) Defendant also argues that the trial court erred in permitting State Police Officer David Osuna to testify concerning oral statements given by Kinslow which were incriminatory of defendant. Defendant asserts that the statement of Kinslow were hearsay and violated his right to confront witnesses called to give testimony against him.

Kinslow gave two statements to Officers David Osuna and Carlos Maldonado in California: the first on August 1, 1987; the second on August 3, 1987. Osuna testified at trial that in both instances Kinslow indicated his wish to make a statement and also that in both instances Kinslow had been given his *Miranda* rights and that he indicated he understood these rights prior to the time he gave any statements.

Osuna testified at trial that the second interview with Kinslow was taped and transcribed and that he, himself, checked the accuracy of the transcript against the tape.

Following Kinslow's arrest in California, the state offered him immunity and agreed not to return him to New Mexico if he gave a truthful statement regarding the circumstances of the escape and testified concerning defendant's role in aiding and assisting the escapees. Kinslow gave a written statement to Officer Osuna; however, Kinslow later recanted the truthfulness of these statements and asserted that they had been extracted by coercion.

At trial Kinslow was called as a witness both by the state and the defense. Officer Osuna testified at trial that Kinslow admitted that defendant had brought food and beverages to the escapees in Santa Fe, had driven them to Albuquerque and secured motel lodging for them, and then had driven Gallegos and Gilbert to California. Kinslow, when called as a witness by the state, refused to testify despite the grant of immunity. Later in the trial, however, Kinslow was called as a witness by defendant and he testified that defendant had not aided or assisted the escapees and denied that defendant had driven the three inmates to Albuquerque. At the time the state offered Kinslow's statements through Officer Osuna, Kinslow was declared to be an unavailable witness because he had refused to testify and had invoked his fifth amendment right to remain silent. Under SCRA 1986, 11–804(A)(2), a witness may be

declared to be unavailable where the declarant persists in refusing to testify concerning the subject matter of a statement despite an order of the judge to do so. In any event, because Kinslow was subsequently called as a witness for the defense and responded to questions about his statement as a witness for the defense, the testimony by Osuna concerning Kinslow's statements was not hearsay. A statement is not hearsay if the declarant testifies at trial, the declarant is subject to cross-examination concerning the statement, and the statement is inconsistent with his other testimony. SCRA 1986, 11–801(D)(1)(a). Under these circumstances we find defendant was not deprived of his right to confront the witness and determine that the statements were properly admitted.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant also challenges the sufficiency of the evidence to support his convictions of assisting escape, reasserting his contention that he was improperly charged with the offenses of assisting escape and that there was no evidence that he knew that Gallegos, Gilbert, and Kinslow were escapees. We have previously addressed defendant's contention that he was improperly charged under Point I of this opinion and found this issue without merit. Additionally, our review of the record confirms that there was substantial evidence on which the jury could properly determine beyond a reasonable doubt that defendant committed each of the offenses of assisting escape.

Following his arrest defendant admitted to Agents Kinard and Wright that he had travelled from Albuquerque to Santa Fe to take food to Gallegos, Gilbert, and Kinslow, that he transported them to Albuquerque, and that he helped them get a motel room there. Defendant was arrested with Gallegos and Gilbert in California, and hotel registration slips corroborated that defendant assisted the defendants in obtaining lodging in Albuquerque and California. Moreover, the statements of Kinslow, related by Officer Osuna, implicate defendant in each of the charges.

Without detailing all of the evidence presented at trial, we have reviewed the evidence and find that substantial evidence exists in the record to support the verdict of the jury on each of the charges against defendant.

V. DENIAL OF MOTION TO DISMISS

Defendant's final point asserted on appeal is that Counts I and II of the indictment should have been dismissed because the harboring statute, Section 30–22–4, provides for the specific exclusion of individuals who are related to a felon by consanguinity or affinity. Defendant argues that because he was the brother-in-law of Gallegos, it was improper to charge him with offenses of harboring or aiding a felon. This argument is without merit because the trial court dismissed each of the counts of harboring or aiding a felon on other grounds. Moreover, nothing in the provisions of Section 30–22–11, the statute on which defendant was convicted, evinces a legislative intent to immunize a defendant from prosecution for assisting the escape of inmates because of consanguinity or affinity. The defenses of consanguinity or affinity recognized under Section 30–22–4 are not applicable to a charge filed under Section 30–22–11.

CONCLUSION

Defendant's conviction and sentences are affirmed.

IT IS SO ORDERED.

HARTZ, J., concurs.

CHAVEZ, J., dissenting.

CHAVEZ, Judge (Dissenting).

It is undisputed that defendant was not present at the time of the breakout from the penitentiary. It is also uncontested that his first contact with the escapees was three weeks after the escape from custody had been effectuated. The state does not claim that defendant in any way planned, assisted or incited the initial departure from custody. By holding that escape is a continuing offense, the majority has imper-

missibly extended the language of the statute defining the crime of assisting escape to include the conduct of defendant. Penal statutes must be strictly construed, and the definition of a crime is not to be broadened. *State v. Collins,* 80 N.M. 499, 458 P.2d 225 (1969); *State v. Allen,* 77 N.M. 433, 423 P.2d 867 (1967).

Assisting escape is: "intentionally aiding any person *confined or held in lawful custody or confinement* to escape." NMSA 1978, § 30–22–11 (Repl.Pamp.1984) (emphasis added). "Lawful custody or confinement" is "the holding of any person pursuant to lawful authority, including, * * * actual or constructive custody of prisoners temporarily outside a penal institution * * *" NMSA 1978, § 30–1–12(H) (Repl.Pamp.1984). The storage shed is not a place of lawful custody or confinement and the escaped prisoners were not in the "constructive custody" of law enforcement officials at the time defendant picked up the inmates and drove them to Albuquerque. *See State v. Trujillo,* 106 N.M. 616, 747 P.2d 262 (Ct.App.1987). Thus, although defendant's actions clearly fell outside the scope of the statute, the majority nonetheless brings him within the statute by contending that the *escapees* were still in the process of escaping. Penal statutes should not be subjected to strained or unnatural constructions in order to bring them within conduct not legislated against. *State v. Garcia,* 98 N.M. 585, 651 P.2d 120 (Ct.App.1982).

The majority reasons that since escape is a continuing offense, any person giving assistance to an escapee at any time prior to recapture can be convicted of assisting escape. The policy considerations which define escape as a continuing offense, however, are based on the nature of the crime, the threat posed by an escaped prisoner, and the defenses an escapee can present at trial. Cases holding that escape is a continuing offense have turned on the *escapee's* culpability after the initial breakout from custody, in the context of the defenses of duress, *see, e.g., United States v. Bailey,* 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980); necessity, *Wells v. State,* 687 P.2d 346 (Alaska Ct.App.1984); lack of intent to escape, *State v. Burnett,* 292 Minn. 484, 195 N.W.2d 189 (1972); *Parent v. State,* 31 Wis.2d 106, 141 N.W.2d 878 (1966); statute of limitations, *Campbell v. Griffin,* 101 Nev. 718, 710 P.2d 70 (Nev. 1985), *People v. Miller,* 157 Ill.App.3d 43, 109 Ill.Dec. 146, 509 N.E.2d 807 (1987); and in the context of felony-murder, *State v. Milentz,* 547 S.W.2d 164 (Mo.Ct.App.1977). None of these situations apply here. The defendant is not an escaped prisoner. I have found no authority for the conclusion that the continuing nature of the crime of escape should serve to expand statutes defining other crimes such as assisting escape.

While I agree that the very nature of escape makes it a continuing offense *for the escapee,* there is a point at which the escape is complete for the purpose of determining the applicability of our assisting escape statute. Cases dealing with the culpability of one who assists an escapee fall into two categories. The distinguishing factor is whether or not the defendant assisted in the initial departure from custody. *See, e.g., State v. Bishop,* 202 Cal.App.3d 273, 248 Cal.Rptr. 678 (1988) (assisting escape is helping a person in lawful custody to depart from limits of that custody, e.g., diverting suspicion, serving as a lookout, taking charge of an automobile, stopping a guard's attempt to apprehend an escaping prisoner, furnishing information which facilitates an escape, inciting or advising escape by words); *State v. Jones,* 54 Idaho 782, 36 P.2d 530 (1934) (the prisoner was employed outside the jail, in the custody of his supervisor, when defendant gave him money which enabled him to carry out his escape); *Collins v. State,* 174 Ind.App. 116, 366 N.E.2d 229 (1977) (two prisoners took a guard hostage and hijacked a prison vehicle; they later met defendant who arrived with a car and they drove away, thus "completing" their escape); *Suan v. State,* 511 So.2d 144 (Miss.1987) (defendant drove to a work center where prisoner, after leaving the center, entered the car and they drove away; assistance was of sufficient immediacy to fall within assisting escape statute). The common element in all of

these cases is that defendants assisted the prisoners in their *initial departure* from custody or confinement.

This case is more similar to *Orth v. United States,* 252 F. 566 (4th Cir.1918) and *United States v. Vowiell,* 869 F.2d 1264 (9th Cir.1989). In *Orth,* the prisoner escaped and three weeks later appeared at defendant's home. Defendant assisted the prisoner to leave the area. The appellate court found that the evidence did not support a conviction of the charge of aiding an escape. The court held that where physical control has ended by flight beyond immediate active pursuit, the escape is complete. 252 F. at 568. Likewise, the Ninth Circuit in *Vowiell* held that the crime of aiding an escape ends once the escapee has reached temporary safety.

By enacting NMSA 1978, Section 30–22–11 (Repl.Pamp.1984) Assisting Escape, and NMSA 1978, Section 30–22–4 (Repl.Pamp. 1984) Harboring or Aiding a Felon, the legislature has defined two separate and distinguishable offenses, with different elements and penalties. The difference between the two offenses lies in the circumstances under which the assistance is given and in the intent of the individual charged. One distinguishing element is whether the prisoner was in custody at the time aid was rendered; another is the intent of the defendant. The majority, however, has blurred the distinction between these two crimes.

In order to violate Section 30–22–11, the defendant must have incited, supported or reinforced the prisoner's exertions to escape. *See* SCRA 1986, 14–2220, Committee Commentary. The intent is to assist a prisoner in his efforts to leave custody. The crime of harboring or aiding a felon, on the other hand, is committed when a person "knowingly conceals any offender or gives such offender *any other aid,* knowing that he has committed a felony, *with the intent that he escape* or avoid arrest, trial, conviction or punishment." NMSA 1978, § 30–22–4 (Repl.Pamp.1984) (emphasis added). Although under both statutes the intent is to help another in his efforts to escape, in assisting an escape, a defendant intends to aid a prisoner, confined in lawful custody, to depart from the limits of his confinement. One who violates the harboring statute, however, intends to aid a known felon in his efforts to elude the authorities.

The majority argues, in effect, that the continuing threat to society posed by escaped prisoners justifies the convictions of defendant under Section 30–22–11. Under this decision, however, a person who drives a known murderer to another state would be guilty of a lesser crime than one who assists a misdemeanant escapee to leave the county months after his escape. In addition, today's holding removes the consanguinity exception applicable under Section 30–22–4 when a family member helps an escapee. I do not believe the legislature intended these results in enacting Section 30–22–11.

The majority has rewritten the assisting escape statute to include the aiding of any person who *has escaped* from lawful custody or confinement, *to further escape.* This is not our function. It is the legislature's function and prerogative to define crimes. *State v. Moss,* 83 N.M. 42, 487 P.2d 1347 (Ct.App.1971). The legislature could very well have determined that the threat posed by one who assists in the initial breakout from custody is much greater than that posed by one who assists an escaped prisoner already at large. 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). Defendant did not aid the escape of prisoners who were held in lawful custody contrary to Section 30–22–11. His conduct fell within Section 30–22–4. Because I find the charges of assisting escape improper under the facts of this case, I respectfully dissent.

781 P.2d 316

STATE of New Mexico,
Plaintiff–Appellee,

v.

Ricky BYBEE, a/k/a Ricky Frame,
Defendant–Appellant.

No. 11205.

Court of Appeals of New Mexico.

Aug. 17, 1989.

Hal Stratton, Atty. Gen., Charles H. Rennick, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Appellate Defender, Santa Fe, Calvin R. Neumann, District Public Defender, Clovis, for defendant-appellant.

OPINION

DONNELLY, Judge.

Defendant was charged with three counts of burglary of soft drink vending machines located outside a grocery store. He subsequently entered a plea of nollo contendre to one charge of burglary, and the other charges were dismissed. Defendant specifically reserved, however, the right to appeal the trial court's denial of his motion to dismiss the burglary charges. The dispositive issue is whether a soft drink vending machine constitutes a "structure" within the purview of the burglary statute, NMSA 1978, Section 30–16–3(B) (Repl.Pamp.1984). We reverse.

The criminal information filed against defendant alleged that he "without authorization [entered three] commercial structure[s], to-wit: [soft drink vending machines]." The three vending machines were located outside a grocery store in Clovis. Each vending machine contained canned soft drinks and had a locked door which enclosed the beverages and money change box. The machines were not anchored or attached to the building but an electrical cord plugged into the building served to operate the refrigeration unit and dispensing equipment on each machine.

Defendant argues that unlawfully obtaining entry into a vending machine located outside a building does not constitute the offense of burglary within the contemplation of Section 30–16–3. The issue presented constitutes a question of first impression in this jurisdiction.

Section 30–16–3 states in part, "[b]urglary 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." In determining whether a vending machine is a "structure" within the contemplation of the statute, our primary purpose is to ascertain the legislative intent. *See State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 749 P.2d 1111

(1988); *State v. Gonzales,* 78 N.M. 218, 430 P.2d 376 (1967); *State v. Owens,* 103 N.M. 121, 703 P.2d 898 (Ct.App.1984); *State v. Garcia,* 83 N.M. 490, 493 P.2d 975 (Ct.App. 1971). In ascertaining legislative intent, the courts will look to the language used but may also consider the history and background of the statute. *Id. See also Munroe v. Wall,* 66 N.M. 15, 340 P.2d 1069 (1959) (the construction of a statute may be gleaned from the history of the statute).

The offense of burglary as defined by Section 30–16–3 materially varies from the common-law offense. *See State v. Sanchez,* 105 N.M. 619, 735 P.2d 536 (Ct.App. 1987); *State v. Rodriguez,* 101 N.M. 192, 679 P.2d 1290 (Ct.App.1984). As observed in *Rodriguez,*

> At common law, burglary was "an offense against the security of habitation or occupancy." C. Torcia, 3 *Wharton's Criminal Law* § 326 (14th ed. 1980). This Court has described the statutory offense as one against "the security of the property which is entered." *State v. Ortiz,* 92 N.M. 166, 584 P.2d 1306 (Ct. App.1978). This change in definition reflects the legislature's expansion of the dwelling house requirement to include various movable and immovable structures * * *.
>
> * * * * * *
>
> * * * The general purpose of burglary statutes is to protect possessory rights with respect to structures and conveyances and to define "prohibited space." [Citations omitted.]

Id. 101 N.M. at 193–194, 679 P.2d at 1291–1292. The crime of common law burglary consisted of breaking and entering a dwelling house of another in the nighttime with the intent to commit a felony therein. *Id.* at 193, 679 P.2d at 1291. *See also Miller v. Cox,* 97 N.M. 414, 356 P.2d 231 (1960); *State v. Wilkerson,* 83 N.M. 770, 497 P.2d 981 (Ct.App.1972). Examination of Section 30–16–3 indicates that the present language of the statute parallels a prior statute enacted in 1963 as a part of the comprehensive revision of the Criminal Code. *See* former Section 40A–16–3, enacted by 1963 N.M.Laws, ch. 303, § 16–3. The present burglary statute and its predecessor statute, Section 40A–16–3, are consolidations of several different former burglary statutes. *See* NMSA 1953, §§ 40–9–1, –6, –7 & –10; *see also State v. Gonzales.*

The legislature in adopting NMSA 1953, Sections 40–9–6 and –7, expanded the offense of burglary to include places and specific structures other than dwellings and specifically provided that the offense of burglary also included offices, shops, warehouses, telephone pay stations, and "other building[s] or structure[s]." *See Martinez v. United States,* 295 F.2d 426 (10th Cir.1961). In *State v. Ortiz,* 92 N.M. 166, 584 P.2d 1306 (Ct.App.1978), this court held that the burglary statute was amended so as to no longer define burglary in terms of a "breaking."

The state argues that "structure" as used in Section 30–16–3 includes a soft drink vending machine and that the term "structure" should be construed in its normal context. The term "structure" as defined in the dictionary is "something constructed or built." Webster's Third New International Dictionary 2266 (3d ed. 1971). *See also* Random House Dictionary of the English Language 1887 (2d ed. 1987); Black's Law Dictionary 1276 (5th ed. 1979).

In *Gonzales,* the supreme court construed the term "other structure" as it was used in NMSA 1953, Section 40A–16–3 (now designated § 30–16–3), a predecessor statute to Section 30–16–3, noting that "other structure" should be construed in its literal sense. The court declined to apply ejusdem generis as a rule of construction and held that the words of the burglary statute need not be limited by the specific language preceding it. *Gonzales* held that a food store could be burglarized because it was a "structure" within the ordinary meaning of the word.

The state also argues that the supreme court in *Gonzales* considered the issue of whether the term "other structure" contained in the burglary statute, NMSA 1953, Repl.Vol. 6 (1964), Section 40A–16–3 was limited under ejusdem generis as a rule of construction by the specific language preceding it. As defined in Black's Law Dic-

tionary 464 (5th ed. 1979), "ejusdem generis" is a statutory rule of construction requiring that where general words follow an enumeration of persons or things of a particular and specific meaning, the general words are not construed in their widest extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned.

Although it is clear that the legislature acted to broaden the definition of the burglary statute, in interpreting the language of Section 30–16–3, we determine that legislative modification of the definition of the offense of burglary did not, however, expand the reach of the statute to include the unlawful entry into soft drink vending machines under the facts presented here and that the legislature did not intend that a soft drink vending machine constitute a "structure" within the contemplation of the present burglary statute.

In *Rodriguez* this court upheld the burglary conviction of a defendant charged with taking property from the bed of a pickup truck with intent to commit a felony, observing that Section 30–16–3 expressly included a prohibition against the unauthorized entry of any vehicle with intent to commit any felony or theft therein. In *Sanchez* the court observed that the burglary statute (Section 30–16–3) as adopted by the legislature significantly departed from its common law counterpart, however, we conclude that, under the facts present here, the expanded definition of burglary and the term "structure" as set forth in Section 30–16–3 does not include the unauthorized entry into a soft drink vending machine located outside a building or other structure with intent to commit a felony or theft within. *Compare State v. Douglas,* 86 N.M. 665, 526 P.2d 807 (Ct. App.1974) (affirming conviction of burglary where defendant was shown to have broken and entered into a gas station and then broke and entered a coke machine located *inside* a gas station). The power to define crimes is a legislative function, and penal statutes must be strictly construed; the definition of crimes contained therein may not be broadened by intendment. *State v. Allen,* 77 N.M. 433, 423 P.2d 867 (1967).

As observed by our supreme court in *Bokum Resources v. New Mexico Water Quality Control Commission,* 93 N.M. 546, 603 P.2d 285 (1979), statutes defining criminal conduct are strictly construed. *See also State v. Allen; State v. Ortiz,* 78 N.M. 507, 433 P.2d 92 (Ct.App.1967). Doubts about the construction of a criminal statute are resolved in favor of the rule of lenity. *State v. Keith,* 102 N.M. 462, 697 P.2d 145 (Ct.App.1985). A criminal statute may not be made applicable beyond its intended scope, and it is a fundamental rule that crimes must be defined with appropriate definiteness. *Pierce v. United States,* 314 U.S. 306, 62 S.Ct. 237, 86 L.Ed. 226 (1941). Similarly, a statute will not be read to apply to a criminal offense unless the legislative proscription is plain. *See United States v. Scharton,* 285 U.S. 518, 52 S.Ct. 416, 76 L.Ed. 917 (1932).

In so construing the statute, we do not believe the legislature intended the burglary statute to protect space within any thing constructed, no matter how small, absent specific language in the statute evincing intent to include such structure within the proscription of the statute. Thus, considering Section 30–16–3(B) in light of the rule that criminal statutes are construed strictly against the state, we do not interpret the language "or other structure" to apply to soft drink vending machines located outside a dwelling house or other structure.

We have reviewed the cases from other jurisdictions relied on by the state and find that those cases are distinguishable by reason of the differences in the specific language of the statutes involved. Thus, *State v. Newman,* 313 N.W.2d 484 (Iowa 1981), involved a coin changer and a statute that specifically provided, among other things, that the crime of burglary included the unlawful entry of an " 'area enclosed in such manner as to provide a place for the keeping of valuable property secure from theft.' " *Id.* at 486. *Shumate v. Commonwealth,* 433 S.W.2d 340 (Ky.1968), *cert. denied, Brotze v. Kentucky,* 394 U.S. 993, 89 S.Ct. 1485, 22 L.Ed.2d 769 (1968),

involved a statute that expressly provided that the terms "storehouse" or "warehouse" as used in the burglary statute included a vending machine. Similarly, in *State v. Mann,* 129 Ariz. 24, 628 P.2d 61 (Ct.App.1981), the court upheld defendant's conviction of burglary based on unlawful entry of a Salvation Army collection box under a statute that defined structure as any building, object, vehicle, or place with sides and a floor and used for storage.

Although the legislature may include specific objects or places under the proscription of the burglary statute, the court may not enlarge or amend the statute by judicial fiat. *See Varos v. Union Oil Co.,* 101 N.M. 713, 688 P.2d 31 (Ct.App.1984). At least one state, Oklahoma, has expressly adopted legislation proscribing burglary of "any coin-operated or vending machine." *See* 21 Okla.Stat.Ann., § 1435 (West 1983); *see also Hudson v. State,* 525 P.2d 1380 (Okla.Crim.App.1974). In light of our ruling we need not reach the collateral issue raised by defendant.

Reversed and remanded.

IT IS SO ORDERED.

ALARID and APODACA, JJ., concur.

781 P.2d 319

Leroy SANCHEZ, Respondent–Appellant,

v.

BRADBURY & STAMM CONSTRUCTION and Transamerica Insurance Services, Claimants–Appellees.

No. 11602.

Court of Appeals of New Mexico.

Sept. 7, 1989.

Certiorari Denied Oct. 18, 1989.

Leof T. Strand, Albuquerque, for respondent-appellant.

Arlon L. Stoker, Jr., Albuquerque, for claimants-appellees.

OPINION

DONNELLY, Judge.

Appellant filed an application for interlocutory review of a hearing officer's order denying his motion to dismiss appellees' petition to reduce his workers' compensation benefits. We conclude that we are without jurisdiction to grant the application because the court of appeals only has jurisdiction to review matters as provided by law and the legislature has not conferred jurisdiction upon this court to consider interlocutory appeals from the Workers' Compensation Division (Division). Accordingly, we deny the application for interlocutory review and remand the matter to the Division for further proceedings.

Appellant was injured on January 17, 1984. Appellees voluntarily paid him workers' compensation benefits from the date of his injury until he returned to work in April or May of the same year. On April 27, 1986, appellant again left work as a result of the January 1984 accidental injury, and

appellees again voluntarily paid him workers' compensation benefits. No claim for compensation benefits has ever been filed by appellant. On January 11, 1989, appellees filed in the Division a petition to reduce benefits pursuant to NMSA 1978, Section 52–5–5(A) (Repl.Pamp.1987). Appellant then filed a motion to dismiss appellees' petition asserting lack of jurisdiction. The hearing officer denied the motion but certified the order for interlocutory appeal. *See* NMSA 1978, § 39–3–4(A).

The issue certified for interlocutory review is whether the Division may consider an employer's petition for reduction of benefits where no compensation order has been previously entered. In considering whether to grant the application, we address initially the threshold question of whether this court has jurisdiction to entertain appellant's application. The parties have filed responses to our order to show cause as to whether this court has jurisdiction to grant the application. Appellees argue we have jurisdiction and appellant concedes we do not have jurisdiction.

JURISDICTION

The court of appeals only has jurisdiction to review matters as provided by law. N.M. Const. art. VI, § 29; *State ex rel. Townsend v. Court of Appeals,* 78 N.M. 71, 428 P.2d 473 (1967); *State ex rel. Dep't of Human Servs. v. Manfre,* 102 N.M. 241, 693 P.2d 1273 (Ct.App.1984). Since appellant's petition was filed after December 1, 1986, the Division has original jurisdiction over appellees' petition to reduce benefits. *See Wylie Corp. v. Mowrer,* 104 N.M. 751, 726 P.2d 1381 (1986). However, Section 39–3–4(A), the statutory authorization for interlocutory appeals, only provides for interlocutory appeals from the district court.

Our appellate rules, SCRA 1986, 12–101 through 12–607, include procedural rules pertaining to interlocutory appeals. *See* R. 12–203. They also provide for the substitution of the administrative agency appealed from whenever the rules refer to the district court. *See* R. 12–601(B). However, our appellate rules do not confer the right to appeal since the right of appeal is a matter of substantive law outside of the supreme court's rule making authority. *See Durand v. New Mexico Comm'n on Alcoholism,* 89 N.M. 434, 553 P.2d 714 (Ct.App.1976). Thus, the appellate rules do not provide authority for interlocutory review in the instant matter.

Appellees contend that NMSA 1978, Section 52–5–8(B) (Repl.Pamp.1987) permits this court to review interlocutory appeals from the Division. Subsections (A) and (B) provide:

> A. Any party in interest may, within thirty days of mailing of the final order of the hearing officer, file a notice of appeal with the court of appeals.
>
> B. A decision of a hearing officer is reviewable by the court of appeals in the manner provided for other cases and is subject to stay proceedings as provided by the rules of civil procedure for the district courts, except that the appeal shall be advanced on the calendar and disposed of as promptly as possible.

Appellees argue that subsection 52–5–8(B) is the general provision that provides authority for interlocutory appeals from decisions of hearing officers and that the term "other cases" in subsection (B) refers to district court cases. They note that properly certified decisions of district courts are reviewable pursuant to Section 39–3–4 and argue correspondingly that if an interlocutory appeal is a manner of appeal available in district court cases, the statute contemplates that the same manner of appeal is made applicable to workers' compensation cases by Section 52–5–8(B). They further argue that subsection 52–5–8(A) does not limit the kinds of appeals from the Division, including interlocutory appeals, but only addresses itself to the proper timing of a notice of appeal from final orders.

Although subsection 52–5–8(A) expressly provides for a direct appeal from a final order of the hearing officer, the statute does not expressly provide for an interlocutory appeal from a non-final order. Subsection 52–5–8(A) limits appellate jurisdiction to review final orders of the Division. Similarly, subsection 52–5–8(B), does not

explicitly provide for a right of interlocutory appeal.

The general rule in administrative law is that, absent express statutory authorization, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Coca-Cola Co. v. F.T.C.*, 475 F.2d 299, 302 (5th Cir.), *cert. denied*, 414 U.S. 877, 94 S.Ct. 121, 38 L.Ed.2d 122 (1973) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51, 58 S.Ct. 459, 463–464, 82 L.Ed. 638 (1938)); *see also Angel Fire Corp. v. C.S. Cattle Co.*, 96 N.M. 651, 634 P.2d 202 (1981). As observed by our supreme court in *Angel Fire*, "[j]urisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with. The courts have no authority to alter the statutory scheme...." *Id.* at 652, 634 P.2d at 203.

We believe the legislature did not intend to permit interlocutory appeals from the Division and that appellate review is limited to final orders as specified in subsection 52–5–8(A). We also determine that subsection 52–5–8(B) does not provide statutory authority for interlocutory appellate review of non-final administrative orders of the Division.

Under Section 39–3–4(A), only the district court is authorized to certify a question for interlocutory appellate review. We conclude that if the legislature had intended to extend to the Division the authority to certify questions for interlocutory appeal it would have specifically so provided. *See Garrison v. Safeway Stores*, 102 N.M. 179, 692 P.2d 1328 (Ct.App.1984).

The intent of the legislature in creating the workers' compensation division was, in part, to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers. *See* NMSA 1978, § 52–5–1 (Repl.Pamp.1987). In order to effect this intent, the act provides specific time limits for resolving a claim. Within sixty days after receipt of a claim, the director is required to issue his recommendations for resolution of the claim and to provide the parties with a copy. *See* § 52–5–5(C). Within thirty days of receipt of the recommendation, each party must notify the director of the acceptance or rejection of the recommendation. *See id.* If the matter cannot be resolved by informal conference or other techniques, the director is then required to transmit a copy of the claim to the other parties. *See* NMSA 1978, § 52–5–7(A) (Repl.Pamp.1987). A written answer to the claim is required within twenty days of receipt of it and a formal hearing is to be held within sixty days of the filing of the answer. *See id.;* § 52–5–7(B). A final decision is to be filed with the director within thirty days of the hearing. *See id.*

There is no provision in this expedited process for a delay resulting from an interlocutory appeal. In fact, such a delay is inconsistent with the expedited process since it is otherwise possible to obtain a final order from the Division in a little more than six months. *See New Mexico State Bd. of Educ. v. Board of Educ. of Alamogordo Pub. School Dist. No. 1*, 95 N.M. 588, 624 P.2d 530 (1981). Accordingly, there is no apparent need for an interlocutory appeal from the Division.

We do not believe that the language relied on by appellees was intended to grant the right of interlocutory appeal. We believe the language is addressed to the standard of review applied to the decision of a hearing officer. *See Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 767 P.2d 363 (Ct.App.1988) (construing same language and holding that the hearing officer's decision is reviewed on the record as a whole). Also, the preceding workers' compensation act used the identical language in reference to an appeal from the district court to the state supreme court. *See* NMSA 1978, § 52–1–39(A) (Orig.Pamp.). Thus, we conclude that there is no authority permitting an application for an interlocutory appeal from a non-final order issued by the Division, and that this court is without jurisdiction to grant the application herein.

There are two exceptions to the general rule prohibiting interlocutory review. One is the assertion of a constitutional right;

the second is the class of cases in which claim is made that an agency has exceeded its authority or otherwise acted in a manner clearly at odds with the specific language of a statute. *See Coca-Cola Co. v. F.T.C.* Appellant does not claim either exception. Instead he concedes that this court is without jurisdiction in this matter and claims that the district court has original jurisdiction pursuant to N.M. Const. Art. VI, Section 13. However, the only issue before this court is whether we have jurisdiction in this matter, not whether the district court has jurisdiction. Accordingly, we need not reach the question of whether the district court has original jurisdiction.

For the above reasons, we deny appellant's application for interlocutory appeal. The matter is remanded to the Workers' Compensation Division for further proceedings.

IT IS SO ORDERED.

ALARID and APODACA, JJ., concur.

781 P.2d 322

Anthony CANO, Plaintiff-Appellee,

v.

SMITH'S FOOD KING, Defendant-Appellee,

v.

Fabian CHAVEZ, State Superintendent of Insurance, the New Mexico Subsequent Injury Fund, and Vicente Jasso, Defendants-Appellants.

No. 10863.

Court of Appeals of New Mexico.

Sept. 26, 1989.

David H. Pearlman, David H. Pearlman, P.A., Albuquerque, for plaintiff-appellee.

Robert A. Martin, Bradley & McCulloch, P.A., Albuquerque, for defendant-appellee Smith's Food King.

Nathan H. Mann, M. Clea Gutterson, Gallagher, Casados & Mann, P.C., Albuquerque, for defendants-appellants New Mexico Subsequent Injury Fund and Vicente Jasso.

OPINION

BIVINS, Chief Judge.

Defendant Subsequent Injury Fund (the Fund) appeals the district court's judgment assigning it 100% liability for worker's disability. It raises four issues: (1) whether sufficient evidence exists to establish liability against the Fund; (2) whether the district court erred in holding the Fund 100% responsible; (3) whether defendants are entitled to credit on amount of prior settlement; and (4) whether the district court properly allowed interest on the judgment. We reverse and remand.

The accidental injury giving rise to this claim occurred on July 12, 1986, when worker, while pulling a rack of meat trays from a meat locker, tripped over a milk crate, causing him to fall backward onto his buttocks. Worker had suffered three previous accidental injuries to the same area of his body while working for the same employer. The first occurred in 1981, causing worker to miss eight weeks of work; the second in 1983, causing him to miss fifteen weeks. On February 12, 1985, worker suffered the third accidental injury, for which he was paid benefits of $14,632.87, plus $20,000 in full settlement of all future compensation benefits. In addition, worker received open medical benefits for one year until May 30, 1987. Worker had been released to return to light duty approximately four months prior to the accidental injury giving rise to this claim.

Relevant to the issues raised on appeal, the district court found worker totally disabled and assigned 100% of that disability to the Fund. It also refused to allow any credit for the prior settlement and ordered interest to accrue from the date of an earlier judgment that was later set aside and vacated.

Since this case was tried before the district court, we apply the traditional standard for determining the sufficiency of the evidence as set forth in *Sanchez v. Homestake Mining Co.*, 102 N.M. 473, 697 P.2d 156 (Ct.App.1985). *Cf. Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 767 P.2d 363 (Ct.App.1988) (applying whole record review for cases tried before the Workers' Compensation Division).

I. *Substantial Evidence of Fund Liability*

The Fund correctly points out that it is not liable unless worker's disability is materially and substantially greater than that which would have resulted from the July 12, 1986 accident alone. NMSA 1978, § 52-2-9 (Orig.Pamp.); *Ballard v. Southwest Potash Corp.*, 80 N.M. 10, 450 P.2d 448 (Ct.App.1969). This is essentially a medical causation question that ordinarily must be established by expert medical testimony. *See Cervantes v. Forbis*, 73 N.M. 445, 389 P.2d 210 (1964), *modified on other grounds, Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977). The Fund cites to testimony given by Dr. McCutcheon that the subsequent injury of July 12, 1986 was sufficient alone to produce all of worker's symptoms. The Fund states, "There was no testimony by Dr. Schultz on this issue."

The Fund concedes Dr. Schultz testified that the July 12, 1986 accidental injury aggravated worker's preexisting condition, but claims this physician "never testified whether Cano's condition was materially and substantially greater than it would have been as a result of the second injury alone." We do not so read Dr. Schultz's deposition testimony.

Dr. Schultz answered "yes" to a hypothetical question as to whether the accidental injury of July 12, 1986 aggravated the preexisting condition to some percentage extent of permanent impairment that was greater than the impairment that existed prior to that accidental injury. His subsequent testimony is even clearer.

Dr. Schultz, when asked to assume a preexisting impairment of 10%, said that to a reasonable medical probability the accidental injury of July 12, 1986 aggravated that condition and resulted in an increased percentage of permanent impairment. He assessed that increase at about 20–25% impairment, an increase of 10–15% over what it was before. Dr. Schultz also said that, without the July 12, 1986 accidental injury, worker's preexisting physical impairment would have continued. The 1986 accidental injury increased the symptoms. We believe this testimony would permit the trier of fact to infer that worker's disability is materially and substantially greater than that which would have resulted from the July 12, 1986 accidental injury alone. But there was direct testimony on the subject.

The Fund's counsel asked the following question and got the following answer:

> Q Do you have an opinion as to whether that fall could have resulted in his entire injuries and symptomatology just by itself, without having had a preexisting problem?
>
> A No way. Because in my report I stated that if you review this man's history you could see what was happening with him. His first injury resolved in eight weeks. His second injury resolved in 15 weeks. And the third injury resulted in the first episode of lower extremity pain on the left side. So you can see what is happening each time this guy gets hurt. He is producing a little more pathology at that disc level.
>
> Finally the one on July 12 is the one that puts him on the operating table. This is a process of attrition, like fraying a hemp rope. At some point that rope is going to fray enough to where you give it a sudden jerk and it is going to part.

This testimony from Dr. Schultz provides substantial evidence to support a finding that the Fund is liable.

II. *Finding of 100% Fund Liability*

Based on findings that the accidental injury of July 12, 1986 was not in and of itself sufficient to cause the extent of physical impairment and disability suffered by worker, the district court concluded that the Fund was responsible for all benefits due worker. The Fund challenges these findings and conclusions. We agree.

The district court could assign 100% of the liability to the Fund only if it found that the preexisting injury alone caused 100% of the disability and that the subsequent injury caused none. The district court made no such findings, and the findings that it did make directly contradict such a conclusion.

The court found that worker's surgery was probably necessary only because of the July 12, 1986 injury; that worker's permanent, partial impairment of 20–25% was a direct and proximate consequence of the July 12 injury; and that worker's inability to return to work as a meat cutter was causally connected to the July 12 injury. It thus appears that the court assigned some, if not most, responsibility for worker's total disability to the July 12, 1986 injury. The court did not make a finding that 100% of the disability was caused solely by the preexisting condition. In the absence of such a finding, the trial court erred by assigning all liability to the Fund.

III. *Credit for Lump Sum Settlement*

The Fund argues that any benefits due worker must be reduced by the previous settlement made three months before the accidental injury of July 12, 1986. In making this argument, it relies on NMSA 1978, Section 52–1–47(D) (Orig.Pamp.). Employer joins in this argument and agrees there should be a reduction. Worker did not file any brief in opposition.

The trial court's finding of fact No. 12 indicates that the $20,000 paid to worker was a settlement only of his future weekly compensation benefits. Worker's attorney was not paid out of that fund, nor were future medical expenses included. Therefore, it is possible to calculate the number of weeks of benefits the $20,000 covers. Finding No. 12 also indicates that the $20,000 should cover all weekly compensation benefits coming due after February 19, 1986. We adopt the Fund's method of determining worker's weekly benefit level,

dividing $14,632.87 (total weekly benefits paid) by 53 (number of weeks for which benefits were paid, up to February 19). This yields a benefit level of $276.09. The $20,000 settlement must then be divided by the weekly rate to arrive at a figure for the number of weeks covered by the settlement. *See Gurule v. Albuquerque–Bernalillo County Economic Opportunity Bd.*, 84 N.M. 196, 500 P.2d 1319 (Ct.App. 1972). That figure is 72.44, which means that the $20,000 equaled 72.44 weeks of compensation. We must determine whether any of these weeks overlap with the benefits paid or payable as a result of the subsequent injury. *See id.*

Worker was injured on July 12, 1986. However, he continued working after the injury until forced to halt because of his injury. The court found worker disabled *beginning November 13, 1986*, and awarded benefits beginning on that date. Therefore, worker's settlement benefits did not begin to overlap on the date of his injury, as the Fund claims, but on the date benefits for that injury were first payable, or November 13. The period from February 19, 1986 to November 13, 1986 encompasses thirty-eight weeks and one day, or 38.14 weeks. Subtracting that figure from 72.44 provides a result of 34.3. Therefore, worker still had 34.3 weeks of compensation remaining from his settlement at the time he became eligible for more compensation as a result of the subsequent injury. 34.3 multiplied by worker's weekly compensation rate, $276.09, yields $9,469.89. On remand, employer and the Fund should be given credit for that amount, in the proportions for which they are found liable for worker's disability.

IV. *Interest*

The district court awarded prejudgment interest. It could have done so only under NMSA 1978, Section 56–8–4(B) (Repl. 1986); however, as the Fund points out, there is no indication that the court considered the necessary factors to award prejudgment interest under that statute. Accordingly, it appears that the district court considered its award to be postjudgment as opposed to prejudgment interest. We base this on the judgment, which allowed interest to accrue from January 7, 1988, the date of the original judgment, as opposed to July 8, 1988, the date final judgment was entered.

The January judgment and a February amended judgment, however, were vacated and set aside on February 25, 1988. Thus, the earlier judgments were rendered void and of no effect. The subsequent judgment in July could not have merely modified the earlier judgments, because they no longer existed at the time the July judgment was entered. Therefore, this case is unlike *Varney v. Taylor*, 81 N.M. 87, 463 P.2d 511 (1969), or *Genuine Parts Co. v. Garcia*, 92 N.M. 57, 582 P.2d 1270 (1978), in which valid district court judgments were in effect during the pendency of appeals. Postjudgment interest should properly accrue only after judgment has been entered.

Conclusion

Based on the foregoing, we reverse and remand this case to the district court with instructions to determine the proportions in which the preexisting condition and the subsequent injury contributed toward worker's disability. The district court shall then apportion liability between the Fund and employer in accordance with those proportions, assigning liability to the Fund only to the extent that the preexisting condition, not the subsequent injury, contributed to the disability. In addition, the trial court shall grant the Fund and employer credit in the amount of $9,469.89, apportioned in accordance with their liability, to prevent overlap in benefits between the lump sum settlement and the benefits awarded as a result of the subsequent injury. Finally, the trial court may allow postjudgment interest on any lump sums due worker only from the date of judgment in this case.

IT IS SO ORDERED.

MINZNER and CHAVEZ, JJ., concur.

[redacted]

[redacted]

781 P.2d 783

STATE of New Mexico,
Plaintiff–Appellee,

v.

Ernest Jose GALLEGOS,
Defendant–Appellant.

No. 10702.

Court of Appeals of New Mexico.

Aug. 3, 1989.

Certiorari Denied Sept. 6, 1989.

Hal Stratton, Atty. Gen., Margaret B. Alcock, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Linda Yen, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BIVINS, Chief Judge.

The court's opinion filed July 20, 1989 is withdrawn and the following substituted therefor.

Defendant appeals his convictions on three counts involving larceny, aggravated assault with intent to commit larceny, and conspiracy to commit larceny; one count of fraudulent use of a credit card; and one count of larceny over $100. We reverse and remand in part and affirm in part.

Defendant moved to amend his docketing statement to clarify certain issues, and to add an additional issue. We grant the motion, except as to the new issue. *See State v. Rael,* 100 N.M. 193, 668 P.2d 309 (Ct.App.1983). However, because we reverse and remand this case in part, and this issue may arise on retrial, we briefly discuss it. We disagree with the state that the motion to amend was untimely, since we granted defendant an extension of time in which to file his brief-in-chief and motion to amend. *But cf. State v. Jacobs,* 91 N.M. 445, 575 P.2d 954 (Ct. App.1978) (motion to amend made during extension of time to file brief-in-chief not timely where original briefing time had expired and where defendant did not also receive extension of time to file motion to amend).

Defendant was indicted March 30, 1987, on eight counts involving three separate alleged crimes. The state subsequently dropped one of these counts. Defendant was convicted of five of the remaining seven counts March 3, 1988. He appeals his convictions, claiming (1) his sixth amendment speedy trial rights on two of the counts were violated by both pre-indictment and post-indictment delay; (2) the trial court improperly denied a motion to sever; (3) admission of a co-defendant's confession violated his sixth amendment rights to confrontation and cross-examination; (4) the trial court erred in granting an amendment to the indictment; and (5) the evidence on all counts was insufficient to convict. He also raises a sixth point, that the trial court erred in allowing certain evidence to be admitted. We do not reach the merits of this issue because defendant raised it improperly; however, we hold that on retrial, this evidence should not go to the jury.

We resolve these issues as follows: (1) Finding no speedy trial violations, we affirm the trial court's denial of defendant's motion to dismiss two of the counts for speedy trial violations. (2) We agree with defendant that the trial court erred in refusing to grant his motion for severance. Therefore, we reverse and remand for separate trials on the three charges. (3) We affirm the trial court's admission of co-defendant Goode's statement because the statement fulfills the "indicia of reliability" test laid out in *State v. Earnest,* 106 N.M. 411, 744 P.2d 539, *cert. denied,* 484 U.S. 924, 108 S.Ct. 284, 98 L.Ed.2d 245 (1987). (4) The trial court properly granted the amendment to the indictment. (5) Finally, we hold that the evidence was sufficient to support the convictions.

FACTS

The charges in this case stem from three separate incidents. Counts II through VI involved a larceny that occurred at Sundance Automotive in Albuquerque on October 24, 1986 ("Sundance case"). Count VII involved fraudulent signing of a credit card at Sears in Albuquerque on August 2, 1986 ("Sears case"). Count VIII involved larceny over $100 for the theft of automobile tires and rims from a car on February 23, 1986 ("Tires case").

A. SUNDANCE CASE

Donald Goode entered Sundance Automotive around 4:30 p.m. on October 24, 1986, to ask about possible employment. While he was filling out an application, the Sundance employee left the room. Goode then snatched up a cash box that was behind and underneath the counter, out of public view, and began to run toward Best Discount Store. Two Sundance employees heard the change rattling and pursued

Goode. Paul Andrews, a United Parcel Service (UPS) employee who was making a delivery in the area at the time, joined in the chase. Goode fired a gun in Andrews' direction before jumping into a blue Pontiac that was waiting in the Best parking lot. The license plate was covered by a piece of paper, which Andrews was able to grab as the Pontiac drove off, allowing him to observe the license plate number. Neither Andrews nor the two Sundance employees saw the driver of the car.

A fourth witness, Lennie Garcia, an employee of a nearby office supply store, saw two men run by. The first looked at him and grinned; the second carried a small gun and a cash box. He saw this second man fire the gun. Andrews shouted at Garcia to stop the second man, but Garcia did not join in the chase. At trial, Garcia testified that neither of the two men he had seen was in the courtroom.

The Pontiac was ultimately traced to defendant's mother through the license plate number. Marcia Sinclair, defendant's ex-girlfriend, testified that defendant told her he was driving his mother's car the day of the larceny because his was in the shop; that he had gone to pick up a friend at work; and, fearing that "something like this was going to happen," he had covered the license plate. He denied any involvement with the larceny, however. Upon cross-examination, defense counsel elicited from Sinclair that defendant had an outstanding judgment against her for taking his television set, and that, although she had been charged with harboring a felon (defendant), she had been allowed to leave the state after giving police her statement.

The state introduced into evidence a confession by Goode to Detective Cantwell. Cantwell obtained the confession while she was interrogating Goode on other charges involving the murder of Guy Funkhouser. Goode, knowing that the police had his fingerprints from the employment application, voluntarily stated that he had committed the larceny; that defendant had given him the gun; that defendant, who had previously worked at Sundance Automotive, told him where the cash box was located; that he (Goode) had shot at the UPS driver, but did not aim at or intend to shoot him; and that defendant drove the car. Goode refused to testify at trial. The state therefore presented Goode's confession as testimony of an unavailable witness under SCRA 1986, 11–804(A)(2). The court admitted it over defendant's objection.

Defendant did not testify; however, he presented the testimony of Toby Zamora as an alibi. Zamora, an auto body repairman at the time of the crime, testified that he was working on defendant's car the day of the larceny, and that defendant was at the shop at which Zamora worked from around 4:30 p.m. to 5:30 or 6:00 p.m., waiting for the work to be finished. On cross-examination, the prosecutor impeached Zamora with three prior convictions involving various types of theft.

The jury convicted defendant of larceny over $2500, conspiracy to commit larceny over $2500, and aggravated assault with intent to commit a larceny, with firearm enhancement. Defendant was acquitted of two other counts of aggravated assault with intent to commit larceny.

B. TIRES CASE

On February 23, 1986, at approximately 9:30 p.m., Art Vermillion noticed a figure crouched near the front of his neighbor Miles Zintz's car. The car was propped up on bricks and some tires were missing. Vermillion asked "Miles, are you having a problem?" A man responded he was fixing a flat. The voice was not Miles' voice. Vermillion went home, called Zintz, found that he was at home, and found that nothing was wrong with his car. He got a light and began to go out the door to find out what was happening. He saw a figure running toward him. He stepped out and asked for identification. The person responded, "I am Miles." Again, the voice was not that of Miles Zintz. Vermillion did not pursue the man, but went instead to Zintz's house. He saw three wheels stacked up in the bushes near Zintz's car, and also saw the lug nuts lying around.

Zintz's wife called the police. While they waited for the police, Vermillion and anoth-

er neighbor began looking around the neighborhood. They saw a strange car down the street parked in a place visible from the Zintz residence. It was unoccupied; Vermillion copied down the license number, which was later found to match one of two license plates defendant apparently used for his car, a late model Cadillac. Vermillion believed the person he saw running toward him was the same as the first person he saw. He identified defendant as that person both during a photo array the police presented to him, and at trial.

When the police came to investigate, they found defendant sitting in the Cadillac. Upon searching the car, they found a screwdriver wrapped in a jacket inside the car. They also found a tire iron in the trunk.

Zintz testified that he had not given anyone permission to remove the tires and rims, and that they were valued between $520 and $550. Defendant was convicted of larceny over $100.

C. SEARS CASE

On August 2, 1986, defendant approached a sales clerk at Sears. He handed her a gold chain and a Sears credit card. The clerk received an indication that something was wrong with the card; she called for and obtained approval. However, she noted that the signature on the sales slip did not match the one on the card. She asked for identification; defendant told her he left his wallet in the car. The clerk called a security guard and began arguing with defendant about where he obtained the card. Finally, defendant left the store, leaving the merchandise and card behind. A security assistant followed defendant from the store and saw him enter a 1970 Cadillac. All three identified defendant as the person attempting to use the credit card. The arresting officer also testified that, while she viewed a videotape of the transaction at the police station, another officer saw it and identified the customer as defendant.

Defendant was arrested the same day. Upon arrest, he admitted that he had found the card in a trash can while walking through the mall with his brother, that he decided to "go see if we can get anything with this," and that he had tried to purchase the gold chain with the card.

Defendant was convicted of fraudulent signing of a credit card.

DISCUSSION

A. ISSUE ONE—SPEEDY TRIAL

At the outset, we note that, although defendant moved in the district court to dismiss all the counts for speedy trial violations, he does not appeal the denial of his motion on the counts involving the Sundance case.

1. TIRES CASE

Defendant was arrested for this crime on February 23, 1986. He was released pending investigation, without having to post bond. Although defendant believed he was subject to a restriction not to leave Bernalillo County, the record does not reflect that such a condition was imposed. Defendant claims that the arrest alone was sufficient to trigger his speedy trial rights. He argues that his speedy trial rights attached on the day of his arrest because the state had completed its investigation of the case, essentially making him an "accused" protected by the sixth amendment.

Our recent case of *State v. Sanchez,* 108 N.M. 206, 769 P.2d 1297 (Ct.App.1989), answers this issue adversely to defendant. "[A]rrest alone, without posting bond, imposition of restrictive conditions of release, or being held to answer for unresolved criminal charges does not trigger a defendant's speedy trial rights under the sixth amendment." *Id.* at 207, 769 P.2d at 1298. Because defendant's sixth amendment speedy trial right was not triggered in this case by the arrest alone, we affirm the trial court's denial of his motion to dismiss the charge for a pre-indictment violation of his speedy trial rights.

Defendant's speedy trial rights did not attach until his indictment on March 30, 1987. Thus, the only period of delay we review for purposes of defendant's speedy

trial issue in this case is the time after indictment. After the state received two six-month rule extensions under SCRA 1986, 5–604(C) from the supreme court, trial commenced on February 29, 1989, an eleven-month delay. Whether there was sufficient delay to trigger defendant's speedy trial rights depends on the effect of supreme court extensions of time under Rule 5–604(C). We have held that, where trial is commenced within the time limits of the six-month rule, there is no presumptively prejudicial delay. *State v. Santillanes,* 98 N.M. 448, 649 P.2d 516 (Ct.App.1982). *See State v. Mascarenas,* 84 N.M. 153, 500 P.2d 438 (Ct.App.1972) (six-month rule expresses policy of our state as to acceptable length of delay). Because the time about which this defendant may complain under the *Sanchez* holding is limited to the same amount of time the supreme court dealt with in granting extensions, defendant is essentially asking us to review the propriety of the supreme court's grant of extensions of time. This we cannot do. *State v. Mazurek,* 88 N.M. 56, 537 P.2d 51 (Ct.App. 1975). *See also State v. Apodaca,* 105 N.M. 650, 735 P.2d 1156 (Ct.App.1987) (time period about which complaint was made was largely the same time period as covered by the six-month rule and extensions thereof). We therefore affirm the trial court's denial of defendant's motion as regards the post-indictment period.

2. SEARS CASE

Defendant was arrested for this crime on August 2, 1986; he posted a $2500 bond the same day. He was indicted on March 30, 1987, and tried on February 29, 1988. Because he posted bond, his speedy trial rights were triggered on August 2, 1986. *See Kilpatrick v. State,* 103 N.M. 52, 702 P.2d 997 (1985).

We analyze speedy trial claims under the four-factor test set forth in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In this case, there was nearly a nine-month pre-indictment delay between the August 1986 arrest and the March 1987 indictment and an eleven-month delay between the indictment and trial in February 1988. We recognize we held above that, where pre-indictment delay is not factored and post-indictment delay is approved by supreme court extensions, we will not review defendant's issue. As to the Sears case, we will not separate the two periods of delay for purposes of analysis because we wish to reserve the issue of whether a supreme court extension affects our review of a case involving both pre-indictment and post-indictment speedy trial issues. Moreover, deciding the reserved issue is not necessary to a disposition of this case.

Before we engage in a *Barker* analysis of the period of delay, we must find this time period is presumptively prejudicial. In this relatively simple case, we assume a twenty-month delay is presumptively prejudicial, *see State v. Kilpatrick,* 104 N.M. 441, 722 P.2d 692 (Ct.App.1986), thus triggering the *Barker* analysis.

Once defendant presents evidence of the length of the delay, the state may rebut this by showing that a portion of the time period is attributable to defendant, and that the "time involved is not impermissibly long." *State v. Tartaglia,* 108 N.M. 411, 414, 773 P.2d 356, 359 (Ct.App. 1989). The state here asserts that defendant fled the jurisdiction for almost four months of the nine-month pre-indictment delay, thus contributing to the delay. Ordinarily, we would agree with the state that a defendant who flees the jurisdiction while under bond restrictions should not be able to use this time period to create presumptively prejudicial delay. The trial court in this case made no findings on this, however, and we cannot make these findings on appeal. Therefore, we must hold the nine-month delay was presumptively prejudicial, requiring an analysis of the other *Barker* factors.

A factual finding on this issue could have disposed of defendant's speedy trial claim without the necessity of engaging in a *Barker* analysis. Because speedy trial claims are so fact-sensitive, we urge the trial courts to make findings of fact, particularly where, as here, the evidence concerning defendant's flight and date of arrest conflicted. *See State v. Boseck,* 45

Wash.App. 62, 723 P.2d 1182 (1986) (trial court's findings are of great significance to reviewing court, especially where those findings are based on conflicting evidence). Nevertheless, the appellate court must independently examine the record to determine whether there has been a violation of the constitutional right. *See id.*

The state must present evidence of the reason for the delay. *State v. Tartaglia.* The state asserts that the reason for the pre-indictment delay was administrative backlog, a neutral reason which we weigh against the state, but not heavily. *State v. Kilpatrick.* The state asserts that most of the reason for the post-indictment delay was complications arising from the fact that the Sears case was joined with the Sundance case and the state had problems obtaining the testimony of a co-defendant in the latter case. Such complications should also not be weighed heavily against the state. *See State v. Grissom,* 106 N.M. 555, 746 P.2d 661 (Ct. App.1987).

In this case, defendant first asserted his right six months after indictment. While defendant does not have to assert his right before indictment, *State v. Kilpatrick,* we believe it is inconsistent to complain about a lengthy pre-indictment delay and then wait six months after indictment before bringing it to the court's attention. Thus, we will weigh this factor in neither party's favor.

As to the final *Barker* factor—prejudice—defendant asserts that he was subject to oppressive pretrial incarceration and anxiety. He claims oppressive pretrial incarceration while he was released on bond because he suffered economic loss from losing his job. However, the facts show he lost his job after his arrest on the Tires case, not after his arrest on the Sears case. We do not believe this constitutes oppressive pretrial incarceration. He does not assert any anxiety different from that attendant to most criminal prosecution, *see State v. Grissom;* therefore, we weigh this factor against him. Defendant did not assert that his defense was impaired by the pre-indictment delay, asserting that under *Moore v. Arizona,* 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973), he does not have to show actual prejudice. Defendant misreads *Moore;* that case held that a showing of actual prejudice is not a prerequisite to prevail on a speedy trial claim. It does not mean that a defendant who claims impairment to his defense need not present affirmative evidence of impairment. *See State v. Tartaglia.* Since defendant made no assertion of impairment, however, we do not weigh his failure to present evidence against him. However, we weigh the prejudice factor in general against defendant, since he failed to show oppressive pretrial incarceration or anxiety.

Balancing these factors, we find a presumptively prejudicial delay attributable to neutral reasons. The assertion of the right factor is weighed in neither party's favor. The defendant showed no prejudice. Therefore, we affirm the trial court's denial of defendant's motion to dismiss the Sears case on speedy trial grounds.

B. ISSUE TWO—SEVERANCE

Defendant argues that the three crimes charged in the indictment should have been tried separately under SCRA 1986, 5-203. We agree.

Defendant argues both that the offenses were improperly joined under Rule 5-203(A) and that the court abused its discretion in failing to sever under Rule 5-203(C). In *State v. Paschall,* 74 N.M. 750, 398 P.2d 439 (1965), a pre-rules of criminal procedure case, our supreme court noted that the question of whether charges are properly joined is largely governed by the same considerations as are applied to an application for severance. Similarly, commentators on the federal rules of criminal procedure note that an important consideration in determining the propriety of joinder of offenses of the "same or similar character" is whether evidence of one offense would be admissible in the trial of another. 1 C. Wright, *Federal Practice and Procedure: Criminal* § 143 (2d ed. 1982). This is the same standard we use in determining whether defendant has shown

the requisite prejudice for us to be able to say that the district court abused its discretion in denying a severance. *State v. Burdex,* 100 N.M. 197, 668 P.2d 313 (Ct.App. 1983). Nonetheless, we need not decide in this case whether different considerations or a different standard should apply to cases alleging improper joinder as compared to cases alleging error in the failure to sever. *See State v. Gammill,* 102 N.M. 652, 699 P.2d 125 (Ct.App.1985). This is because it is clear that the district court abused its discretion in refusing to sever.

In *Paschall,* the supreme court held the trial court abused its discretion in refusing to sever four different indictments for trial. The indictments charged Paschall with concealing property belonging to another, larceny of pipe, two charges of receiving stolen property, selling stolen property, and larceny. The six crimes occurred at different times over a two-year period and involved five different victims. The court noted that, although a trial court has broad discretion in deciding motions to sever, it is "fundamental, however, that courts must not permit a defendant to be embarrassed in his defense by a multiplicity of charges to be tried before one jury." *Id.* at 752–53, 398 P.2d at 440. The court held that "in the very nature of things it cannot be said that the defendant ... was not prejudiced in his defense by consolidation for trial of these separate charges." *Id.* at 754, 398 P.2d at 441.

We believe defendant in this case was embarrassed in his defense by the multiplicity of charges before one jury. *See id.* The crimes charged in this indictment were remote in both time and place of occurrence. Moreover, although all three involved some form of theft, defendant's modi operandi were not similar in each crime. The victims of the crimes were all different, as were the articles stolen or attempted to be stolen. None of the witnesses of the crimes were the same. The crimes were not provable by the same evidence.

To obtain a severance, defendant must prove he was prejudiced. *See State v. Gammill.* He argues that he was prejudiced because the joint trial allowed the state to get before the jury evidence of "other crimes" under SCRA 1986, 11–404(B), which would not have been admissible in separate trials. He asserts that this allowed the jury to use evidence of one crime to infer defendant's criminal disposition on the others. Rule 11–404(B) allows evidence of other crimes, wrongs, or acts to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." We do not believe evidence of one of these crimes would have been admissible in trials on the others, since there is no common thread linking these crimes that would have fallen within Rule 11–404(B). *See State v. Burdex* (no prejudice where evidence showed common modus operandi).

We deem it noteworthy that the state does not advance any arguments to support the admissibility of evidence of entirely distinct crimes in separate trials of the charges against this defendant. The state, citing *State v. Johnson,* 84 N.M. 29, 498 P.2d 1372 (Ct.App.1972), and other similar cases, argues that the denial of the severance motion was not prejudicial because the jury acquitted defendant of two of the seven counts, thus showing it was able to follow the evidence and was not swayed by the fact that defendant was charged with three separate crimes. We agree that this may often provide a strong indication of lack of prejudice. It does not, however, overcome the prejudice resulting from having evidence of other crimes before the jury, at least under the circumstances of this case, where they were different, totally unrelated, and remote in time.

We follow the rationale of *Paschall,* and reverse and remand for separate trial on each of the three crimes.

C. ISSUE THREE—ADMISSION OF CO-DEFENDANT GOODE'S CONFESSION AND WAIVER OF RIGHTS

1. ADMISSION OF THE STATEMENT TO DETECTIVE CANTWELL

Although we have reversed defendant's convictions because of the improper join-

der, we address this issue because it will likely arise on retrial.

Defendant claims he was denied his right to confrontation because the state introduced co-defendant Goode's statement implicating defendant in the Sundance larceny. Because Goode refused to testify, defendant was unable to cross-examine him. Such statements are presumptively unreliable. *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); *State v. Earnest.* The state must rebut this presumption by demonstrating sufficient "indicia of reliability." *State v. Earnest.* It must show (1) Goode was not offered leniency in exchange for the incriminatory statement; (2) the statement was against Goode's penal interest; (3) Goode did not attempt to shift responsibility from himself to defendant; and (4) independent evidence was presented at trial which substantially corroborated Goode's statement. *See id.*

The first three indicia of reliability are clearly met here. There is no evidence that Goode was offered leniency in exchange for the statement. In fact, he voluntarily gave the statement while being questioned on other charges. The statement was clearly against his penal interest because he admitted that he and defendant carried out the crime, and that he shot at Andrews. Nor did he attempt to shift liability to defendant, because he implicated himself in the crime also. The question arises of whether there was other evidence substantially corroborating Goode's statement.

The corroboratory evidence here was that (1) defendant's mother's car was used in the larceny; (2) Marcia Sinclair testified that defendant told her he was using his mother's car that day, that he had gone to pick up a friend, and, fearing that "something like this was going to happen," he covered the license plate; (3) a witness removed a piece of paper covering the license plate; and (4) Goode was able to quickly locate the money box, which was not visible from the front of the counter. Although defendant presented some alibi testimony, the jury obviously did not believe it. The jury determines the credibility of the witnesses and resolves conflicts in the evidence. *State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978); *State v. Hudson,* 78 N.M. 228, 430 P.2d 386 (1967).

This evidence is sufficiently corroborative of Goode's statement to satisfy *Earnest*'s indicia of reliability requirement. Therefore, we decline to hold that defendant's confrontation rights were violated by the admission of Goode's statement.

2. ADMISSION OF THE WAIVER OF RIGHTS FORM

Defendant also claims that the Waiver of Rights which Goode signed prior to questioning on the Funkhouser murder either should not have been admitted at all, or should have been admitted without deletion of the reference to the Funkhouser case. Defendant made these objections below. He did not, however, raise them in his original docketing statement, but raised them in a motion to amend his docketing statement.

Defendant cites no authority that this is a jurisdictional issue or involves fundamental error, *see In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984), nor have we found any such authority. Accordingly, we will only grant a motion to amend his docketing statement "upon good cause shown." SCRA 1986, 12-208(C). Defendant asserts this issue was omitted from the original docketing statement "due to inadvertence." We do not deem this reason "good cause shown," and accordingly deny the motion to amend the docketing statement to raise this issue. *See State v. Rael.*

However, this issue will likely arise on retrial, and we should therefore instruct the trial court. We believe that the Waiver of Rights form should not go to the jury. It is irrelevant to anything it must decide. The state argues the Waiver goes to the issue of the voluntariness of Goode's statement, and hence, its reliability under *Earnest.* However, whether a statement bears the indicia of reliability required by *Earnest* is a question of law for

the court to decide, not a question of fact. The Waiver should not, therefore, go before the jury on retrial.

D. ISSUE FOUR—AMENDMENT OF THE INDICTMENT

The state originally charged defendant in Counts III, IV, and V with assault with intent to commit the violent felony of robbery contrary to NMSA 1978, Section 30-3-3 (Repl.Pamp.1984). Prior to trial, the state amended the indictment to charge assault with intent to commit the felony of larceny. It did not, however, change the statutory reference from Section 30-3-3 to NMSA 1978, Section 30-3-2(C) (Repl.Pamp. 1984), the appropriate section. Defendant objected to the amendment, arguing that larceny is not one of the inherently dangerous felonies the legislature intended to include in Section 30-3-3, and that there was no such crime as assault with intent to commit the violent felony of larceny. He also argued that he did not have notice the state was not proceeding under Section 30-3-3, but under Section 30-3-2(C). The trial judge overruled his objection, noting that larceny was a lesser included offense of robbery, and that he had actually read the charges to the jury as assault with intent to commit larceny, so that defendant was on notice of the charges against him.

Defendant raised this issue with regard to Counts III, IV, and V. We address Count V (assault of Paul Andrews with intent to commit larceny) only, since the jury acquitted defendant on Counts III and IV.

We uphold the trial court's ruling on this issue. Under SCRA 1986, 5-204(C), an indictment may be amended to conform to the evidence, so long as a variance between the indictment and the evidence offered in support of it does not prejudice substantial rights of the defendant. Defendant has not shown prejudice in this case.

Larceny is a lesser included offense of robbery. *State v. Wingate,* 87 N.M. 397, 534 P.2d 776 (Ct.App.1975). A defendant is placed on notice of the potential for being charged with lesser included offenses of an offense charged in the indictment. *See State v. Edwards,* 97 N.M. 141, 637 P.2d 572 (Ct.App.1981). The trial court could have instructed on all lesser included offenses supported by the evidence, even though defendant objected to the instruction. *Id.; Glymph v. United States,* 490 A.2d 1157 (D.C.App.1985). Defendant therefore was not prejudiced by the amendment, especially given the facts that (1) the amended charge was a fourth degree felony, while the original charge was a third degree felony, and (2) defendant heard the trial court charge the jury initially that he was charged with assault with intent to commit larceny. He cannot argue he was without notice that the state was basing its case on the aggravated assault section upon which the jury was ultimately instructed.

The fact that the amended indictment continued to contain the statutory references to assault with intent to commit a violent felony is not fatal to the indictment. Misreference to statutory sections is not a sufficient reason to dismiss the indictment. *State v. Covens,* 83 N.M. 175, 489 P.2d 888 (Ct.App.1971).

Therefore, the trial court could properly allow the amendment to the indictment.

E. ISSUE FIVE—SUFFICIENCY OF THE EVIDENCE ON COUNTS II, V, VI, VII, AND VIII

Defendant argues that the evidence was not sufficient to support his convictions on Count II (larceny over $2500) and Count VI (conspiracy to commit larceny over $2500), because his "mere presence" at the scene of the crime does not show he shared Goode's criminal intent to commit the larceny, and because there was no direct evidence of his intent. Intent is rarely established by direct evidence; rather, it is usually inferred from other facts of the case. *State v. Sparks,* 102 N.M. 317, 694 P.2d 1382 (Ct.App.1985). Moreover, the evidence showed more than defendant's "mere presence" at the scene of the crime. The evidence presented was that defendant gave Goode the gun, that he

told Goode where the cash box was located, that he covered the car's license plate, and that he drove the car. From this evidence, the jury could have reasonably inferred that defendant and Goode planned the larceny, and that defendant took part in carrying it out.

Defendant argues that he could not have been convicted on Count V (assault with intent to commit larceny), because the larceny was already completed when Goode fired at Paul Andrews. We disagree. Larceny is a continuing offense. *State v. Meeks,* 25 N.M. 231, 180 P. 295 (1919); *State v. Tapia,* 89 N.M. 221, 549 P.2d 636 (Ct.App.1976). It was not complete merely upon Goode's flight with the cash box. The assault here was closely bound up with the larceny itself, and was apparently committed to ensure that the larceny would be successful. On these facts, we cannot say as a matter of law that the assault was not committed in the course of the larceny.

As to Count VII (Tires case), defendant argues there is no direct evidence that he was the person who removed the tires. He incorrectly argues that direct evidence is necessary to convict. Our supreme court has clearly held that circumstantial evidence can be sufficient evidence on which to convict. *State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984). "A verdict in a criminal case will not be set aside if supported by substantial evidence; the fact that the evidence is circumstantial does not alter this approach." *State v. Adams,* 89 N.M. 737, 740, 557 P.2d 586, 589 (Ct.App. 1976). From the evidence presented at trial, we hold the jury could have determined that defendant was present and that he removed the tires.

As to Count VIII (Sears case), defendant argues there was no direct evidence that he was not authorized to use the credit card. Fraudulent intent may be proved by reasonable inferences drawn from a defendant's statements and conduct. *State v. Gardner,* 103 N.M. 320, 706 P.2d 862 (Ct.App.1985). Again, circumstantial evidence can be sufficient evidence to convict. *State v. Brown.* From the evidence presented—that defendant found the card in a trash can, and that he left the card and the merchandise he had attempted to purchase after Sears employees questioned his signature—the jury could have logically inferred that he did not have authority to use the card.

CONCLUSION

We reverse and remand for separate new trials on the three crimes because of the improper denial of defendant's motion to sever. We affirm on all other issues.

IT IS SO ORDERED.

MINZNER and CHAVEZ, JJ., concur.

781 P.2d 795

STATE of New Mexico,
Petitioner-Appellee,

v.

BENJAMIN C., a Child,
Respondent-Appellant.

No. 11404.

Court of Appeals of New Mexico.

Sept. 5, 1989.

Certiorari Granted Oct. 18, 1989.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Appellate Defender, Santa Fe, Marc Gordon, Asst. Public Defender, Carlsbad, for respondent-appellant.

Hal Stratton, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for petitioner-appellee.

OPINION

HARTZ, Judge.

The child appeals the children's court judgment that he had committed the charged offenses of Driving Under the Influence of Intoxicating Liquor (DWI), NMSA 1978, Section 66–8–102 (Supp.1988) and Minor Allowing Self to be Served Alcoholic Liquor, NMSA 1978, Sections 60–7B–1(B) and 60–7B–1.1 (Repl.Pamp.1987), and was a delinquent child in need of care and rehabilitation. The child raises three contentions: (1) the children's court erred in ruling that the initial stop of the child by the police was valid; (2) the evidence was insufficient to support the finding that the child allowed himself to be served alcohol in New Mexico; and (3) the children's court improperly denied the child a jury trial. We affirm on issue (1) and reverse on issues (2) and (3).

Shortly before 4:00 a.m. on September 2, 1988, a Carlsbad city police officer stopped the child, who was driving west through Carlsbad, for " 'violation of going through an intersection straight ahead with his turn signal on.' " After giving the child three field sobriety tests, the officer arrested him. The officer testified at trial that he did not know where the child had been drinking. The child is a resident of Carlsbad. From Carlsbad one can drive to Texas by going south about 35 miles or by going east about 75 miles. The child timely filed a demand for a jury trial, which the children's court denied.

LEGALITY OF THE STOP

The child argues that the officer's initial stop of him was invalid, because the officer did not have a reasonable suspicion that the child had been or was violating any state law or municipal ordinance at the time of the stop. *See State v. Galvan,* 90 N.M. 129, 560 P.2d 550 (Ct.App.1977). We view the evidence in the light most favorable to support the children's court's finding. *See id.* The officer's observations

entitled him to stop the child for careless driving. NMSA 1978, Section 66–8–114(B) (Repl.Pamp.1987) defines "careless driving" as operating a vehicle "in a careless, inattentive or imprudent manner." That definition encompasses driving straight through an intersection with one's turn signal on.

The child argues that the stop was unlawful because it was pretextual. He urges us to adopt the standard set forth in *United States v. Guzman,* 864 F.2d 1512 (10th Cir.1988), for determining whether a stop was pretextual: In the same circumstances would a reasonable police officer have made the stop in the absence of an invalid purpose? Under *Guzman,* " '[A] stop [i]s unreasonable not because the officer secretly hope[s] to find evidence of a greater offense, but because it [i]s clear that an officer would have been uninterested in pursuing the lesser offense absent that hope.' " *Id.* at 1517 (quoting *United States v. Smith,* 799 F.2d 704, 710 (11th Cir.1986)) (brackets in *Guzman*). This court, however, has adopted a different test for determining whether a stop must be declared invalid on the ground that it was pretextual. In *State v. Mann,* 103 N.M. 660, 712 P.2d 6 (Ct.App.1985) we upheld a stop against a claim that it was pretextual, because the evidence supported the district court's finding that there was a valid basis for the stop.

In any case, the stop here should be upheld under both *Mann* and *Guzman.* The requirement of *Mann* is satisfied, because we have already determined that the children's court could have found that there was a valid basis for the stop. As for the *Guzman* test, the children's court could have found that a reasonable police officer would have stopped the child for careless driving. Indeed, we would expect that, late at night, when other duties are not pressing, an officer would stop anyone driving erratically. We note that the child has not suggested any ulterior purpose of the officer. Yet *Guzman* requires that it be clear that the stop would not have been made except for an ulterior purpose. The child's reasoning appears to be that the stop must have been pretextual because there was no valid reason for the stop. We have ruled, however, that the officer had a lawful reason to stop the child. The officer's testimony is sufficient evidence to support the children's court's ruling upholding the stop.

SUFFICIENCY OF THE EVIDENCE ON CHARGE OF MINOR ALLOWING SELF TO BE SERVED

The state bore the burden of proving beyond a reasonable doubt that the child was served alcohol *in New Mexico. See State v. Losolla,* 84 N.M. 151, 500 P.2d 436 (Ct.App.1972). In *Losolla* the defendant was convicted in Dona Ana County for unlawfully using heroin. We reversed because the record did not establish where the defendant used the drug. In the present case the state contends that it satisfied its burden with (1) the officer's testimony that he stopped the child in Carlsbad and (2) evidence that the child and his parents live in Carlsbad. We disagree, even though we "must view the evidence in a light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of a verdict of conviction." *State v. Lankford,* 92 N.M. 1, 2, 582 P.2d 378, 379 (1978).

State v. Mirabal, 108 N.M. 749, 779 P.2d 126 (Ct.App.1989), upon which the state relies, is readily distinguishable. In that case testimony described the site of the offense (a pharmacy) but no one explicitly testified where the pharmacy was. Other evidence, however, clearly implied that the pharmacy was in New Mexico. In contrast, there was absolutely no evidence in this case describing the site at which the child was served an alcoholic beverage. The evidence concerning where the child lived and where he was arrested is inadequate to establish beyond a reasonable doubt that he committed the offense in this state. *See State v. Losolla.* We reverse the finding that the child committed the offense of allowing himself to be served alcoholic liquor.

RIGHT TO JURY TRIAL

Neither the federal Constitution nor the New Mexico Constitution confers the

right to a jury trial in a juvenile proceeding. *McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971); *State v. Doe,* 90 N.M. 776, 568 P.2d 612 (Ct.App.1977). New Mexico, however, has provided a partial right by statute. NMSA 1978, Section 32-1-31(A) (Repl.1986) entitles a child to a jury trial "when the offense alleged would be triable by jury if committed by an adult."

We construed Section 32-1-31(A) in *Doe,* in which the single delinquent act charged against the child was a petty misdemeanor. If an adult had committed the offense, the magistrate court would have had jurisdiction. NMSA 1978, § 35-3-4 (Repl.Pamp.1988). In all magistrate court actions, except those for contempt, the defendant has the right to a jury trial. NMSA 1978, § 35-8-1 (Repl.Pamp.1988). The child therefore argued that because an adult would have had the right to a jury if charged with that offense, he too had a right to a jury trial. *Doe,* however, reasoned that if the child's proposed interpretation of the statute were correct, then the words "when the offense alleged would be triable by jury if committed by an adult" would be superfluous; a juvenile would always have a right to a jury trial. The court concluded: "For the phrase to have any reasonable meaning it must be read in light of when an adult is entitled to have a jury trial in district court." *State v. Doe,* 90 N.M. at 777, 568 P.2d at 613.

The state focuses on the concluding sentence of the *Doe* opinion, which reads, "Accordingly, we hold that the phrase '* * * when the offense alleged would be triable by jury if committed by an adult * * *' to mean [sic] a district court offense." *Id.* Noting that *Doe* held that a petty misdemeanor was not such a "district court offense," the state then points out that both alleged offenses in this case are petty misdemeanors; the statutory maximum periods of imprisonment are ninety days for a first DWI conviction, Section 66-8-102, and six months for Minor Allowing Self to be Served Alcoholic Liquor, NMSA 1978, Section 60-7B-9 (Repl.Pamp.1987). The state cites as additional support the Committee Commentary to the children's court rule on jury trial, SCRA 1986, 10-228. The commentary states that the rule "should not be construed as extending a right to trial by jury in cases where the delinquent act would have been a petty misdemeanor if committed by an adult." According to the state, one must conclude that a juvenile is not entitled to a jury trial on such charges.

The state's analysis errs, however, by focusing on each individual offense, rather than on the totality of the offenses charged against the child. Both *Doe* and the Committee Commentary to Rule 10-228 were written in the context of a single charged offense. As explained below, (1) we must apply Section 32-1-31(A) in light of *all* the offenses charged against him and (2) the right to a jury depends on the *aggregate* penalty for all the charged offenses.

First, we must read Section 32-1-31(A) in accordance with the legislative enactment on statutory interpretation, NMSA 1978, Section 12-2-2 (Repl.Pamp.1988), which reads in pertinent part:

> In the construction of constitutional and statutory provisions, the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the constitutional provision or statute:
>
> * * * * * *
>
> B. words importing the singular number may be extended to several persons or things * * *.

Thus, in the context of this case, we should read Section 32-1-31(A) as granting a jury trial "when the offense[*s*] alleged would be triable by jury if committed by an adult."

Second, we examine how the right to a jury may be affected by the presence of multiple charges. Although it did not construe the statute involved in this case, *Vallejos v. Barnhart,* 102 N.M. 438, 697 P.2d 121 (1985) illustrates how we are to interpret statutes granting the right to a jury trial when a defendant faces more than one charge. *Vallejos* considered the statute providing for jury trials in metropolitan court, NMSA 1978, Section 34-8A-5(B) (Repl.Pamp.1981). The statute grants

rights to a jury trial depending on the maximum penalty for the offense. *Vallejos* held that the severity of the maximum authorized *aggregate* penalty for all the offenses charged against the defendant determines the scope of his or her statutory right to a jury trial. Although not expressly so holding, *Vallejos* intimated that the *constitutional* right to a jury trial also depends on the aggregate sentence to which a defendant is exposed. *Id.* at 440, 697 P.2d at 123.

Similarly, in applying Section 32-1-31(A) to a juvenile facing multiple charges, we should determine the right to a jury trial by looking at the maximum aggregate penalty that could be imposed on an adult facing those charges. In essence we treat the multiple charges as one aggregate offense and see if it is a "district court offense," that is, an offense for which "an adult is entitled to have a jury trial in district court." *State v. Doe,* 90 N.M. at 777, 568 P.2d at 613. This analysis combines the approach of *Vallejos* with the teaching of *Doe* that Section 32-1-31(A) "must be read in light of when an adult is entitled to have a jury trial in district court." *Id.*

In this case the state does not dispute that an adult would be entitled to a jury trial if facing two charges with the same penalties as the offenses on which the child was tried, since the maximum possible aggregate sentence exceeds six months. *See Haar v. Hanrahan,* 708 F.2d 1547 (10th Cir.1983); *Vallejos v. Barnhart.* We therefore hold that the child was entitled to a jury when he filed his timely demand for one.

Our calendar notices proposed the above rulings and that on remand the child be granted a jury trial on the remaining DWI charge. Although the state objected to our proposed rulings regarding (1) the sufficiency of the evidence and (2) the right to a jury trial on the two original charges, it did not address in either of its memoranda in opposition our proposed disposition of the case in the event that we did not change our view on proposed rulings (1) and (2). Because the state did not respond to that proposed disposition, we remand for a jury trial on the remaining DWI charge. The state's concession on this matter relieves us of having to decide the interesting question of whether the child would, in the absence of the concession, be entitled to a jury trial on remand of the DWI charge, even though he would not have been entitled to a jury if the DWI charge had been the only charge at the original trial.

The judgment is reversed and the case remanded for a jury trial on the DWI charge.

IT IS SO ORDERED.

BIVINS, C.J., and MINZNER, J., concur.

781 P.2d 799

ARMENDARIS WATER DEVELOPMENT COMPANY,
Plaintiff-Appellee,

v.

Ralph H. RAINWATER, R & H Enterprises, Defendants-Appellants,

and

Miller & Associates, Ltd., Defendant.

No. 10526.

Court of Appeals of New Mexico.

Sept. 7, 1989.

Ruth M. Schifani, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, for plaintiff-appellee.

Anthony F. Avallone, Law Systems of Las Cruces, P.A., Las Cruces, for defendants-appellants.

OPINION

MINZNER, Judge.

Appellants Ralph M. Rainwater and R & H Enterprises appeal from a decision of the district court foreclosing various liens and ordering the sale of a ranch originally owned by Rainwater, title to which is now held by R & H Enterprises. Their appeal raises questions about the rights of the beneficiary of a purchase money resulting trust, when judgment lien creditors of the trustee sue to foreclose their liens against the trustee. We reverse and remand for further proceedings.

BACKGROUND.

R & H Enterprises is a trust of which Rainwater and a friend, Clifford Hammond, are co-trustees and the sole beneficiaries. One of Rainwater's judgment lien creditors sued him, R & H Enterprises, and several other creditors who held judgment liens against Rainwater, on the theory that Rainwater held legal title to the ranch prior to the time he transferred it to the trust. Appellants contended at trial that the liens did not attach because Rainwater had acquired title to the ranch on resulting trust for R & H Enterprises. The district court found that appellants had failed to prove Rainwater accepted title only for R & H Enterprises and ordered a sale of the ranch and distribution of the proceeds to the judgment lien creditors in order of priority. After judgment was entered and prior to the sale, the original plaintiffs assigned all their right, title and interest to appellee, Armendaris Water Development Company, who then purchased the property at the foreclosure sale. Appellee ultimately acquired the interests of the other creditors and moved this court to restyle the case. We granted the motion.

The record indicates that the ranch originally belonged to Rainwater and his wife as community property. She went through bankruptcy proceedings, but he did not. Sometime prior to the present action, Rainwater and his wife divorced.

In settling the bankruptcy estate of Rainwater's wife, the bankruptcy court ordered the sale of the ranch. Pursuant to 11 U.S.C. Section 363(f) and (h) (1982), the court ordered the sale free and clear of liens. As co-owner of the ranch, Rainwater was entitled to purchase it at a price equal to the highest price bid. *See* 11 U.S.C. § 363(i). This right is generally referred to as the right of first refusal. Appellee's predecessors in interest participated in the bankruptcy proceedings, but there is no evidence in the record that they entered into any written agreement concerning the sale.

Because Rainwater was unable to meet the highest price bid, Hammond agreed to provide the purchase price. Rainwater and

Hammond entered into written trust agreements. Rainwater agreed to assign his right of first refusal and his interest as co-owner to a trust; Hammond agreed to transfer the sum due the bankruptcy trustee to the trust. The name of the trust was R & H Enterprises. Under the terms of the trust agreements, Hammond had the right "to designate" all of the beneficial interest in R & H Enterprises until Rainwater paid Hammond one-half of the sum due the bankruptcy trustee plus interest. Thereafter, each would have the right "to designate" one-half of the beneficial interest. Rainwater was to manage the ranch, run and tend his cattle, and pay R & H Enterprises certain monthly charges based on the cattle tended during that period. By a separate document, Rainwater assigned his interest in the ranch to R & H Enterprises.

Rainwater asked the bankruptcy court to order the bankruptcy trustee to issue a deed to R & H Enterprises. Rainwater was concerned that his creditors, whose claims had not been satisfied in the bankruptcy proceedings, would seek to foreclose their liens if he received title directly. The court refused, and the bankruptcy trustee deeded the ranch to Rainwater. He in turn immediately deeded the ranch to R & H Enterprises. A few days later the present action was instituted. Appellants moved to add Hammond as a party, on the ground that he held a purchase mortgage on the ranch. The motion was denied.

DISCUSSION.

Appellants argue that when Rainwater received title from the bankruptcy trustee he acquired only legal title, and the beneficial interest belonged to R & H Enterprises. They contend that Rainwater had no interest in the ranch to which the judgment liens attached and that the district court erred in ordering foreclosure and sale on behalf of his creditors. *See McCord v. Ashbaugh,* 67 N.M. 61, 352 P.2d 641 (1960).

For the reasons that follow, we conclude Hammond was an indispensable party to the foreclosure action because his rights were affected by the judgment ordering foreclosure, and his rights differed from those of Rainwater and R & H Enterprises. *See* SCRA 1986, 1–019(A)(2). Because Hammond should have been made a party and was not, the trial court was without jurisdiction to proceed in his absence. *Sellman v. Haddock,* 62 N.M. 391, 310 P.2d 1045 (1957), *overruled on other grounds, Safeco Ins. Co. v. U.S. Fidelity & Guar. Co.,* 101 N.M. 148, 679 P.2d 816 (1984). As has been stated in a leading treatise,

> [g]enerally, the beneficiary [of a trust] is held not to be a necessary party. The earlier equity rule was that the beneficiary was always a necessary party, but the present position of the courts is that the trustee may represent the beneficiary in all actions relating to the trust, if rights of the beneficiary as against the trustee, or the rights of the beneficiaries among themselves, are not brought into question.

G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 593 at 421–2 (Rev.2d ed. 1980). Here, both co-trustees were required to be joined. *See generally* Annotation, *Trust Beneficiaries as Necessary Parties to Action Relating to Trust or Its Property,* 9 A.L.R.2d 10 (1950); Annotation, *Who Must Be Joined in Action as Person "Needed for Just Adjudication" Under Rule 19(a), Federal Rules of Civil Procedure,* 22 A.L.R.Fed. 765 (1975). Although appellants did not make this argument on appeal, failure to add an indispensable party is jurisdictional, and the court may consider it *sua sponte. Sellman v. Haddock.* Thus, the judgment and order must be reversed, and the cause remanded with instructions to add Hammond as a party defendant. We now address the resulting trust argument.

A resulting trust is a type of implied trust, recognized in a number of situations as a device to effect intent. For example, when property is taken in the name of one person, but another person provides the purchase price, the person holding legal title may be said to hold that title on resulting trust for the person who provided the funds with which the property was purchased. *See McCollum v. McCol-*

lum, 202 Ga. 406, 43 S.E.2d 663 (1947); *Godzieba v. Godzieba,* 393 Pa. 544, 143 A.2d 344 (1958). This resulting trust is described as a purchase money resulting trust. *See generally* G. Bogert, *Trusts* § 74 (6th ed.1987). This resulting trust does not arise if the person by whom the purchase price is paid manifests an intention that no resulting trust should arise. *Restatement (Second) of Trusts* § 441 (1959). It also does not arise if the policy against unjust enrichment is outweighed by the policy against giving relief to a person who has entered an illegal transaction. *Id.* at § 444. We believe that a transaction that is against public policy should be treated like an illegal transaction. Thus, a resulting trust would not arise if recognition of the trust would be against public policy.

The record indicates that Hammond, on behalf of R & H Enterprises, advanced the funds necessary for Rainwater to exercise the right of first refusal, but title was taken in Rainwater's name. On these facts, an inference arises that the beneficial interest did not belong to the person to whom legal title was transferred. *See Browne v. Sieg,* 55 N.M. 447, 234 P.2d 1045 (1951). Rather, there is an inference that the beneficial interest belonged to R & H Enterprises. In this case, there is no evidence of a contrary intent.

Where there is evidence of an express agreement consistent with the inference of a purchase money resulting trust, then that evidence will not defeat the claim to a resulting trust. Here, we have evidence of an agreement between the parties that R & H Enterprises would ultimately hold legal title. We view the agreement as strengthening the presumption that Rainwater received title to the ranch on behalf of R & H Enterprises. *See Viner v. Untrecht,* 26 Cal.2d 261, 158 P.2d 3 (1945); *McCollum v. McCollum; Godzieba v. Godzieba.*

Nevertheless, under the trust agreements, the beneficiaries of R & H Enterprises are the person who advanced the purchase price and the person in whose name title was acquired. Under these circumstances, it is necessary to identify the beneficial interests in the trust in order to evaluate appellants' resulting trust argument. In other words, it is necessary to consider the substance of what occurred rather than the form. Considering the substance rather than the form, we see no reason why appellee's liens would not have attached to the legal title acquired by Rainwater to the extent he had a beneficial interest in R & H Enterprises. To this extent, we disagree with appellants' theory on appeal. To the extent Hammond had a beneficial interest, however, we agree that Rainwater would have held only legal title; and appellee's liens would not have attached. *See McCord v. Ashbaugh.*

The trust agreements indicate that the parties intended Hammond would own a one-half undivided interest. As to this portion of the beneficial interest, the agreement proven is identical with that implied by law. We conclude the evidence would support a finding that a resulting trust for the benefit of Hammond arose as to one-half interest at the time Rainwater acquired the ranch.

The trust agreements also indicate that Rainwater had the opportunity to purchase a one-half undivided beneficial interest for a period of three years. He also had other rights under the trust, such as the right to manage the ranch. At oral argument, the parties advised the court that Rainwater was entitled to one-half of the proceeds of the bankruptcy sale but had not yet received them. We conclude the evidence supports an inference that Hammond gave Rainwater an unsecured, short-term loan with the expectation that Rainwater would be able to purchase a one-half undivided interest with his share of the bankruptcy sale proceeds. If the trial court finds Hammond made an unsecured loan, Rainwater would have acquired a one-half beneficial interest in his own name at the time of the transfer from the bankruptcy trustee, and the judgment liens would have attached to that interest. There would be no basis for a resulting trust as to this half. *See Lifemark Corp. v. Merritt,* 655 S.W.2d 310 (Tex.Ct.App.

1983); G. Bogert, *supra,* at 273–74; *see also Restatement, supra,* at § 441 comment f.

Appellee argues that the right of first refusal is a personal right, which Rainwater could not assign. It contends that this court ought not enforce the express trust, because enforcement would circumvent the purpose of Section 363(h). Appellee also argues that because Rainwater retained some beneficial interest in the trust, such as the right to live at and work the ranch, this court cannot treat him as a "straw" or nominal owner. Finally, appellee argues that appellants' theory is against public policy, because it would permit Rainwater to evade his creditors. We now address each of these arguments.

Although Rainwater attempted to assign his right of first refusal, under the findings of the district court the assignment was not effective. Appellants do not challenge the court's findings. Therefore, we assume, but do not decide, that the right was personal and not assignable. We agree with appellee's related argument that if the express trust circumvents the purpose of Section 363(h) it should not be enforced. However, we are not convinced from the record before us that the purpose of that section has been circumvented by the express trust or that recognition of a resulting trust would be contrary to public policy.

The record reveals no evidence that Hammond would have purchased the property at the bankruptcy sale for himself. Rather, the evidence suggests that the trust agreements were intended to permit Rainwater to exercise his right of first refusal by acquiring a new co-owner for one-half of the beneficial interest and obtaining short-term financing for the other one-half interest. There is nothing in Section 363(h) that directly prohibits such financing, and we decline to imply such a policy. However, if the court on remand finds that Hammond's "financing" was an attempt to acquire the property by circumventing the bidding process in the bankruptcy sale, *see In re Fehl,* 19 B.R. 310 (N.D.Cal.1982), then it also may conclude that the policy against unjust enrichment is outweighed by public policy. Under those circumstances, it would be inappropriate to recognize a resulting trust. *See Restatement, supra,* at § 444.

We agree with appellee's contention that Rainwater was not a nominal owner. However, the interest of the beneficiary of a resulting trust is in direct relationship to the proportional part of the consideration paid. *Wimberly v. Kneeland,* 293 S.W.2d 526 (Tex.Ct.App.1956). The party attempting to prove the existence of a resulting trust need not show that the alleged trustee has no beneficial interest. *See id.* Consequently, Rainwater's beneficial interest under the trust does not preclude the recognition of a resulting trust as to Hammond's beneficial interest.

The case law supporting appellee's final argument concerns debtors who furnish funds to purchase property in the name of another person in an attempt to evade their own creditors. *See* 4 J. Pomeroy, *Equity Jurisprudence* § 1043 (5th ed. 1941). That situation is not analogous to the present one. Appellee is entitled to reach Rainwater's interest in the ranch. The liens were of record, and Rainwater's beneficial interest is subject to attachment by his creditors. *See* NMSA 1978, § 14–9–3 (Repl.Pamp.1988). The trust is not a spend-thrift trust, and we doubt whether as a matter of public policy, Rainwater could have created a spend-thrift trust for his own benefit. *See* NMSA 1978, § 42–9–4. As to any beneficial interest in Rainwater, then, appellee's claims have priority over Hammond's rights as an unsecured creditor.

The same cannot be said for any interest for which Hammond paid and with respect to which Rainwater acquired the ranch on resulting trust for Hammond's benefit. As to that interest, Hammond's rights attached at the time of the transfer by the bankruptcy trustee and have priority over appellee's liens. We view Hammond's right to priority as comparable to those of a purchase money mortgagee. *Cf.*

Pinellas County v. Clearwater Fed. Sav. & Loan Ass'n, 214 So.2d 525 (Fla.Dist.Ct. App.1968) (recognizing that a purchase money mortgagee has priority over prior and subsequent lien creditors).

Under the district court's decision, it appears that appellee satisfied its claims against Rainwater with property that belonged in whole or in part to Hammond. If so, Rainwater's lien creditors have been unjustly enriched. Appellants have argued for the imposition of a resulting trust, which is a remedy intended to prevent unjust enrichment. *See Restatement, supra,* at § 444. Hammond is a necessary party to the resolution of appellants' claims. Because he was not joined, the judgment entered below must be reversed, and the case remanded for further proceedings. We reverse and remand to require joinder of Hammond as co-trustee and beneficiary and to permit the district court to consider what portion of the beneficial interest belonged to Hammond.

CONCLUSION.

In this case, the district court ordered a sale of the entire ranch, in a proceeding to which Hammond was not a party. The sale was not limited to Rainwater's interest in the trust. Because Hammond is a necessary party and was not joined, we reverse the trial court's judgment ordering foreclosure, and we remand the case for joinder of Hammond as a party defendant and for a new trial on the merits. No costs are awarded.

IT IS SO ORDERED.

DONNELLY and ALARID, JJ., concur.

781 P.2d 1156

COTTONWOOD ENTERPRISES, a California limited partnership, Plaintiff–Appellant,

v.

Mark McALPIN, Barbara McAlpin, and Territorial Abstract and Title Company, Defendants–Appellees.

No. 18199.

Supreme Court of New Mexico.

Oct. 26, 1989.

As Amended Oct. 30, 1989.

Rehearing Denied Nov. 15, 1989.

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Sommer, Udall & Hardwick, P.A. Jack N. Hardwick, Santa Fe and Wade H. Hover, Los Gatos, Cal., for plaintiff-appellant.

Moses, Dunn, Beckley, Espinosa & Tuthill, P.C., Jon H. Tuthill, Albuquerque, for defendant-appellee Territorial Abstract.

Scheuer & Engel, P.C., Richard S. Lees, Santa Fe, for defendants-appellees the McAlpins.

OPINION

BACA, Justice.

Plaintiff appeals the dismissal of its claim based on an SCRA 1986, 1–041(E) motion to dismiss for inactivity, arguing that the trial court's grant of the motion constituted abuse of discretion. Plaintiff also contends that dismissal pursuant to defendants' SCRA 1986, 1–012(B)(6) motion for failure to state a claim upon which relief can be granted and defendants' SCRA 1986, 1–012(B)(7) motion for failure to join a necessary party would have been erroneous. We reverse the trial court's grant of the 1–041(E) motion, which dismissed the cause with prejudice for inactivity, and remand to the trial court for consideration of defendants' other motions and for trial, if required.

FACTS

Plaintiff filed its initial complaint in this action, alleging misrepresentation, negligence and breach of warranty arising out of a contract for the sale of realty and title services rendered in connection with the sale of property against defendants Mark

and Barbara McAlpin (McAlpins) and Territorial Abstract and Title Company (Territorial). The action was originally filed on April 20, 1983.

Immediately subsequent to filing the action, plaintiff engaged in a flurry of activity, filing, among other things, motions for injunctive relief and responses to defendants' motions. It promptly requested trial settings several times, and appeared to be actively pursuing its case. However, after approximately a year and a half of activity, plaintiff's case lay fallow for over two years. In September 1986, defendants filed a motion to dismiss for inactivity, which was denied on August 11, 1987. The case was subsequently transferred to Judge Maes' court, and on July 15, 1988, plaintiff filed a request for a trial setting. Judge Maes granted the request and set trial for October 27, 1988. On July 28th, the McAlpins filed a second motion to dismiss for lack of prosecution, as well as second motions to dismiss pursuant to 1–012(B)(6) and (7). Defendants also moved to vacate the trial setting. On October 12th, a hearing was held on the motions, at which plaintiff chose not to appear. Judge Maes granted the motion to dismiss for inactivity pursuant to 1–041(E).

On this appeal, we consider two issues: (1) whether the trial court abused its discretion by granting defendants' motion to dismiss, and (2) whether the dismissal was proper pursuant to the trial court's inherent discretion to dismiss a cause of action for inactivity. We reverse the order of the trial court granting defendants' 1–041(E) motion to dismiss for lack of diligence in bringing the matter to a conclusion, and remand for a consideration of defendants' motions and trial.

I. *DID THE TRIAL COURT ABUSE ITS DISCRETION BY GRANTING THE 1–041(E) MOTION TO DISMISS?*

SCRA 1986, 1–041(E)(1) provides that, in a civil action, "when it shall be made to appear to the court that the plaintiff ... has failed to take any action to bring such action or proceeding to its final determination for a period of at least three (3) years after the filing of said action ..., any party to such action or proceeding may have the same dismissed with prejudice...."

In considering a 1–041(E) motion, a district 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. *State ex rel. Reynolds v. Molybdenum Corp. of America,* 83 N.M. 690, 697, 496 P.2d 1086, 1093 (1972). The trial court has discretion to determine a motion to dismiss for inactivity, and its decision will not be reversed except for abuse of discretion. *Id.*

Plaintiff first contends that the district court abused its discretion, because plaintiff had diligently attempted to bring its cause to a final determination. In support of this argument, plaintiff identifies the two motions it filed for a trial setting in 1983 and 1984, defendants' reluctance to submit responsive pleadings, various motions plaintiff filed in 1987 and 1988, the filing of its first amended complaint in 1988, and its third request for a trial setting in July 1988. The facts of this case do not require us to determine whether plaintiff's actions constituted adequate activity to satisfy 1–041(E), because we find plaintiff's second argument is meritorious. However, it bears stating that plaintiff's conduct in pursuing its case was not a model of trial practice to be followed by other members of the bar. It should be noted that plaintiff's counsel on appeal was not plaintiff's trial counsel. If not for plaintiff having been granted a trial date prior to the granting of the motion to dismiss, as discussed *infra,* defendants had very strong grounds on which to argue for dismissal.

Plaintiff argues that, because it had filed for and been granted a trial date prior to the district court's grant of the motion to dismiss, it had been actively pursuing a final determination, and therefore the district court abused its discretion. We agree, and remand for further consideration.

In *Martin v. Leonard Motor-El Paso,* 75 N.M. 219, 222–23, 402 P.2d 954, 957 (1965), this court determined that when a plaintiff has made a written motion to set a date for trial, preliminary activities leading toward a trial need not be considered for a determination that the plaintiff is actively pursuing its cause. The court interpreted Rule 1–041(E) to be satisfied "when the requisite action is taken to bring the case to its final determination," even if the mandatory period has expired. *Id.* at 222, 402 P.2d at 956. It is necessary for the defendant to "invoke his right to compel a dismissal" by filing a written motion to dismiss, prior to plaintiff actively bringing the case to trial. *Id.* As the court stated:

> [T]he defendant may not sleep upon such rights and permit a party to continue prosecution of a case which is subject to being dismissed upon motion, expending both time and money, and particularly to take action to bring the case to its final determination, and then press for a dismissal.... [I]t cannot be denied that the filing of the motion for a trial setting on the merits amounted to action by the plaintiff to bring the case to its final determination, and that such action came before the defendant elected to invoke his right to dismissal.

Id. at 222–23, 402 P.2d at 957 (citations omitted). *See also Jones v. Montgomery Ward & Co.,* 103 N.M. 45, 48, 702 P.2d 990, 993 (1985) (determining that a written request for a jury trial, properly submitted to the court subsequent to defendant's 1–041 motion to dismiss but prior to the hearing, should be considered in evaluating whether plaintiff is actively pursuing his case); *Baca v. Burks,* 81 N.M. 376, 377, 467 P.2d 392, 393 (1970) (Rule 1–041(E) "is not self-executing but requires the timely filing of a motion for its operation"); *Foundation Reserve Ins. Co. v. Johnston Testers, Inc.,* 77 N.M. 207, 421 P.2d 123 (1966).

■ What constitutes activity bringing a case to a final determination must be decided considering the facts of each case. *Martin,* 75 N.M. at 222, 402 P.2d at 956–57. Thus, the filing for a trial date does not per se mandate that the 1–041 motion must be denied. *See, e.g., Stoll v. Dow,* 105 N.M. 316, 731 P.2d 1360 (Ct.App.1986) (although plaintiff had filed a motion for a trial setting, the motion was over eleven years old when defendant moved to dismiss, and the circumstances indicated that plaintiff was not actively bringing his case to trial).

In the instant case, however, plaintiff moved the district court for a trial setting, and was granted a setting, prior to defendant's second motion to dismiss. Although we do not wish to condone plaintiff's failure to appear at the hearing held on the motion, his irresponsibility did not warrant dismissal for inactivity. Judge Maes had other weapons in her judicial arsenal with which to reprimand the plaintiff; however, dismissal was not the appropriate sanction. Ultimately, plaintiff did file for a trial setting, thereby acting to bring the case to a conclusion and saving itself from a likely dismissal. Although defendants are correct in stating that a plaintiff has an affirmative duty to bring the case to a conclusion and cannot rest on motions for trial settings that are not being acted upon by the court, *see Stoll,* 105 N.M. at 319, 731 P.2d at 1363, defendants waited too long to assert their position. They should not have waited to file their second 1–041(E) motion until after plaintiff had moved for and been granted a trial setting. *See Martin,* 75 N.M. at 222, 402 P.2d at 957. As this court has stated: "[T]he rights afforded by the rule are intended to expedite the prosecution of litigation in our courts...." *Id.* In the present case, this policy has been achieved through the granting of a trial setting. *Id.* Defendants should not have sat on their rights while plaintiff satisfied Rule 1–041(E)'s requirements, and their subsequent motion to dismiss was too late.

Defendants maintain that the order dismissing the case was merely a reconsideration of the original denial of their motion to dismiss, and that Judge Maes properly reconsidered Judge Kaufman's denial of the motion. Defendants contend that, because the order was entered without a hearing or finding of fact to support its conclusion, it was contrary to court rules and subject to reconsideration. However, our review of the record indicates that the matter of re-

consideration of the earlier motion was not raised before Judge Maes at the hearing on the second motion to dismiss. We therefore find that defendants' contention is without merit.

II. *WAS IT WITHIN THE DISTRICT COURT'S INHERENT POWERS TO DISMISS FOR INACTIVITY?*

It is within a trial judge's inherent power to dismiss a cause of action for failure to prosecute, independent of any statutory authority. *Gathman-Matotan Architects & Planners, Inc. v. State,* 107 N.M. 113, 114, 753 P.2d 892, 893 (1988); *Smith v. Walcott,* 85 N.M. 351, 512 P.2d 679 (1973). Such an order will be reviewed for abuse of discretion. *Pettine v. Rogers,* 63 N.M. 457, 460, 321 P.2d 638, 640 (1958).

McAlpins contend that it was within Judge Maes' inherent authority to dismiss, and that she did not abuse her discretion. Nevertheless, as discussed above, a trial setting had been obtained by plaintiff from Judge Maes. Given that circumstance, dismissing the case pursuant to the district court's inherent authority constituted abuse of discretion.

CONSIDERATION OF THE 1-012(B)(6) AND (7) MOTIONS

Both plaintiff and defendants agree that the district court did not consider defendants' motions filed pursuant to SCRA 1986, 1-012(B)(6) and (7). Accordingly, we make no decision regarding the merits of these motions and remand the cause of action to the district court for consideration. *See* SCRA 1986, 12-201.

IT IS SO ORDERED.

LARRABEE, J., and STEVE HERRERA, District Judge (sitting by designation), concur.

781 P.2d 1159

STATE of New Mexico, Plaintiff-Appellee,

v.

Gary CORNEAU, Defendant-Appellant.

No. 10518.

Court of Appeals of New Mexico.

May 16, 1989.

Certiorari Denied July 17, 1989 and July 27, 1989.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BIVINS, Chief Judge.

The court's opinion filed March 21, 1989, is hereby withdrawn and the following substituted therefor. Defendant appeals his convictions for criminal sexual penetration in the second degree (CSP II) contrary to NMSA 1978, Section 30-9-11(B)(4) (Repl. Pamp.1984)[1] and for false imprisonment contrary to NMSA 1978, Section 30-4-3 (Repl.Pamp.1984). He makes the following contentions on appeal: (1) The trial court erred in allowing the state to use false imprisonment as the underlying felony for CSP II *and* as a separate offense when there was no evidence of force or restraint separate and apart from the force used to "cause" the sexual intercourse. Therefore, defendant urges, the highest offense for which he could be convicted was criminal sexual penetration in the third degree (CSP III) contrary to Section 30-9-11(C), with false imprisonment as the proper lesser included offense. (2) Related to this issue, the trial court erred in refusing to give defendant's requested instruction on CSP III. (3) The trial court erred in granting the state's motion for joinder of two criminal cases involving different victims. (4) The trial court erred in denying defendant's motion to suppress the fruits of a warrantless search. (5) Defendant was denied effective assistance of counsel.

We hold it was not error, under the facts of this case, for the trial court to submit to the jury the offenses of CSP II, with false imprisonment as both the underlying felony and a separate crime. Defendant's double jeopardy rights were not violated, notwithstanding guilty verdicts on both charges, since the trial court entered judgment running the sentences concurrently. We also hold, however, it was error not to instruct on CSP III and, therefore, we reverse and remand for a new trial on the charges of CSP II and false imprisonment. Because the jury acquitted defendant of all charges involving one victim, and reversal and remand for a new trial of the charges involving the other victim is required, we need not reach the joinder issue. We do decide the suppression of evidence question, since that issue will likely arise on retrial. We hold that the evidence was not improperly admitted. Finally, we hold that defendant was not denied effective assistance of counsel. Accordingly, we reverse and remand for new trial.

FACTS

Defendant was originally charged with committing false imprisonment and CSP II against two victims. Although separately indicted, defendant was tried for the offenses against both victims in one trial, after the state's motion to join the two indictments was granted. Defendant was acquitted of all offenses relating to the first victim and was convicted on the counts involving the second victim, from which he now appeals.

The second victim met defendant at a Santa Fe nightclub in May 1987, when defendant offered her a ride home. According to the victim, defendant stopped at his residence instead of taking her directly home. She waited outside the premises in defendant's vehicle for approximately ten to fifteen minutes while defendant went inside. Defendant then returned to his vehicle and asked the victim to come inside, which she agreed to do so she could use the

1. **Subsequently amended.** *See* NMSA 1978, § 30-9-11 (Cum.Supp.1988).

restroom. Once they were inside, defendant opened a can of beer and talked with the victim. He began to make sexual advances, which the victim rebuffed. She then asked him whether he was going to take her home. He responded, "You're not going anywhere."

The victim testified that defendant then forced her to his bed and forced her to have sexual intercourse after she resisted him and after he made several threats, including a threat to kill her. She hid her wallet between the bed and the wall to corroborate her version of what occurred or so she could be identified if defendant did kill her. Afterwards, the victim dressed, went to the living room, managed to unlock the front door while defendant turned his back, and ran out of the house. The victim threw her shoe against a neighbor's window to obtain assistance. She successfully roused that neighbor, the landlord, and telephoned the police from his residence.

The police arrested defendant and took him into custody. After defendant was in custody, the police entered his apartment on three separate occasions. First, the officers at the scene made an initial search of defendant's apartment to determine whether there were any additional suspects, victims, or weapons inside. After this first entry, the victim told the police she had left her wallet in the apartment and had lost a button from her clothing. The police officers were uncertain whether they could legally re-enter the apartment to search for those items, absent a warrant. Following departmental policy, they telephoned an assistant district attorney, who gave them permission to proceed with the warrantless search based on exigent circumstances. During this second search, the officers recovered the victim's wallet, but did not seize the button, even though one of the officers saw it. The third entry occurred several days later, after another officer, who was not present the night of the crime, had obtained a warrant. The button was seized as evidence during this third search.

CHARGE OF CSP II

The offense of CSP II as charged in this case and as set out in Section 30–9–11(B) "consists of all criminal sexual penetration perpetrated ... (4) in the commission of any other felony." Criminal sexual penetration is the "unlawful and intentional causing of a person, other than one's spouse, to engage in sexual intercourse." § 30–9–11. The offense of false imprisonment, defined in Section 30–4–3, "consists of intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do so." CSP III consists of all criminal sexual penetration perpetrated through the use of force or coercion. Defendant was charged with CSP II because he was allegedly engaged in the felony of false imprisonment when he committed the act of CSP. He was not charged with CSP III.

As we understand defendant's argument, he contends that, because false imprisonment is properly a lesser included offense of CSP III, it should not be used as the underlying felony to enhance that crime to CSP II. He argues that the same "force or coercion," *see* NMSA 1978, § 30–9–10(A) (Repl.Pamp.1984), necessary to establish CSP III constitutes the restraint necessary to prove false imprisonment. Thus, according to defendant, since the same proof of force is required to establish CSP III as to establish false imprisonment, to permit false imprisonment to elevate the act to CSP II effectively nullifies the crime of CSP III. He urges that CSP III was the only proper charge and that false imprisonment is the proper lesser included offense of that charge.

Defendant presents double jeopardy and merger arguments, which we find inapplicable. Merger is an aspect of double jeopardy that applies to the concept of multiple punishment when multiple charges are brought in a single prosecution. *State v. Sandoval,* 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977). In *State v. Srader,* 103 N.M. 205, 704 P.2d 459 (Ct.App.1985), we held that the defendant's double jeopardy rights were protected because he was given concurrent sentences for the three

crimes upon which he was convicted, thereby escaping multiple punishment. *Id.* at 206, 704 P.2d at 460. In the present case, defendant was sentenced to concurrent terms for CSP II and false imprisonment. Pursuant to *Srader*, we reject defendant's double jeopardy and merger claims, since defendant's sentences for CSP II and false imprisonment are to run concurrently.

Although defendant uses the terms "double jeopardy" and "merger," in essence, his argument is one of legislative intent. He argues that the state's charging pattern in this instance does not rely on an independent felony to aggravate CSP III to CSP II. Thus, according to defendant, the state's charging pattern in effect nullifies the legislatively created offense of CSP III, because almost every act of causing a person to engage in sexual intercourse through the use of physical force or violence necessarily involves restraining or confining that person against his or her will without lawful authority. Defendant's argument is analogous to the independent felony rule utilized in those jurisdictions having a felony murder theory of homicide. In those jurisdictions, it has been held that, in order for a defendant to be charged with felony murder, the underlying felony must be independent or collateral to the homicide. *See Sullinger v. State,* 675 P.2d 472 (Okla. Crim.App.1984); Annotation, *Application of Felony–Murder Doctrine Where the Felony Relied Upon Is an Includible Offense With the Homicide,* 40 A.L.R.3d 1341 (1971).

We reject this argument. We recognize that determining whether an offense is a lesser included offense requires us to look at the particular facts of the case to see whether the greater offense could be committed without necessarily also committing the lesser. *State v. DeMary,* 99 N.M. 177, 655 P.2d 1021 (1982). Ordinarily, almost any act of CSP will involve a restraint or confinement that would constitute false imprisonment. However, we disagree with defendant's contention that the facts in this case do not support a finding of false imprisonment before or after the forcible intercourse. Evidence exists in the record to support a finding by the jury that the underlying felony of false imprisonment was separate and apart from any false imprisonment necessarily involved in almost every act of CSP.

False imprisonment does not require physical restraint of the victim; it may also arise out of words, acts, gestures, or similar means. *State v. Muise,* 103 N.M. 382, 707 P.2d 1192 (Ct.App.1985). The restraint need be for only a brief time. *Id.*

In this case, before defendant sexually assaulted the victim and when she asked him to take her home, he threatened her by saying, "You're not going anywhere." He then dragged her from the living room to the bedroom where the CSP occurred. These facts alone satisfy the elements of false imprisonment in that defendant, using both words and acts, confined the victim against her will without the lawful authority to do so.

Moreover, after the act of CSP was completed, defendant continued to falsely imprison the victim until she escaped. When defendant allowed the victim to go to the bathroom to dress, he demanded that she keep the bathroom door open. He demanded to know what she was doing when she went to unlock the apartment door. When she eventually managed to undo the second lock and run out of the apartment, defendant chased her. The events following the CSP clearly indicate he utilized verbal restraint as well as actions in order to continue to falsely imprison the victim.

In contrast, the force defendant used to perform the act of CSP could be viewed as separate and distinct from this false imprisonment. He pushed the victim down on the bed, and put his hand over her mouth. She resisted him, and he pushed her down on the bed once again. Although these actions do constitute a false imprisonment, the jury could find them to be distinct from the false imprisonment which preceded and followed the CSP.

The act of CSP is not a continuing offense; it is completed upon penetration. *See State v. Ramirez,* 92 N.M. 206, 585

P.2d 651 (Ct.App.1978). Thus, any restraint after the completed CSP is separate from the CSP itself, not inherent in the CSP, and does not constitute the same "force or coercion" necessary to establish CSP. By the same token, on the facts we have before us, the restraint which preceded the act of CSP was not the same "force or coercion" necessary to establish CSP, or the same restraint inherent in CSP.

Defendant's argument may apply in other fact situations where it would be inappropriate for the state to use false imprisonment as the underlying felony to aggravate CSP III to CSP II. For example, when two individuals voluntarily spend a portion of an evening together and have some physical contact, but the defendant then forces the victim to engage in further sexual activity against her will, including forcible sexual intercourse, the same force the defendant utilized to commit CSP could be considered the same force used to falsely imprison the victim. We find the present case factually distinct from such a scenario; therefore, we cannot find as a matter of law that defendant's legislative intent argument is applicable.

In his brief in support of his motion for rehearing, defendant argued that the CSP was not perpetrated "*during* the commission of false imprisonment" (emphasis in original), since we determined in our prior opinion that a view of the evidence supports a finding that the false imprisonment was present before and after the CSP. *State v. Martinez,* 98 N.M. 27, 644 P.2d 541 (Ct.App.1982), answers this contention adversely to defendant.

The defendant in *Martinez* was convicted of CSP II perpetrated during the commission of a burglary. The defendant argued that, since burglary is complete upon breaking and entering with the intent to commit a felony or theft, *see State v. Madrid,* 83 N.M. 603, 495 P.2d 383 (Ct.App. 1972), any CSP occurring after the burglary could not have been perpetrated "in the commission of" the burglary.

The court noted that the phrase "in the commission of" any felony that appears in the CSP statute also appears in the felony-murder statute. *See* NMSA 1978, § 30–2–1(A)(2) (Repl.Pamp.1984). In that context, if a homicide occurs within the res gestae of the felony, it occurs in the commission of the felony whether it occurs before or after the felony. *State v. Flowers,* 83 N.M. 113, 489 P.2d 178 (1971); *State v. Martinez.* A homicide is within the res gestae of the felony if it is part of a continuous transaction and closely connected in time, place, and causal connection, with no independent intervening forces. *Id.* (citing *State v. Harrison,* 90 N.M. 439, 564 P.2d 1321 (1977), *superseded by rule on other grounds, Tafoya v. Baca,* 103 N.M. 56, 702 P.2d 1001 (1985)).

The court held the phrase had the same meaning in both the felony-murder and CSP statutes. Therefore, the court held that so long as the CSP was within the res gestae of the burglary, it occurred in the commission of the burglary.

Martinez applies even more forcefully in the case before us since false imprisonment, unlike burglary, is an ongoing offense, not one which is complete as soon as the requisite elements have occurred. Applying the *Martinez* definition to the facts of this case, the CSP occurred in the commission of the false imprisonment. The trial court did not err in instructing the jury on CSP II perpetrated in the commission of the false imprisonment.

FAILURE TO INSTRUCT ON CSP III

Defendant argues that the trial court erred in failing to give his tendered instruction for CSP III to the jury. We find defendant's argument persuasive and reverse the trial court on this ground.

Relying on *State v. Aragon,* 99 N.M. 190, 656 P.2d 240 (Ct.App.1982), the state contends defendant failed to preserve this issue for appeal because he did not make a clear and unequivocal request for the CSP III instruction. The state's reliance on *Aragon* is misplaced. In *Aragon,* the defendant made a request for a particular jury instruction, but later withdrew it, thereby negating any "clear and unequivocal" request. In the present case, defense coun-

sel specifically submitted the CSP III instruction to the trial court, but added it was "futile" to do so, because the trial court had previously rejected defendant's merger theory. Defense counsel informed the trial court he was tendering the instruction in order to preserve the issue for appeal. The trial court then specifically rejected the tendered jury instruction. The trial court marked the tendered instruction "Refused," not "Withdrawn."

At the time defense counsel offered the CSP III instruction, he made statements that indicate that the instruction was being tendered as a lesser, rather than a lesser included, offense. This, of course, was consistent with his theory that CSP III was the highest crime and false imprisonment the only proper lesser included offense. In denying defendant's motion for directed verdict, the trial court had rejected that theory. Therefore, to have submitted the CSP III instruction as a lesser included offense to CSP II, defendant would have been retreating from his position. He apparently did not want to do that, but at the same time did not want to lead the court into error by offering CSP III as a lesser included offense. As we discuss below, the giving of CSP III as a lesser included offense would not have been error. In fact, it was warranted under the facts. Notwithstanding the manner in which the tender was made, we believe that the trial court actually refused that instruction under the mistaken belief that it was not justified under the facts. The trial court said, "In my view, the proffered instructions by the defendant, which essentially describe third degree felonies—CSP's—the Counts I and I in both indictments—are not acceptable, are not consonant with the evidence in this particular case, and are denied for that reason. They will be rejected." This statement indicates the trial court believed defendant had made a tender; otherwise, there would have been no need to rule on the offer. Therefore, it would appear that even though defendant's tender may have been somewhat less than clear or unequivocal, the trial court rejected the instruction as not being supported by the evidence. In this, we believe the trial court erred. Under these circumstances, defendant did not fail to preserve this issue for appeal.

In criminal cases the jury must be instructed on all lesser included offenses if the evidence supports such instruction and the instruction is requested by the defendant. *State v. Benavidez,* 94 N.M. 706, 616 P.2d 419 (1980), *overruled on other grounds, Sells v. State,* 98 N.M. 786, 653 P.2d 162 (1982). Failure to do so is reversible error. *State v. Trammel,* 100 N.M. 479, 672 P.2d 652 (1983). Even if the requested instruction is contrary to the defendant's initial case theory at trial, the requested instruction must be given if supported by the evidence. *State v. Privett,* 104 N.M. 79, 717 P.2d 55 (1986).

In *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985), the defendant tendered jury instructions for third degree criminal sexual penetration and false imprisonment, which the trial court rejected. The defendant was convicted of CSP II based on the victim's testimony that defendant had forced her to have intercourse through use of a deadly weapon. The weapon, a knife, was not produced at trial as evidence. *Id.* at 778–79, 701 P.2d at 377–78. We held in that case that it was appropriate to instruct the jury on CSP III because the evidence could have supported a finding by the jury that the defendant raped the victim, but did so while unarmed. *Id.* at 779, 702 P.2d at 378. Thus, the evidence could sustain a verdict that "third degree criminal sexual penetration was the highest degree of the crime that occurred." *Id.*

We find *Fish* applicable in the present case. Evidence from the record could sustain a jury's finding that defendant committed CSP III. Specifically, the jury could believe the victim that the CSP was with force, not consensual, and believe defendant that he did not restrain the victim separate and apart from force used for the CSP. Thus, the jury could find from the evidence that the sexual intercourse occurred by coercion or force, but without the requisite elements of false imprisonment as an independent felony.

We reject the state's contention that instructing the jury on CSP III would "fragment" the evidence, and that such an instruction would lead to acquittal. *See State v. Manus,* 93 N.M. 95, 597 P.2d 280 (1979), *overruled on other grounds, Sells v. State.* With appropriate jury instructions, no fragmentation of the evidence would occur, nor would there be a danger that such instruction could only lead to acquittal or conviction of the higher offense. The jury may decide whether the elements of false imprisonment exist independent of the force or coercion inherent in any CSP, thereby supporting a conviction of CSP II, or decide the evidence only supports a conviction of CSP III. To avoid confusing the jury, SCRA 1986, 14–6002 (necessarily included offense) should precede any CSP III instruction.

Pursuant to *Trammel,* we find the failure to instruct the jury on CSP III reversible error in the present case.

FAILURE TO SUPPRESS

Defendant argues the wallet and button belonging to the victim were the fruits of a warrantless search and should have been suppressed. The trial court allowed the wallet to be admitted, based on the exigent circumstances exception to the warrant rule and the inevitable discovery exception, and allowed the button under the independent source exception.

We reject the state's contention that defendant waived the issue by failing to renew his objection to the evidence at trial after losing a pretrial motion to suppress. The record of the pretrial motion to suppress was submitted with defendant's appeal; therefore, the state's reliance on *State v. Hall,* 103 N.M. 207, 704 P.2d 461 (Ct.App.1985) is misplaced. *See also State v. Mason,* 79 N.M. 663, 448 P.2d 175 (Ct. App.1968) (holding that a defendant need not renew objection at trial when issue is fully preserved prior to trial).

Generally, a warrantless search is, per se, unreasonable, unless it falls within an exception to the warrant requirement. *State v. Crenshaw,* 105 N.M. 329, 732 P.2d 431 (Ct.App.1986). Exceptions to the warrant requirement include exigent circumstances, searches incident to arrest, inventory searches, consent, hot pursuit, open field, and plain view. *Id.*

1. *Exigent Circumstances*

Exigent circumstances are defined as those situations where immediate action is necessary "to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." *State v. Copeland,* 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct.App.1986). Exigency of circumstances involves a determination of whether in a given situation a prudent, cautious, and trained officer, based on facts known, could reasonably conclude swift action was necessary. *Id.* Determining exigent circumstances is a question for the trial court, whose decision will be upheld on appeal if supported by substantial evidence. *Id.* We hold the evidence in the present case does not support a determination of exigent circumstances permitting a warrantless search.

Prior to the second search of the apartment, during which the victim's wallet was seized, defendant had been arrested and transported from the scene. The police had previously searched the apartment to determine whether other suspects, victims, or weapons were present. None were found. The state argues additional exigent circumstances existed, based on the difficulty of securing the apartment with officers until a search warrant could be obtained. According to the state, this security was necessary because defendant had a roommate and because the landlord was "hostile" to the police investigation, having indicated he wanted to clean defendant's apartment, which might have destroyed the evidence.

Testimony by law enforcement officers at the motion to suppress hearing established that the apartment could have been adequately secured by the presence of two or three officers, pending the acquisition of a warrant. Additional testimony indicated that as soon as police informed the landlord the apartment was a crime

scene, the landlord walked away. The state presents no convincing reasons why the police would have been unable to secure the area until a search warrant was obtained, except that it would have taken some period of time to secure a warrant because the incident happened early on a Saturday morning. Inconvenience to law enforcement officers is not a listed element for exigent circumstances. *See State v. Copeland.* Therefore, we reject exigent circumstances as a basis for the search.

2. *Inevitable Discovery*

The trial court additionally ruled the wallet admissible based on the inevitable discovery rule. In *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the United States Supreme Court held that evidence originally obtained through illegal means, which would, in all likelihood, inevitably have been discovered through independent lawful means, is admissible at trial. As described in *Nix,* the inevitable discovery rule is based on the view that, since the tainted evidence would be admissible if discovered through an independent source, it should be admissible if it inevitably would have been discovered. *Murray v. United States,* 487 U.S. 533, 539, 108 S.Ct. 2529, 2534, 101 L.Ed.2d 472, 481–82 (1988). *See* Annotation, *What Circumstances Fall Within "Inevitable Discovery" Exception to Rule Precluding Admission, in Criminal Case, of Evidence Obtained in Violation of Federal Constitution,* 81 A.L.R.Fed. 331 (1987). The court in *Nix* sought to balance on one hand the need to deter possible police misconduct by ensuring that the prosecution is not put in a better position than it would have been in if no illegality had transpired, but, at the same time, to ensure that the prosecution not be put in a *worse* position by the operation of the rule than it would have been in but for the improper police conduct.

> [I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct.

Nix v. Williams, 467 U.S. at 447, 104 S.Ct. at 2511 (emphasis in original). The inevitable discovery rule is, in reality, an extrapolation from the larger "independent source" exception to the exclusionary rule. *Murray v. United States.* "Inevitable discovery" relates to evidence that was seized unlawfully but would have been seized independently and lawfully in due course, while the term "independent source" applies to evidence that has been obtained independent of "tainted" or possibly "tainted" information. *Id.* We agree with the trial court that the wallet in the present case was admissible under the inevitable discovery rule.

Nix was decided subsequent to our decision in *State v. Barry,* 94 N.M. 788, 617 P.2d 873 (Ct.App.1980), in which we held that the inevitable discovery rule would allow admission of evidence obtained without a warrant when the prosecution (1) establishes that the police have not acted in bad faith to hasten the discovery of the evidence in question, and (2) shows the evidence would have been discovered without the impermissible act. *Id.* at 790, 617 P.2d at 875. *Nix* apparently removed the good faith requirement.

In the present case, the trial court could reasonably find the wallet would inevitably have been discovered by law enforcement officers independent of their warrantless search. The victim specifically informed the officers of the existence and location of the wallet and button before the warrantless search. This information alone furnished sufficient probable cause for the search warrant which was later obtained by an officer who was not present on the scene the night of the crime. In addition, from the scene of the crime the police officers contacted an assistant district attorney to inquire whether it would

be permissible to enter the premises to search, and were told to proceed. The only claim of bad faith present here is the substitution of an assistant district attorney's judgment for that of a neutral magistrate. While we do not condone the substitution of the district attorney's opinion for that of a neutral magistrate in authorizing searches, we do not find the deterrence purpose of the fourth amendment furthered by the exclusion of evidence in the present case.

We recognize that, in another case, law enforcement officers' conduct may involve actual bad faith. We leave the question of the good faith test required under *Barry,* but apparently removed in *Nix,* to be answered in such a case. *See* 4 W. LaFave, *Search and Seizure* § 11.4(a), at 382 (2d ed. 1987); *State v. Garcia,* 76 N.M. 171, 413 P.2d 210 (1966) (adopting United States Supreme Court exclusionary rule in fourth amendment violation cases). We uphold the trial court's finding that the wallet would inevitably have been discovered pursuant to the search conducted under the search warrant, and that the officers acted in good faith in this instance; therefore, the evidence was properly admitted at trial. *See United States v. Silvestri,* 787 F.2d 736 (1st Cir.1986), *cert. denied,* 487 U.S. 1233, 108 S.Ct. 2897, 101 L.Ed.2d 931 (1988) (post-*Nix* decision holding evidence of drugs admissible at trial because search warrant inevitably would have been sought and issued even if illegal search had not taken place).

We note that some federal circuits have adopted the position that, in order to qualify under the inevitable discovery exception, it must be proven in most cases not only that the evidence would inevitably have been discovered by lawful means, but also that the police already possessed the lawful means and were pursuing them prior to the illegal conduct. *E.g., United States v. Cherry,* 759 F.2d 1196 (5th Cir.1985), *cert. denied,* 479 U.S. 1056, 107 S.Ct. 932, 93 L.Ed.2d 983 (1987); *United States v. Satterfield,* 743 F.2d 827 (11th Cir.1984), *cert. denied,* 471 U.S. 1117, 105 S.Ct. 2362, 86 L.Ed.2d 262 (1985); *United States v. Romero,* 692 F.2d 699 (10th Cir.1982). At least one other circuit has rejected this position in cases such as this one, where an independent search warrant was actually obtained and executed after the illegal conduct. *United States v. Silvestri.* The *Silvestri* court declined to adopt a fixed rule, holding that the facts of each case would determine whether the independent investigation must be contemporaneous with the illegal conduct. We decline to adopt a position on this issue because it was not raised on appeal. We believe such a potentially important position should be adopted only after full briefing and consideration of the issues.

3. *Independent Source*

On appeal, defendant does not address the finding that the button was admissible under the independent source exception. He instead proceeds as if both the button and wallet were admitted under the exigent circumstances and inevitable discovery exceptions. Therefore, he has waived any argument that the button was improperly admitted under the independent source exception. *See Rhodes v. First Nat'l Bank of Hagerman,* 35 N.M. 167, 290 P. 743 (1930) (appellate court will not undertake general review of evidence for discovery of error not specifically pointed out); *see also State v. Wiberg,* 107 N.M. 152, 754 P.2d 529 (Ct.App.1988) (issues not briefed deemed abandoned).

INEFFECTIVE ASSISTANCE

Pursuant to *State v. Boyer,* 103 N.M. 655, 712 P.2d 1 (Ct.App.1985), defendant complains that his trial counsel should have disqualified Judge Encinias after the judge revoked defendant's original bond following the filing of the second charges. We reject this claim. SCRA 1986, 5-403, Revocation of Release, grants broad latitude to the trial court to revoke the release of an accused person if circumstances arising after the initial release indicate the release should not be continued. *See Tijerina v. Baker,* 78 N.M. 770, 438 P.2d 514 (1968). Exercise of that discretion provides no basis for disqualification. Trial coun-

sel's failure to disqualify did not constitute ineffective assistance of counsel.

CONCLUSION

We reverse and remand for new trial consistent with this opinion.

IT IS SO ORDERED.

DONNELLY and CHAVEZ, JJ., concur.

781 P.2d 1170

Ragina C. WILLIAMS, Petitioner–Appellant,

v.

Rodney WILLIAMS, Respondent–Appellee.

No. 10987.

Court of Appeals of New Mexico.

Aug. 22, 1989.

Certiorari Denied Oct. 18, 1989.

Elizabeth Cunningham, Sp. Asst. Atty. Gen., Human Services Dept., Roswell, for petitioner-appellant.

Michael E. Dargel, McCormick, Forbes, Caraway & Tabor, Carlsbad, for respondent-appellee.

OPINION

ALARID, Judge.

Mother appeals from the trial court's order denying her petition for child support arrearages. She challenges some of the findings of fact the trial court made and the trial court's conclusion that she waived her right to collect the child support arrearages. We affirm and hold the trial court could reasonably have concluded mother waived her right to collect the child support arrearages.

FACTS

The parties' son was approximately 19 months old when they divorced in New Mexico in 1976. Mother was awarded sole

custody of the parties' son and father was awarded reasonable visitation rights. Father was also ordered to pay $100 per month in child support.

In March 1978, mother remarried and moved to Texas. Father claimed that shortly before this move, mother told him she did not want his money or for him to ever see their child again. Mother denied this. Instead she claimed she sent father a certified letter giving her sister's address in Carlsbad, New Mexico, as a forwarding address and informing father he could deposit his child support payments in a savings account mother opened in Carlsbad before she moved to Texas. After she moved to Texas, mother changed the child's last name without notifying father.

While she lived in Texas, mother filed a URESA petition in New Mexico for child support arrearages that had accrued since February 1978. *See* NMSA 1978, §§ 40–6–1 to 40–6–41 (Repl.1986). She moved to Oklahoma during the pendency of this proceeding. The trial court conducted a hearing on mother's URESA petition in October 1978. Father appeared at this hearing and claimed mother had denied him visitation since March 1978. Mother did not appear at the hearing. The trial court found father had deposited $600 in a savings account in New Mexico, which represented child support arrearages that had accrued through the date of the hearing on mother's URESA petition. The trial court ordered father to give this money to mother when he picked up the child for a thirty-day visitation, and to continue to deposit $100 per month into the savings account for child support. Mother testified she received a copy of this order while she was living in Oklahoma. Both father and mother testified that their understanding of the October 1978 order was that father was not obligated to pay any child support until mother allowed him a thirty-day continuous visit with the child. This visit never occurred. Nevertheless, father continued to deposit $100 per month into the savings account for approximately two years thereafter, at which time he withdrew the funds due to financial difficulties.

Between March 1978 and December 1978, mother moved five times, two moves within Texas, and three moves within Oklahoma. Father, his parents, and mother's parents lived in Carlsbad during this time. Father testified he did not see the child during this time and that he made some efforts to locate the mother through her family, but they were uncooperative. Mother testified she did not "think to" inform father of her various moves and that she did not encourage the child to have any contact with her father during this time. She also testified the only contact she had with father during this time was the March 1978 letter she sent him telling him where he could deposit his child support payments, even though she returned to Carlsbad each year for vacation and allowed her parents and father's parents to see the child. She also testified she never informed father of her trips to Carlsbad. Father testified his parents did not tell him of their visits with the child until several months after they occurred. Father also testified his parents told him in December 1987 that mother had "led them to believe" she would deny them visitation if they told father of her trips to Carlsbad. Mother moved back to Carlsbad in December 1987, and shortly thereafter commenced efforts to collect child support between October 1978 and when she filed the petition in March 1988 for the child support arrearages that had accrued since October 1978. Father testified mother told him she intended to use the child support arrearages to buy a home.

On March 8, 1988, father filed a petition to change custody. On March 25, 1988, mother filed a petition for child support arrearages that had accrued since October 1978. On July 22, 1988, the trial court awarded the parties joint custody of the child and ordered father to pay $100 per month in child support. This order is not at issue in this appeal. On August 11, 1988, the trial court entered an order denying mother's petition for child support arrearages, finding that she waived her right to collect them. It is from this order that wife appeals. We set out other facts as they become relevant to our discussion.

DISCUSSION

Mother challenges some of the trial court's findings of fact as not supported by substantial evidence and claims the trial court should have adopted her requested findings of fact and conclusions of law. In determining whether a trial court's findings of fact are supported by substantial evidence, we view the evidence in the light most favorable to support the finding, and we do not consider any evidence unfavorable to the finding. *See Trujillo v. Romero,* 82 N.M. 301, 481 P.2d 89 (1971). We do not reweigh the evidence or substitute our judgment for the trier of fact. *See Sanchez v. Homestake Mining Co.,* 102 N.M. 473, 697 P.2d 156 (Ct.App. 1985). The duty to weigh the credibility of witnesses and to resolve conflicts in the evidence is for the trial court, not this court. *See Dibble v. Garcia,* 98 N.M. 21, 644 P.2d 535 (Ct.App.1982). We liberally construe a trial court's findings in determining whether they support the trial court's judgment. *See Arnold v. Ford Motor Co.,* 90 N.M. 549, 566 P.2d 98 (1977). An erroneous finding of fact is not a basis for reversal if it is unnecessary to the trial court's decision. *See Newcum v. Lawson,* 101 N.M. 448, 684 P.2d 534 (Ct.App.1984). We will affirm a trial court's decision when it reaches the correct result for the wrong reason. *See H.T. Coker Constr. Co. v. Whitfield Transp., Inc.,* 85 N.M. 802, 518 P.2d 782 (Ct.App.1974). Where the trial court's findings and conclusions are supported by the evidence, it is not error to deny requested findings and conclusions to the contrary. *See Wright v. Brem,* 81 N.M. 410, 467 P.2d 736 (Ct.App.1970).

The findings mother challenges on appeal that we determine are necessary to support the trial court's decision are findings 8, 10, 11, and 13. *See Newcum v. Lawson.* Therefore, we do not address the other findings mother challenges on appeal. *See id.* Moreover, since we decide with some modifications that these findings are supported by the evidence and they support the trial court's decision, we conclude the trial court did not err in refusing mother's requested findings and conclusions. *See Wright v. Brem.*

The trial court's finding number eight states mother had not asked father for child support since October 1978, she did not collect any of the money father deposited in the savings account in Carlsbad for two years, and she did not allow the child to contact father for ten years. Mother challenges the first part of this finding that she had not asked father for child support since October 1978. While admitting she did not ask father for child support from October 1978 until she returned to Carlsbad in December 1987, she claims this finding lacks evidentiary support because of her efforts to collect child support after returning to Carlsbad in December 1987. It is clear from the record and the transcript that this finding was meant to apply between October 1978 and when mother began her efforts to collect child support arrearages after she moved back to Carlsbad in December 1987. Findings are not to be construed with the strictness of special pleadings; in the case of ambiguous findings, an appellate court is bound to indulge in every presumption to sustain the judgment. *Ledbetter v. Webb,* 103 N.M. 597, 711 P.2d 874 (1985). *See also Arnold v. Ford Motor Co.*

Mother also challenges the trial court's finding number 10 which states mother told father in October 1978 she would not allow a thirty-day continuous visitation and that she did not want his money or for him to ever see the child again. This finding is undoubtedly based on father's testimony because he was the only one to testify about this conversation. Although the date contained in this finding is not supported by the evidence because father testified this conversation took place shortly before mother moved to Texas in March 1978, the date is not material to the ultimate finding concerning the substance of the conversation. Father's testimony provides substantial evidence to support the material portions of this finding. Findings of fact adopted by the trial court are to be construed so as to uphold rather than defeat the judgment, and, if from the facts

found, other necessary facts to support the judgment may reasonably be inferred, the trial court's judgment will not be disturbed. *Newcum v. Lawson,* 101 N.M. 448, 684 P.2d 534 (Ct.App.1984).

The trial court's finding number 11 states that father made reasonable efforts to find the child and paid $100 into the savings account in Carlsbad for over two years and then stopped. Mother challenges the first part of this finding that father made reasonable efforts to find the child. Mother seems to argue the evidence presented at the hearing would only support a finding that father made no efforts to locate the child. Mother relies on the evidence that she left her sister's forwarding address when she moved to Texas in March 1978, and that father never sent her anything through her sister's address or asked her sister where she was. However, father testified that, when he attempted to contact mother's family concerning mother's whereabouts, they were uncooperative.

Mother also relies on evidence that father had her address in Pittsburg, Texas, when she filed the URESA proceedings. However, mother testified she moved from Pittsburg, Texas, to Chickasha, Oklahoma, during the URESA proceedings. Father testified that, when the district attorney wrote to the state of Texas concerning his visitation rights, the state of Texas replied by stating mother did not live at the address they had for her anymore.

She also relies on the evidence that father read an article in the newspaper about her loss of a baby in 1980 while she lived in Elmore City, Oklahoma, and that she continued to live there until 1984, without father making any attempts to contact her there. However, the trial court had before it other evidence of mother's various moves without notifying father of them and father's limited financial means.

Mother further relies on evidence that father's parents knew where the child was and that father knew they were in contact with the child but that he never made any attempt to obtain any information from them about mother's whereabouts. However, father testified his parents did not tell him of mother's visits to Carlsbad until several months after they occurred, and that in December 1987, he learned that his parents were led to believe mother would not let them see the child if they informed father of mother's visits to Carlsbad.

We believe, based on the testimony before it, that the trial court could reasonably find that father made reasonable efforts to locate the child. *See Trujillo v. Romero* (appellate court does not consider evidence unfavorable to the finding). *See Evans Prod. Co. v. O'Dell,* 96 N.M. 500, 632 P.2d 735 (1981) (on appeal appellate court indulges all reasonable inferences in support of the trial court's findings).

Mother also argues there is no evidence supporting the trial court's finding number 13 that she willfully, intentionally, and maliciously kept father from seeing the child by refusing to allow him to contact father and by her refusal to notify father of her address whenever she moved. This contention is without merit because the finding is supported by mother's own testimony that she did not "think to" notify father of her various moves, that she never encouraged the child to have any contact with father, and her visits to Carlsbad without notifying father. In addition, father's testimony that mother told him prior to her move to Texas in March 1978 that she did not want him to ever see the child again together with his testimony that he did not see the child for almost ten years also provides support for this finding. The trial court could reasonably find mother's actions were those of a mother trying to conceal her child from his father. *See Trujillo v. Romero* (appellate court does not consider evidence unfavorable to the finding where other evidence exists to support the finding). We have reviewed the other contentions mother makes under this point and find them to lack merit.

Mother claims the trial court's conclusion that she waived the child support arrearages is erroneous. *See Whitehurst v. Rainbo Baking Co.,* 70 N.M. 468, 374 P.2d 849 (1962) (conclusions of law are reviewable on appeal). We believe the issue is, under the facts as found by the trial court, whether

the trial court could conclude that mother waived her right to the child support arrearages. *See id.*

Mother characterizes this case as one where the trial court denied her petition for child support arrearages because she denied father visitation. She, in effect, argues denial of visitation is not a defense as a matter of law to her petition for child support arrearages. Father argues the trial court did not recognize denial of visitation as a defense to mother's petition for child support arrearages. Instead, father contends the court based its decision that mother waived her right to collect the child support arrearages on other factors. It is unclear from the trial court's findings and conclusions whether it recognized denial of visitation as a defense to the child support arrearages or whether it decided mother waived her right to collect child support arrearages for reasons other than her denial of visitation. For this reason, and because the duty to pay child support is so important in New Mexico, we address whether the trial court could have denied mother's petition under both theories. *See H.T. Coker Constr. Co. v. Whitfield Transp., Inc.* (appellate court will affirm trial court's decision if it reaches correct result for wrong reason).

Whether Denial Of Visitation Constitutes A Defense To Collection Of Child Support Arrearages

Although courts cannot retroactively modify a child support order, New Mexico recognizes that any valid defense may be raised in a proceeding for enforcement of a child support order. *See Mask v. Mask,* 95 N.M. 229, 620 P.2d 883 (1980). Mother relies on *Fullen v. Fullen,* 21 N.M. 212, 153 P. 294 (1915), and *Dillard v. Dillard,* 104 N.M. 763, 727 P.2d 71 (Ct.App. 1986), in support of her contention that denial of visitation is not a defense to the payment of child support arrearages. However, these cases are distinguishable because they primarily involved modifications of a noncustodial parent's ongoing or future support obligations to enforce visitation. *Compare Lindsey v. Lindsey,* 6 Haw.App. 201, 716 P.2d 496 (1986) (distinguishing between past due and not yet due support payments, court held rule that mother cannot agree with father to waive right to collect court ordered child support payments applies only to not yet due child support payments). *Accord Brannock v. Brannock,* 104 N.M. 385, 722 P.2d 636 (1986) (parties cannot agree to modify future support payments).

Dillard also recognized that courts are authorized to withhold child support to enforce visitation only in extreme circumstances. *See id.* at 768, 727 P.2d at 76. Moreover, the educational trust set up in *Dillard* by the trial court out of father's accumulated child support arrearages was struck down because it provided for support of the children past the age of majority, not because the court did not recognize denial of visitation as a defense to payment of child support arrearages. *See id.* at 766, 727 P.2d at 74. Mother also relies on *Brannock.* However, this case did not address the issue of whether denial of visitation is a defense to the payment of child support arrearages. Therefore, we have concluded this is an issue of first impression in New Mexico.

Our research from other jurisdictions that have addressed this issue reveals a split of authority. Some jurisdictions hold denial of visitation is a defense to the payment of child support arrearages. *See, e.g., Sharum v. Dodson,* 264 Ark. 57, 568 S.W.2d 503 (1978); *Lamagro v. Murray,* 107 Misc.2d 579, 435 N.Y.S.2d 501 (1980). Other jurisdictions hold it is not a defense. *See, e.g., Hagstrom v. Smith,* 148 Ga.App. 18, 251 S.E.2d 27 (1978); *Jacot v. Jacot,* 37 Or.App. 803, 588 P.2d 122 (1978). Some jurisdictions hold it is a defense in extreme cases where, for example, the custodial parent conceals his whereabouts. *See, e.g., Commonwealth ex rel. Zercher v. Bankert,* 266 Pa.Super. 595, 405 A.2d 1266 (1979); *Commonwealth ex rel. Chila v. Chila,* 226 Pa.Super. 336, 313 A.2d 339 (1973).

We believe the better approach is to follow the rule that denial of visitation is generally not a defense to collection of child support arrearages except in those

extreme cases where, for example, the noncustodial parent against whom the arrearages are sought to be enforced can prove the custodial parent concealed his whereabouts and the noncustodial parent made reasonable efforts to locate the custodial parent. *See Sharum v. Dodson* (father presented uncontradicted evidence that he thought mother had left the state and he did not know where she was); *Commonwealth ex rel. Chila v. Chila* (custodial parent concealed whereabouts). We also believe this is in accordance with New Mexico case law. *Compare Dillard v. Dillard* (courts are authorized to withhold support to enforce visitation only in extreme cases). However, we caution a noncustodial parent finding himself in this type of situation that the better practice would be for him to immediately move the trial court for a reduction in child support or some other appropriate relief rather than allowing the arrearages to accrue.

Since the trial court, in effect, found that mother concealed her whereabouts during the time in question and father made reasonable efforts to locate her, then we affirm the trial court's judgment on the basis that it could have concluded these circumstances constituted a defense to mother's petition to collect the child support arrearages that accrued during this time. *Compare Dillard v. Dillard; Sharum v. Dodson. See H.T. Coker Constr. Co. v. Whitfield Transp., Inc.* (we will affirm trial court's decision if it is right for any reason).

Waiver

Relying on *Brannock,* mother argues the trial court erroneously concluded she waived her right to collect the child support arrearages because of an absence of an agreement between the parties supported by consideration. She argues there can be no such thing as a "continuing" or "ongoing" waiver. She claims one must be able to point to a certain moment in time when the parties agreed that child support arrearages accrued up to the time of the agreement would be waived. She argues that one must then be able to demonstrate the agreement was supported by sufficient consideration and it does not infringe on the rights of third parties or is not against public policy. Mother argues only under these circumstances can a finding of waiver be made.

Father argues mother's interpretation of *Brannock* completely rewrites the definition of waiver in New Mexico. Father argues *Brannock* discussed two types of waiver. He argues that under *Brannock* waiver can arise from mutual agreement of the parties, which requires consideration, or from acts or conduct inconsistent with claiming a legal right, which does not require consideration. He claims *Brannock* is distinguishable from this case on its facts because it involved a mutual agreement between the parties for modification of child support arrearages already accrued supported by adequate consideration while this case involves a waiver arising from mother's intentional acts and conduct inconsistent with claiming her right to collect the child support arrearages. Although it is unclear from his brief, father also seems to argue parties can agree to waive future child support payments.

We do not completely agree with either parties' interpretation of *Brannock.* The trial court in *Brannock* decided mother waived her right to child support arrearages based on an agreement between the parties that mother would waive her right to the child support arrearages already accrued if father would begin to pay regular child support payments in a lesser amount than originally ordered. The trial court also modified father's future child support obligation based on this agreement. On appeal from this court, our supreme court, distinguishing between ongoing or future support obligations and child support arrearages already accrued and noting mother did not attack the trial court's finding that the agreement was supported by sufficient consideration, affirmed the trial court and held a valid waiver of child support arrearages can be made by the person who provided the children with support, but only where there is evidence of consideration for such waiver and where such waiver does not infringe on the rights of others.

With respect to the trial court's modification of father's future support obligation based on the parties' agreement, the supreme court, noting that parties cannot agree to waive future child support obligations, affirmed because mother never claimed error in this ruling.

We disagree with mother's interpretation of *Brannock* to the extent she suggests a valid waiver of child support arrearages can only occur where there is a mutual agreement between the parties supported by adequate consideration which does not infringe on the rights of others. We agree with father's interpretation of *Brannock* that waiver can also occur from acts and conduct inconsistent with claiming the legal right because the *Brannock* court acknowledged both before differentiating between voluntary surrender or relinquishment of a legal right and intentional action inconsistent with claiming a legal right.

Therefore, our interpretation of *Brannock* is that an agreement to waive child support arrearages already accrued constitutes a valid waiver to collect these arrearages as long as the agreement is supported by sufficient consideration and does not infringe on the rights of others. *See also Brown v. Jimerson,* 95 N.M. 191, 619 P.2d 1235 (1980) (waiver of contract right requires consideration or a written instrument). However, waiver of child support arrearages or the right to ongoing support can also arise from intentional conduct or acts inconsistent with claiming the legal right. *See Brannock v. Brannock.* No consideration is required to support this type of waiver. *See id. Compare Malekos v. Chloe Ann Yin,* 655 P.2d 728 (Alaska 1982) (observance of contract principles seems unnecessary and undesirable when waiver at issue concerns the obligation to pay future child support payments because consideration can always be inferred by noncustodial parent's failure to pursue opportunity to obtain judicial modification of the support obligation). However, parties cannot agree to waive future child support obligations because this is a matter to be determined by the courts. *See Brannock v. Brannock. Accord Lindsey v. Lindsey.*

Under our interpretation of *Brannock,* the issue in this case is whether there was an existing right, a knowledge of its existence, and such conduct by mother as to warrant an inference of the relinquishment by her of her right to collect the child support payments during the time in question. It is undisputed that the first two elements exist—mother had knowledge of an existing right to collect the child support payments each month as they became due. The question is whether the trial court could find mother waived her right to collect these child support payments by her acts or conduct. *See Brannock v. Brannock.*

We hold the trial court could properly conclude that mother waived her right to collect the child support payments during the time in question, based on its finding that in 1978 mother told father she did not want his money or for him to ever see the child again, and its finding that mother never asked father for child support during the time in question. *See Cordova v. Lucero,* 129 Ariz. 184, 629 P.2d 1020 (Ct.App. 1981) (mother waived claim for disputed child support arrearages by writing letter to father advising him she did not want his support and that she was going to have her husband adopt the children); *Kaminski v. Kaminski,* 8 Cal.App.3d 563, 87 Cal.Rptr. 453 (1970) (same except mother orally told father she did not want his support and mother denied father visitation rights); *Malekos v. Chloe Ann Yin* (trial court erroneously ordered father to pay child support arrearages during period of time waiver was in effect where mother told father she wanted nothing to do with him and did not want child support and mother had numerous contacts with father's family during which time she never expressed an interest in collecting child support from father).

Mother argues the fact she filed her URESA petition in 1978 for child support arrearages, after her conversation with father indicates she did not intend to waive her right to collect the child support payments. *See id.* (although custodial parent may waive ongoing or future child support

payments, custodial parent may retract the waiver at any time to enforce the support obligation for the period of time after the custodial parent withdraws the waiver).

Under the particular facts of this case, we reject this argument. Father suggests the reason mother filed her URESA petition while she lived in Texas is that mother could deny father visitation while at the same time collect child support from him because the trial court had no jurisdiction to enforce father's visitation rights in the URESA proceeding. We believe this would be a reasonable inference for the trial court to make from the evidence presented and its other findings.

In its October 1978 order in mother's URESA proceeding, the trial court found father had deposited $600 in a savings account in Carlsbad, New Mexico, which represented child support arrearages that had accrued through the date of the hearing on mother's URESA petition. The trial court ordered father to turn these funds over to mother when he picked up the parties' child for a thirty-day visitation. Father testified this visitation never occurred because mother never notified him of her address in order for him to pick up the child for a thirty-day visitation, and that he subsequently withdrew the funds in the savings account approximately two years later. Mother waited almost ten years before attempting to collect the child support arrearages from father in this proceeding. Although mother arguably retracted her waiver when she filed her URESA petition in 1978, *see id.*, she never collected the funds in the savings account. So, under this view of the facts, mother's filing of the URESA petition was not necessarily inconsistent with her statement to father that she did not want his money or for him to ever see the child again. Therefore, the trial court could conclude mother still intended to waive her right to ongoing or future child support payments despite the fact she filed the URESA petition.

We also believe it relevant that *both* parties testified their understanding of the terms of the October 1978 order resulting from mother's URESA proceeding was that father was not obligated to pay any child support until mother allowed him a thirty-day continuous visit with the child. Since mother refused to allow the visitation, the trial court could conclude she intended to waive her right to the child support payments accruing during this time. *Compare Kaminski v. Kaminski.*

Based on the foregoing, we affirm the trial court's judgment.

IT IS SO ORDERED.

DONNELLY and APODACA, JJ., concur.

781 P.2d 1178

Trinity BOWLES, Claimant–Appellant,

v.

LOS LUNAS SCHOOLS, and New Mexico Public School Insurance Authority, Respondents–Appellees.

No. 10813.

Court of Appeals of New Mexico.

Sept. 26, 1989.

Certiorari Denied Oct. 27, 1989.

Lorenzo A. Chavez, Martin J. Chavez, Chavez Law Offices, Albuquerque, for claimant-appellant.

Carlos G. Martinez, Butt, Thornton and Baehr, P.C., Albuquerque, for respondents-appellees.

OPINION

MINZNER, Judge.

Claimant raises three issues on appeal from a compensation order of the Workers'

Compensation Division. The date of the accident was January 23, 1987. Therefore, these issues arise in part under prior law. *See* NMSA 1978, §§ 52–1–1 to 52–1–69 (Orig.Pamp. & Cum.Supp.1986) (the Interim Act); *see also* NMSA 1978, § 52–4–1 (Repl. Pamp.1987). First, she contends the hearing officer erred in determining her to be partially rather than totally disabled. Second, she contends the hearing officer erred in failing to find a safety device violation. Third, she contends the hearing officer erred in not ordering employer to pay the bills of Dr. Sanchez, a family practitioner; Dr. Hinkeldey, a chiropractor; and Dr. DeBlassie, a psychologist. We affirm.

BACKGROUND.

On January 23, 1987, claimant was working as a school teacher for the Los Lunas public schools in a portable classroom building. The entrance to the classroom is two to three feet off the ground. There is a platform in front of the doorway, with some stairs and a ramp leading from the ground to the platform. The platform had a handrail; the stairs did not, although both the platform and the stairs at other portable classrooms had handrails. Claimant was pushed and fell off the platform to the ground. As a result of the fall, she broke one of the bones in her right foot, sustained a concussion, and strained her neck and back.

Shortly after the injury, claimant was seen by Dr. Ramaswamy, who operated on her right foot. In late April or early May 1987, claimant's care was transferred from Dr. Ramaswamy to Dr. Boyd, who provided follow-up care for the injury to her foot and also prescribed treatment, primarily physical therapy and medication, for claimant's complaints concerning her neck and cervical spine. In August 1987, Dr. Boyd became concerned that some of claimant's difficulties were a result of a psychological condition and recommended claimant be seen by a psychologist. Claimant saw Dr. Yeo, a neuropsychologist, who evaluated claimant to determine whether some of her difficulties were caused by the residual effects of the head injury. Employer paid the bills of these three doctors.

At the hearing before the hearing officer, both parties requested a finding that claimant had reached maximum medical improvement on August 1, 1987. Thus, the primary dispute between the parties was whether and to what extent claimant was disabled on and after that date. Claimant argued that she had suffered a psychological impairment as a result of a physical impairment and that in combination these injuries rendered her totally and permanently unable to earn a comparable wage. *See* § 52–1–25. The hearing officer found that claimant had suffered a permanent physical impairment, that she had reached maximum medical improvement, and that her psychological condition did not increase her disability.

At the hearing, claimant also argued that the employer should be required to pay the medical bills of Drs. Sanchez, Hinkeldey, and DeBlassie. Dr. DeBlassie is a psychologist who testified for claimant at the hearing. He performed the same type of evaluation as Dr. Yeo and came to similar, although not identical, conclusions. Dr. Hinkeldey is a chiropractor. Claimant sought treatment from him while she was still under the care of Dr. Boyd. Employer's insurance carrier notified both claimant and Dr. Hinkeldey that it would not authorize treatment by Dr. Hinkeldey. Dr. Hinkeldey never actually treated claimant; instead, he recommended a course of treatment that was never started. In August 1987, while still under the care of Dr. Boyd, claimant saw Dr. Sanchez, a family practitioner, for the problems with her neck and cervical spine. Dr. Sanchez prescribed muscle relaxants and referred claimant to a specialist.

The hearing officer found that the employer provided adequate medical services and that the services provided by the other doctors were not reasonable. He also rejected a requested finding that Dr. Boyd's services were unsatisfactory.

EXTENT OF DISABILITY.

Under Sections 52–1–24 and 52–1–25 of the Interim Act, disability is defined in terms of "permanent physical impairment." Under Section 52–1–24, compensation for

"permanent total disability" requires evidence of a permanent physical impairment, as a result of which the worker is wholly unable to earn comparable wages or salary. Under Section 52–1–25, compensation for partial disability requires evidence of a permanent physical impairment, as a result of which the worker has an anatomic or functional abnormality existing after the date of maximum medical improvement. By express statutory provision, an anatomic or functional abnormality must be based on "a medically or scientifically demonstrable finding as presented in the American medical association's guides to the evaluation of permanent impairment." § 52–1–25.

The threshold question under either section is whether the worker suffered a "permanent physical impairment." Here, the hearing officer found that claimant suffered a 25% permanent partial disability. That finding has not been challenged. He also found that there has been "no increase in the impairment rating or partial disability rating as a result of the Claimant's treatable psychological condition."

The last sentence of Section 52–1–24 provides that " '[p]hysical impairment' does not include impairment of function due solely to psychological or emotional conditions, including mental stress." On appeal claimant makes a persuasive argument that the last sentence of Section 52–1–24 does not exclude physical impairment based on psychological injury that arises out of a physical injury. We assume, but need not decide, that she is correct. In this case, however, the hearing officer's finding can be read to mean that the psychological injury at issue was not permanent.

Findings of fact are to be liberally construed in support of the judgment. *H.T. Coker Constr. Co. v. Whitfield Transp., Inc.,* 85 N.M. 802, 518 P.2d 782 (Ct.App. 1974). The findings are sufficient if a fair construction of all of them, taken together, supports the trial court's judgment. *Id.* Construed liberally, the findings support a conclusion that the hearing officer found the psychological condition was temporary rather than permanent. If there is substantial evidence to support the finding that claimant's condition was not permanent, Section 52–1–24 is not applicable.

Dr. Yeo gave claimant a battery of psychological tests. Based on those tests, Dr. Yeo described her as having difficulties in some areas of cognitive function, particularly in the areas of attention and concentration, speed of responses, and the organization of problem-solving efforts. He characterized these as "mild but definite." In addition, based on the tests, Dr. Yeo believed claimant had a tendency to somatic complaints under stress.

In Dr. Yeo's opinion, it was more probable than not that claimant's cognitive difficulties were not the result of the concussion but, rather, were secondary to the stress. While Dr. Yeo could not rule out brain damage entirely, it was more probable than not that there was no organic brain damage. Claimant's difficulties met the diagnostic criteria for post-traumatic stress disorder, which is usually temporary. She needs psychotherapy. The problems claimant was experiencing were precipitated by the accident and they would be impediments to her efficient functioning as a school teacher.

Dr. DeBlassie's testimony was similar. Dr. DeBlassie also gave claimant psychological tests. Dr. DeBlassie was of the opinion that at that point she had no organic brain damage. She has extreme reactions to physical difficulties and a tendency to hypochondria. Dr. DeBlassie diagnosed her as suffering from an adjustment disorder with depressed moods. This was probably a temporary situation, although it could be exacerbated by the lack of treatment. She needed psychological treatment and her psychological condition was sufficiently disabling that she could not return to work as a school teacher. In Dr. DeBlassie's opinion, to a reasonable medical probability, claimant's psychological problems were caused by the accident and injury.

The hearing officer found that "[t]he psychological condition of the Claimant arising out of the injury sustained has not resulted in total permanent disability because Claimant can return and has been

asked to return to work by the employer." Claimant challenges the portion of the finding concerning her ability to return to work as not based upon substantial evidence because both psychologists, Dr. Yeo and Dr. DeBlassie, testified she was suffering from a psychological condition that totally prevented her from working.

However, under the circumstances of this case, we do not need to reach this issue. The issue of whether or not claimant is able to earn comparable wages would arise only if the hearing officer had found she suffered from a permanent physical impairment. *See* § 52–1–24(A). The hearing officer in this case found a partial disability. The definition of partial disability does not turn on whether or not claimant is able to earn comparable wages; rather, it is concerned solely with whether she suffers from a permanent physical impairment within the meaning of the statute. *See* § 52–1–25.

In this case, the hearing officer decided the physical disability was permanent but partial and the psychological condition was temporary. On appeal, the question is whether the findings are supported by substantial evidence, not whether the evidence would support a different result. *Bagwell v. Shady Grove Truck Stop,* 104 N.M. 14, 715 P.2d 462 (Ct.App.1986). The testimony of the two psychologists is substantial evidence to support the findings.

SAFETY DEVICE VIOLATION.

Claimant argues that there was evidence below that the handrails on the stairs were in general use in the industry, specifically photographs that showed other portable classrooms at the same school equipped with handrails on the stairs as well as the platform. Claimant admits this is the only evidence that handrails were in general usage.

In *Romero v. H.A. Lott, Inc.,* 70 N.M. 40, 369 P.2d 777 (1962), the supreme court discussed the term "general usage." It held that the question of custom or usage is a matter of fact, not opinion, and can be established by testimony of specific uses or by evidence of general practice of contractors. *Id.* at 43, 369 P.2d at 780. It defined the term as prevalent, usual, widespread, or extensive, though not universal. *Id.* at 45, 369 P.2d at 781. In *Romero* the requirement of general usage of railings around scaffolds was established by the testimony of a witness from the carpenter's union whose job involved overseeing safety at job sites. The witness testified he had commonly seen railings around scaffoldings during his six years of visiting construction sites.

Romero relied on *Jones v. International Minerals & Chem. Corp.,* 53 N.M. 127, 202 P.2d 1080 (1949), for the proposition that general usage could be established by testimony of specific uses. However, in *Jones,* the supreme court held that when there are three potash mines in a county, testimony that the device is used in one does not constitute proof of general usage in the industry. Claimant does not point to testimony in this case concerning other schools in the school district. Under *Jones,* the fact that handrails were in use in her school does not establish that they were in general usage. Thus, we conclude the hearing officer did not err in failing to increase the compensation award under NMSA 1978, Section 52–1–10(B) (Repl. Pamp.1987).

Claimant's second argument appears to be an attack on the finding that the presence of handrails would not have prevented the injuries. It is not necessary to reach this argument, because claimant has not shown that handrails were in general usage.

PAYMENT OF MEDICAL BILLS.

Claimant's argument on appeal concerns employer's obligation to provide medical services. The argument has both a statutory construction and a factual aspect. The relevant statutes are Sections 52–1–49 and 52–4–1. Section 52–1–49 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 provisions for, and has at the service of the workman at the time of the accident, *adequate* surgical, hospital and 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 surgical, medical or hospital services or medicine than those so provided; provided, however, that the employer furnishing such surgical, medical and hospital services and medicines shall be liable to the workman for injuries resulting from neglect, lack of skill or care on the part of any person, partnership, corporation or association employed by the employer to care for the workman. In the event, however, that any employer becomes so liable to the workman, it shall be optional with the workman injured in such a manner to accept the foregoing provisions and retain the right to sue the person, partnership, corporation or association employed by the employer who injures the workman through neglect, lack of skill or care. [Emphasis added.]

Section 52–4–1 provides in pertinent part:

C. Whenever any health services contract issued, delivered, issued for delivery, entered into, amended or renewed after the effective date of this section provides for payment, reimbursement or indemnification for any service which is within the lawful scope of practice of a health care provider in this state, such payment, reimbursement or indemnification shall not be denied when such service is rendered by the health care provider, *provided such treatment is related to the injury and is reasonable and necessary.* Nothing contained in the Workmen's Compensation Act ... or the New Mexico Occupational Disease Disablement Law shall be construed to deny or limit the right of a workman, if he has availed himself of such services as are provided pursuant to those acts and such services have *proven unsatisfactory,* to seek the services of a health care provider; provided that the employer's payment, pursuant to this section, shall not constitute furnishing such services for purposes of Section 52–1–49 NMSA 1978. [Emphasis added; citation omitted.]

Claimant acknowledges that Section 52–1–49 requires employer to provide certain medical services and excuses the employer from any obligation to provide other medical services if the required services are provided. However, she argues that Section 52–1–49 has been modified by Section 52–4–1(C), *see Salcido v. Transamerica Ins. Group,* 102 N.M. 217, 693 P.2d 583 (1985), and that under that section an injured worker may change doctors or seek alternative treatment without demonstrating that the services being provided are unreasonable or inadequate. She asks us to construe the term "proven unsatisfactory" as defining a standard different from the standard of "unreasonable" or "inadequate." Factually, claimant contends that the hearing officer erred in rejecting her requested finding that the services provided by one of employer's doctors were unsatisfactory.

The hearing officer adopted three relevant findings: "[t]he employer did provide medical care"; "[t]he provision of medical services by employer was adequate"; and "[t]he Claimant has sought the care of Dr. Hinkelday [sic], Dr. Deblassie [sic] and Dr. Rolland Sanchez. [This care] was not reasonable as the employer has provided adequate medical services by Drs. Ramasuamy [sic], Yeo and Boyd." Additionally, claimant submitted requested findings of fact to the effect that the doctor bills of the three doctors should be paid. These two findings were rejected. The trial court's refusal to adopt a requested finding of fact is regarded as a finding against the party having a burden of proof on that issue. *Gallegos v. Wilkerson,* 79 N.M. 549, 445 P.2d 970 (1968).

It is the duty of the reviewing court to liberally construe doubtful findings to support the judgment. *Universal C.I.T. Corp. v. Foundation Reserve Ins. Co.,* 79 N.M. 785, 450 P.2d 194 (1969). Liberally construed, we view the hearing officer's findings as determining that the services pro-

vided by the employer were not "proven unsatisfactory" for purposes of Section 52–4–1(C).

The hearing officer apparently determined that if the services provided by the employer were adequate for purposes of Section 52–1–49(B), then they were not unsatisfactory for purposes of Section 52–4–1(C). Thus, this appeal raises two issues: (1) whether the hearing officer construed Section 52–4–1(C) correctly, and (2) whether there was sufficient evidence to support a finding that the medical services employer provided were adequate. We address the statutory construction issue first.

A. The Employer's Obligation to Provide Medical Services Under Sections 52–1–49 and 52–4–1(C).

The general medical services rule in workers' compensation cases is described by Prof. Larson 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 in dependent [sic] arrangements at the employer's expense.

2 A. Larson, *Workmen's Compensation Law* § 61.12(d) (1989) (footnotes omitted). New Mexico follows the general rule.

[3] In New Mexico an injured worker is precluded from seeking independent medical treatment at the employer's expense when the employer has indicated a willingness to furnish treatment and actively makes such services available. *Eldridge v. Aztec Well Servicing Co.*, 105 N.M. 660, 735 P.2d 1166 (Ct.App.1987). Section 52–1–49 sets forth our "medical services rule." *Id.* Section 52–1–49(A) imposes an affirmative obligation to pay for reasonable medical services. Section 52–1–49(B) provides that, if adequate services are provided, the employer is under no obligation to provide additional services. Section 52–1–49(B) also provides that an injured employee has the option to hold his or her employer liable for the negligence of doctors and other medical personnel who treated work-related injuries or to hold doctors and other medical personnel directly liable. *See Security Ins. Co. v. Chapman,* 88 N.M. 292, 540 P.2d 222 (1975).

■ We note that Section 52–1–49(A) requires the employer to pay for "reasonable" medical services, while Section 52–1–49(B) indicates the employer is obligated to pay for "adequate" medical services. Taken in context, the words "reasonable" and "adequate" appear to describe the same standard. *See generally Travelers Ins. Co. v. Hernandez,* 276 F.2d 267 (5th Cir. 1960) (in an action under the Texas Workmen's Compensation Act, the court appears to equate the term "reasonable" with the term "adequate").

■ We conclude that our medical services rule requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery. We now turn to the question of whether and how Section 52–4–1 modifies our medical services rule.

The title to 1983 N.M. Laws, Chapter 116 (§ 52–4–1) provides an insight to the legislative intent and purpose in adopting this statute, indicating that it was intended to extend the definition of "health care provider" within the context of a workers' compensation or occupational disease disablement insurance policy or health services contract and also to clarify a worker's right to choose health care providers.[1] Other portions of Section 52–4–1 address the definition of "health care provider" and "health services contract." Thus, we believe that Section 52–4–1(C) is our legisla-

1. The title reads: "Relating to Workmen; enacting a section of the NMSA 1978; providing for the right to choose health care providers; providing applicability to workmen's compensation and occupational disease disablement insurance; declaring an emergency."

ture's first attempt to address the question of a worker's right to choose his or her own doctor. While the legislature's intent is somewhat ambiguous, we believe it attempts to reconcile competing interests. In light of this court's cases applying our medical services rule, the supreme court's decision in *Salcido,* and the language used in Section 52–4–1(C), we conclude that Section 52–4–1(C) supplements, rather than modifies, Section 52–1–49.

The problems inherent in cases involving the furnishing of medical services result from the need to balance competing interests. *See* 2 A. Larson, *supra,* at § 61.12(b). One interest is that of the employer, who is responsible for payment. It has been suggested that the employer's continuous control over the nature and quality of medical services from the moment of injury tends to secure the maximum level of rehabilitation. *Id.* The other interest is that of the injured employee, who is the subject of the treatment provided. Understandably he or she ordinarily would prefer to choose a doctor as well as a hospital. *Id.*

In some states, the employer is required to give the employee a choice of doctors. *See, e.g., Buchanan v. Mission Ins. Co.,* 713 S.W.2d 654 (Tenn.1986). In others, if the injured employee becomes dissatisfied with the authorized physician, the employer must select another physician to treat the injured employee unless relieved of the obligation by a court order that determines a change in medical attendance is not in the employee's best interests. *See Hill v. Beverly Enters.,* 489 So.2d 118 (Fla.Dist.Ct. App.1986).

Until recently, New Mexico had no particular statutory provision authorizing a choice of doctors. However, as a matter of case law, we had interpreted our "medical services rule" as recognizing some exceptions. *See generally Montoya v. Anaconda Mining Co.,* 97 N.M. 1, 635 P.2d 1323 (Ct.App.1981). For example, we had recognized that an employee has a right to seek independent medical treatment at the employer's expense where the employer, although passively expressing a willingness to furnish medical treatment, fails to do so in fact. *Id.* at 5–6, 635 P.2d at 1327–28. In *Montoya,* we also acknowledged the existence of other exceptions. *Id.* at 6, 635 P.2d at 1328. One of those exceptions is where the medical services provided by the employer are not adequate. *See Travelers Ins. Co. v. Hernandez.*

In *Salcido,* the supreme court indicated that under Section 52–4–1(C) an employer must pay bills incurred by an injured worker for additional medical treatment from a recognized health care provider, provided such services are deemed reasonable and necessary, whether or not the worker has requested additional services from the employer. Based in part on this holding, the court reversed the district court's decision granting the employer's insurance company summary judgment and remanded the case for trial.

Under the first sentence of Section 52–4–1(C), if the workman avails himself of the services provided under a health services contract,[2] if those services are related to the injury, and if they are reasonable and necessary, then the employer is responsible for the bills. Under the second sentence, if the employer provides services that "prove unsatisfactory," then the employer is obligated to pay the reasonable and necessary cost of any other services procured by the worker that are related to the injury. However, under the last portion of the second sentence, the employer's obligation to pay for services procured by the worker does not make him liable, at the worker's option, for negligence in the performance of those services.

Claimant misconstrues *Salcido.* The argument made by the worker in *Salcido* seems to have been that the employer's passive willingness to furnish medical services was not sufficient to satisfy its statutory obligation to provide them, *see Garcia v. Genuine Parts Co.,* 90 N.M. 124, 560

2. Section 52–4–1(B) provides that a "health services contract" means a workers' compensation or occupational disease disablement insurance policy or contract that provides for "payment, reimbursement, or indemnification for treatment or care."

P.2d 545 (Ct.App.1977), and that the employer in fact had offered no more than passive willingness. The court held that the employer may be responsible for bills the worker incurs, provided treatment is related to the injury and is reasonable and necessary. Under *Salcido* this inquiry presents questions of fact.

We do not understand *Salcido* to have reached the issue of what the term "proven unsatisfactory" means. Thus, in *Salcido* the supreme court was not required to consider the statutory construction argument raised in this case.

The language adopted by the legislature in the second sentence of Section 52–4–1(C) does not provide an injured employee the right to select his or her own doctor in the first instance or a right to insist on a different doctor than the one provided by the employer unless the services of that doctor prove "unsatisfactory." *Cf. Buchanan v. Mission Ins. Co.; Hill v. Beverly Enters.* Rather, it seems to codify an exception acknowledged by this court in *Montoya:* that an employee may seek independent medical treatment at the employer's expense, if the medical services provided by the employer are not adequate. So construed, Section 52–4–1 is not inconsistent with Section 52–1–49.

It does not follow from a reading of both statutes that the legislature intended to make a distinction between reasonable, adequate, and satisfactory medical services. Rather, all three words appear to describe a single standard to which the employer is held. Thus, we conclude that the hearing officer did not err in construing the statute. In the event of the employer's failure to provide services in accordance with the statutory standard, the worker may seek the services of another health provider and require the employer to pay for such services, provided such treatment is related to the injury and is reasonable and necessary. The question of whether the employer has provided services in accordance with that standard is ordinarily a question of fact and depends on the circumstances of the particular case. In *Foremost Dairies, Inc. v. Industrial Accident Commission,* 237 Cal.App.2d 560, 47 Cal. Rptr. 173 (1965), the court noted that one of the tests adopted to ascertain whether an employee is entitled to reimbursement of medical treatment obtained from sources not furnished by the employer is that "the treatment received from [claimant's] own physician was a success, and that it was reasonably and seasonably necessary." *Id.* at 575, 47 Cal.Rptr. at 184 (*quoting Pacific Indem. Co. v. Industrial Accident Comm'n,* 220 Cal.App.2d 327, 333, 33 Cal. Rptr. 649, 653 (1963)). In order for the claimant to recover for the services she obtained from sources not furnished by the employer, she was required to prove (1) the services provided by the employer did not produce a positive result due to the care provided; (2) she obtained surgical, hospital, or medical facilities and attention which were successful; (3) the treatment was related to claimant's work-related injury; and (4) the treatment was reasonable and necessary. *See Lea County Good Samaritan Village v. Wojcik,* 108 N.M. 76, 766 P.2d 920 (Ct.App.1988). Thus, we now address the sufficiency of the evidence in this case.

B. Sufficiency of the Evidence.

The hearing officer specifically found that employer provided medical care and that the provision of medical services by employer was adequate. Claimant did not request a finding that all of the medical services provided by employer were inadequate. However, she did request a finding that Dr. Boyd's treatment was unsatisfactory. We review the evidence in support of that determination. *See generally DesGeorges v. Grainger,* 76 N.M. 52, 412 P.2d 6 (1966) (party who does not request findings is not entitled to a review of the evidence to support the findings).

In order for claimant to recover for the services she obtained from Dr. DeBlassie, Dr. Hinkeldey, or Dr. Sanchez, she was required to prove (1) the services provided by Dr. Boyd did not produce a positive result due to the care provided; (2) the treatment she obtained from one or more of the other doctors was successful; (3) the treatment was related to her work-related

injury; and (4) the treatment was reasonable and necessary. *See Foremost Dairies, Inc. v. Industrial Accident Comm'n.* In this case, there is no evidence to support a finding that the services Dr. Boyd provided failed to produce a positive result because of any error or omission on his part. Further, there is no evidence to support a finding that claimant's condition improved under the care of any of the other doctors. As a result, claimant failed to carry her burden of proof as to the first two elements required for the recovery she sought. *Cf. Beckwith v. Cactus Drilling Corp.*, 84 N.M. 565, 505 P.2d 1241 (Ct.App. 1972) (worker's testimony that he was dissatisfied is not sufficient to support a finding that services were unreasonable and inadequate, where the worker got no better under the care of the second doctor). Thus, the hearing officer did not err in rejecting the proposed finding.

CONCLUSION.

Employer's request for oral argument is denied. *See* SCRA 1986, 12-214(A). The decision of the hearing officer is affirmed.

IT IS SO ORDERED.

BIVINS, C.J., and DONNELLY, J., concur.

782 P.2d 82

Alfred Wayne MARCH, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 18357.

Supreme Court of New Mexico.

Oct. 30, 1989.

Rehearing Denied Nov. 21, 1989.

William Ivry, Santa Fe, for petitioner.

Hal Stratton, Atty. Gen., Santa Fe, for respondent.

OPINION

SOSA, Chief Justice.

This case is before us on writ of certiorari to the court of appeals. In a 2–1 decision (No. 10,561, March 16, 1989, Chaves, J., dissenting), the court of appeals affirmed the judgment of the district court finding petitioner, Alfred Wayne March, to be a habitual offender and imposing on him an enhanced sentence. Petitioner contends that the trial court violated his constitutional rights under the Double Jeopardy provisions of the federal and state constitutions, in that he had originally been sentenced for a crime and had begun serving time, when the court increased his sentence for that crime following his successful appeal of the conviction of another crime. Having considered petitioner's contentions, the State's response and the court of appeals' decision, we reverse the court of appeals, and remand the case to the trial court for proceedings not inconsistent with our ruling herein.

The proceedings below began with petitioner's conviction on September 4, 1985 of burglary (Count I) and unlawfully taking of a motor vehicle (Count II). Petitioner's conviction for Count II was affirmed. Petitioner's conviction for Count I was reversed, the case was remanded, and he was convicted a second time. The sentences imposed by the trial court at the time of first conviction were to run consecutively.

After the second conviction on Count I, the State filed a supplemental information alleging that petitioner was a habitual offender, and seeking an enhanced sentence for Count I. The trial court found petitioner to be a habitual offender and increased his sentence for Count I by eight years. Petitioner again appealed his conviction on Count I, and was again successful. The State entered a *nolle prosequi* on Count I, and filed a second supplemental information alleging that petitioner was a habitual

offender and seeking an enhanced sentence on Count II. The court again found that petitioner was a habitual offender and increased the sentence on Count II by eight years.

The court of appeals ruled that because the legislature made it mandatory for the State to seek enhanced sentencing when a convicted felon is a habitual offender (NMSA 1978, § 31–18–19 (Repl.Pamp. 1987)), the State was required to pursue enhanced sentencing as to Count II. Therefore, the court of appeals reasoned, proceedings under the second supplemental information were merely an extension of the proceedings under the first supplemental information. The second sentencing enhancement hearing, the court of appeals concluded, was not a trial for Double Jeopardy purposes, but was in effect the same proceeding as the first sentencing enhancement hearing continued into the future. The State, for its part, argues that it originally did not seek enhanced sentencing on Count II merely out of oversight. Nevertheless, the State concedes that, despite the mandatory tone of Section 31–18–19, the prosecutor has discretion to seek or not to seek enhanced sentencing.

It seems clear enough that, while charging a person as an habitual offender is mandatory, a prosecutor has discretion as to when to charge the defendant as an habitual offender so long as the trial court retains jurisdiction over the defendant. Sentencing may violate concepts of double jeopardy if not within objectively reasonable expectations of finality. *State v. Cheadle,* 106 N.M. 391, 393, 744 P.2d 166, 168 (1987). Here the defendant's objectively reasonable expectation of finality was violated by the State's filing the information as to enhanced sentencing after the defendant's earning of meritorious deductions brought his service of sentence to an end. A defendant's objectively reasonable expectation of finality in sentencing for double jeopardy purposes turns upon NMSA 1978, Section 31–18–19 (Repl.Pamp. 1987), which declares it is the duty of the district attorney to bring the habitual offender charge "at any time, either after sentence or conviction." We note that the statute does not say "after *serving* of sentence."

In *State v. Mayberry,* 97 N.M. 760, 643 P.2d 629 (Ct.App.1982), it was held that delay in bringing the habitual offender charge until after the defendant's conviction was summarily affirmed by the court of appeals, was not a due process violation, even though the prosecutor knew of the prior felony conviction before his conviction on the subsequent count.

In determining whether there is a point in time when the district attorney may no longer bring an habitual offender charge, we apply the same rationale relied upon in *State v. Baros,* 78 N.M. 623, 435 P.2d 1005 (1969), in which it was held that the court has authority to correct an irregular sentence at any time prior to when defendant has served his full sentence. The issue here, then, is expiration of the court's jurisdiction, not notice to the defendant.

Because of our earlier holding in *Lott v. Cox,* 76 N.M. 76, 412 P.2d 249 (1966), we find it necessary to distinguish that case from *Baros. Lott* involved an indeterminate sentencing statute; we now have determinative sentencing. Interpreting *Lott* retrospectively in light of *United States v. DiFrancesco,* 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), and *Cheadle,* the former statute created no expectation of finality in the length of sentence prior to the expiration of the maximum term. For example, a prisoner released on parole under the old system was subject to parole conditions for a period of time (at the discretion of the parole board) up to the remainder of his maximum term. NMSA 1953, § 41–17–31 (Repl.Pamp.1972).

Nevertheless, even interpreted in the above light, there remains a trace of ambiguity between our language in *Lott* and our opinion here. The language in *Lott* would permit sentence enhancement even had the parole board ordered the final discharge of a prisoner from parole status prior to the expiration of his maximum term. In constitutional terms, dicta in *Lott* seem to imply that the court's jurisdiction may be so extended because the defen-

dant's expectation of finality for double jeopardy purposes is determined solely with reference to the original sentence imposed by the trial court. Events transpiring subsequent to sentencing (e.g., discharge from parole) then would have no relevance in determining whether the original sentence was subject to enhancement.

Our holding herein, by contrast, includes in the determination of the defendant's reasonable expectation of finality the post-sentence award of good-time credits that result in a release date earlier than the absolute release date set under the sentencing authority of the court. In the light of post-*Lott* jurisprudence, the question thus is posed as follows: May the determination of a defendant's objectively reasonable expectation of finality take into account events transpiring subsequent to the imposition of the original sentence? We hold that it may.

Such a rule comports more fully both with common sense and precedent than the dicta in *Lott.* When a prisoner is discharged from custody, that individual has fully paid his or her debt to society arising from the commission of the offense upon which sentence and confinement issued. To hold otherwise creates an atmosphere of arbitrariness that is unfair to the prisoner and that undercuts the goals of the legislative and executive branches in rehabilitation and prisoner management as expressed in their good-time credit and parole policies.

The constitutional implications of *Lott* also would create a precedential anomaly. The *DiFrancesco* Court wrote:

> Although it may be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it * * * that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence.

449 U.S. at 139, 101 S.Ct. at 438. If, because of an act of Congress, a defendant must entertain at the time of sentencing the possibility of a subsequent sentence *increase,* there is no reason why, because of legislative and executive policies, a defendant could not also contemplate at the time of sentencing the possibility of a subsequent sentence *decrease.*

In short, there is no reason to fix the defendant's reasonable expectations of finality to the length of the original sentence when that period is subject to change after the defendant has begun serving it. For example, there is no doubt that the original sentence is subject to enhancement after the defendant has begun serving it and before he has been discharged from custody. We therefore conclude that the language in *Baros*—to the effect that the court has jurisdiction to change a sentence any time before the defendant has completed serving his sentence—better comports with double jeopardy values and post-*Lott* jurisprudence.

Accordingly, we reverse the court of appeals because, according to the stipulation of the parties filed September 19, 1989, March finished his sentence on January 22, 1987. The State filed its information to enhance sentence on April 7, 1987. Therefore, the court having lost jurisdiction to enhance the sentence on Count II, Petitioner should be released from custody, as he has completed serving all valid sentences imposed on him.

For the foregoing reasons, we reverse and remand for such proceedings as are not inconsistent with our ruling herein.

IT IS SO ORDERED.

RANSOM, BACA, LARRABEE and MONTGOMERY, JJ., concur.

782 P.2d 85

Charles H. LENZ, Plaintiff–Appellee,

v.

Chris CHALAMIDAS, Defendant–Appellant.

No. 17973.

Supreme Court of New Mexico.

Nov. 1, 1989.

Carl J. Schmidt, Albuquerque, for defendant-appellant.

Kemp, Smith, Duncan & Hammond, P.C., Mary Catherine McCulloch, John P. Eastham, Albuquerque, for plaintiff-appellee.

OPINION

LARRABEE, Justice.

This is an appeal from a jury verdict in the amount of $13,364.82 in favor of plaintiff-appellee, Charles H. Lenz, and from the trial court's award of attorney fees to plaintiff in the amount of $26,268.03. We affirm the jury verdict and remand to the district court for findings of fact and conclusions of law on the issue of attorney fees awarded at trial.

Lenz, a general contractor, filed this lawsuit to recover damages resulting from the breach of an oral agreement and to foreclose on the residence of defendant-appellant, Chris Chalamidas, pursuant to a materialman's lien. Evidence in support of the jury verdict is as follows: Lenz and Chalamidas entered into an oral "cost-plus 15%" agreement for certain construction work on Chalamidas' residence. The work began on August 1, 1986, and was completed December 20, 1986. Progress payments in the amount of $14,264.16 were made by Chalamidas. Upon completion, plaintiff submitted a final bill in the amount of $13,364.82, which was not paid after demand was made by plaintiff. Lenz recorded a second amended claim of lien on January 19, 1987, in the amount of $13,364.82 plus costs and attorney fees.

During cross-examination of Chalamidas, plaintiff introduced into evidence, over defendant's objection, two prior criminal convictions for commercial gambling. The first conviction was a guilty plea entered on December 4, 1981, and the second a guilty plea entered on January 28, 1982. In ruling the evidence admissible, the trial court stated:

> [I]t seems to me that his testimony * * * wasn't as believable as I thought it really should be. [Defendant] made some statements to the effect that he had never heard of the term "cost plus." That seems highly improbable. He made—commented he had never heard of getting a "ball park" figure. That's a rather common term that almost anybody in our society, I think, has heard of.
>
> He also indicated to the jury lack of knowledge about construction contracts and construction work, and yet, in the same breath, he tells of having owned 10 homes that he has remodeled and sold. And it seems highly improbable that he was being completely honest and forthright in his testimony, and, therefore, you felt if this case comes down to an issue as to the credibility of Mr. Lenz, that it would be important for the Jury then to appreciate the character of the Defendant.

Thereafter the jury returned a verdict for plaintiff. On July 29, 1988, a hearing was held on plaintiff's motion for attorney fees. The trial court awarded plaintiff attorney fees in the amount of $26,268.03, prejudgment interest of $2,583.51 and costs of $681.13.

On appeal, Chalamidas argues (1) the district court erred in admitting evidence in a civil contract case on defendant's prior criminal gambling convictions; and (2) the court abused its discretion in awarding exorbitant and excessive attorney fees in an amount double the jury verdict.

1. *Admissibility of Prior Convictions in a Civil Case*

Defendant claims the prior conviction evidence is inadmissible under Evidence Rule 404, SCRA 1986, 11–404; Rule 609, SCRA 1986, 11–609; and Rule 403, SCRA 1986, 11–403. We need not address defendant's

argument that evidence of a person's prior criminal record under Rule 404 is inadmissible to prove the character of a person or that a person acted in conformity with such character, because the trial court ruled the prior convictions admissible under Rule 609 to impeach the credibility of Chalamidas, and not under Rule 404.

Rule 609 provides for the admission of prior criminal convictions for the purpose of attacking the credibility of a witness, but with certain express limitations. A trial court must admit evidence of the conviction of a crime if the crime was (1) punishable by imprisonment in excess of one year and the court determines the probative value of admitting this evidence outweighs the prejudicial effect to the defendant, or (2) an offense, felony or misdemeanor, involving dishonesty or false statement.[1] *State v. Lucero,* 98 N.M. 311, 313, 648 P.2d 350, 352 (Ct.App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982). The charges of commercial gambling to which Chalamidas pled guilty in 1981 and 1982 carry the potential imprisonment in excess of one year, thus implicating subparagraph (A)(1) of Rule 609.

It is unclear from the case law in New Mexico whether the balancing provision of subsection (A)(1), applicable in criminal cases, was intended to apply to evidence of prior convictions for purposes of impeachment in civil cases. It is the phrase "to the defendant" that is ambiguous with respect to its applicability in civil cases. A literal reading of the rule allows a defendant in a civil case, but not a plaintiff, to complain about the use of his or her criminal record to impeach.

New Mexico's rule of evidence, Rule 609(A)(1) and (2), is essentially identical to Federal Rule of Evidence 609(a)(1) and (2). The Supreme Court has addressed this controversy in *Green v. Bock Laundry Mach. Co.,* — U.S. ——, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989). The Court stated in *Green* that a literal interpretation of the rule "that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant" is unacceptable and therefore the rule cannot mean what it appears to say as far as civil trials are concerned. After an exhaustive review of the legislative history of the rule, the Court concluded the ambiguity therein was a result of legislative oversight by an almost exclusive focus on criminal trials and criminal defendants when Congress drafted the rule. *See id.* at ——, 109 S.Ct. at 1990–92. That history, leading to the enactment of the rule as law, established that Congress intended only the defendant in a criminal case should be protected from unfair prejudice by the balancing requirement set out in Rule 609(a)(1). *Id.* at ——, 109 S.Ct. at 1992. Accordingly, the Court reasoned, in order to comport with the language, background and legislative history of the rule, the only witness who may demand a balancing of the prejudicial value of a prior conviction against its probative effect is the defendant in a criminal trial. *Id.* Thus, the Court held a judge must "permit impeachment of a civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony." *Id.* at ——, 109 S.Ct. at 1993. We are persuaded by the reasoning of the Supreme Court and conclude that the balancing provision in Rule 609 subparagraph (A)(1) should not apply to civil cases in New Mexico.

Another area of controversy with respect to prior conviction impeachment evidence in civil cases, also addressed in *Green,* focuses on the interrelationship between Rule 609 and Rule 403 and whether Rule 609 preempts Rule 403. Federal Rule

1. SCRA 1986, 11–609 reads:

A. General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime

(1) was punishable by death or imprisonment in excess of one (1) year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or

(2) involved dishonesty or false statement, regardless of the punishment.

of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." [2] Rule 403 is less restrictive than Rule 609. Evidence may be excluded under Rule 403 only if its probative value is *substantially* outweighed by its prejudicial effect. Moreover, a comparison of the wording of the two rules shows the burden of persuasion differs under them. A party opposing the use of evidence under Rule 403 has the burden of persuading the trial judge to exclude the evidence, whereas under Rule 609 the party seeking the use the evidence has the burden of persuasion.

Several federal courts have used Rule 403 to weigh prejudice and probativeness of impeaching testimony in civil cases to exclude relevant evidence that may be substantially prejudicial to a party. *Donald v. Wilson,* 847 F.2d 1191 (6th Cir.1988); *Shows v. M/V Red Eagle,* 695 F.2d 114 (5th Cir.1983); *Tussel v. Witco Chem. Corp.,* 555 F.Supp. 979 (W.D.Pa.1983). These courts construe Rule 403 as an overriding provision that cuts across the rules of evidence to afford the trial judge a modicum of discretion to exclude a civil witness' unduly prejudicial felony conviction.

In *Green,* the Court concluded that since it is clear that Rule 403 does not modify the mandatory provisions of Rule 609(A)(2) involving crimes of dishonesty or false statement, it strains logic to view Rule 403 as modifying one subsection of Rule 609(A)(1), a specific subsection containing its own balancing provision, but not as modifying the other subsection. *Green,* — U.S. at —, 109 S.Ct. at 1992–93.

> Rule 609(a) states that impeaching convictions evidence "shall be admitted." With regard to subpart (2), which governs impeachment by [crimes of dishonesty or false statement] it is widely agreed that this imperative coupled with the absence of any balancing language, bars exercise of judicial discretion pursuant to Rule 403. Subpart (1), concerning felonies, is subject to the same mandatory language; accordingly, Rule 403 balancing should not pertain to this subsection either.

Id. at —, 109 S.Ct. at 1993 (footnotes omitted); *accord Campbell v. Geer,* 831 F.2d 700, 705 (7th Cir.1987) (Rule 403 "was not meant to overlap, supplant, or contradict the policy premises of, more specific rules, such as Rule 609."). In other words, the discretion afforded by Rule 403 does not apply because Rule 609(a)(1) specifically addresses circumstances under which judicial discretion is permitted. The Court thus held that "Rule 609(a)(1)'s exclusion of civil witnesses from its weighing language is a specific command that impeachment of such witnesses be admitted, which overrides a judge's general discretionary authority under Rule 403. *Green,* — U.S. at —, 109 S.Ct. at 1993.

Research of New Mexico cases reveals one civil case dealing with evidence of prior convictions for attacking credibility, *Jaramillo v. Fisher Controls Co.,* 102 N.M. 614, 698 P.2d 887 (Ct.App.), *cert. denied,* 102 N.M. 613, 698 P.2d 886 (1985). On cross-examination in *Jaramillo,* plaintiff admitted he had pled guilty to shoplifting, a crime involving dishonesty. The evidence was allowed under Rule 609(A)(2). In affirming the trial court, the appellate court stated the evidence was "proper for the purpose of attacking the credibility of [defendant]," and a conviction of this type of crime bears on credibility. *Id.* at 622, 698 P.2d at 895. Plaintiff also challenged the prior conviction evidence under Rule 403 claiming "the probative nature of the conviction was outweighed by its prejudicial impact." *Id.* Following a brief analysis, the court said there was no abuse of discretion by the trial court to require exclusion of the evidence under Rule 403. *Id.* at 623, 698 P.2d at 896.

A case that is more insightful on whether Rule 609 preempts Rule 403 is *State v. Day,* 91 N.M. 570, 577 P.2d 878 (Ct.App.), *cert. denied,* 91 N.M. 491, 576 P.2d 297 (1978). Although a criminal case, *Day* dis-

2. New Mexico's rule of evidence, SCRA 1986, 11–403, is identical.

cusses generally the interrelationship of Rules 403 and 609. After examining Rule 609(A) as originally adopted in 1973, which lacked the specific balancing requirement in subparagraph (A)(1), the court stated that "Evidence Rule 403 gave the trial court discretion to exclude evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice.'" *Id.* at 574, 577 P.2d at 882. The court thus reasoned Rule 403 was always applicable in deciding on the admissibility of evidence relevant to impeachment. "Evidence admissible under Evidence Rule 609 was subject to exclusion by the trial court under Evidence Rule 403." *Id.*

In 1976 Rule 609 was amended to include the specific reference to a balancing requirement in (A)(1), which conformed the New Mexico rule to the federal evidence rule. *Id.* at 574–75, 577 P.2d at 882–83. The court concluded that Rule 403, which applies to the admission of all evidence, continued to apply to impeachment evidence even with the amendment of Rule 609(A). *Id.* at 576, 577 P.2d at 884. In so concluding, the court opined:

> In resolving the interrelationship of Evidence Rules 403 and 609, the intent of Congress in adopting the federal rules of evidence is not controlling. New Mexico adopted rules of evidence before Congress approved the federal rules. In addition, the variations between the New Mexico and federal rules prevent us from stating that the federal intent was New Mexico's intent.
>
> In our opinion, New Mexico's intent is ascertained by considering *two* New Mexico evidentiary rules.
>
> Our rule, a general one, was that the trial court had discretion in the admission or exclusion of evidence. * * * [T]his general rule is not limited to criminal cases; it applies to any type of case, and all forms of evidence. This general rule of evidence is reflected in Evidence Rule 403.
>
> A second rule, which is a specific application of the general rule, applies to the cross-examination of a witness concerning prior convictions * * *. This specific application [the balancing provision] was included by the amendment to Evidence Rule (a)(1).
>
> The amendment which brought the pre-existing specific rule into the rules of evidence cannot be considered as removing the applicability of the general rule [which] has been reaffirmed subsequent to adoption of the amendment. [Emphasis in original.]

Id. at 575–76, 577 P.2d at 883–84 (citations omitted).

It is clear from *Day* that the balancing provision of Rule 403 continues to apply to Rule 609(A)(2). Since we have stated that, based on *Green*, the specific balancing provision in 609(A)(1) is applicable to criminal but not civil cases, we hold that 609(A)(1) evidence is always subject to possible exclusion under Rule 403. We agree with the position espoused in *Day* and decline to follow *Green* on Rule 403.

Employing these principles in the present case, we conclude the prior convictions for purposes of attacking defendant's credibility were admissible. Commercial gambling is a crime punishable by imprisonment in excess of one year. Notwithstanding the admissibility of the prior convictions under Rule 609(A)(1), we must next determine whether the evidence is subject to exclusion under Rule 403. At the appellate level the only question we decide is whether the trial court abused its discretion in permitting this evidence. *Jaramillo*, 102 N.M. at 622, 698 P.2d at 895; *Lucero*, 98 N.M. at 314, 648 P.2d at 353. Abuse of discretion is defined "as a ruling clearly against the logic and effect of the facts and circumstances before the court." *Lucero*, 98 N.M. at 314, 648 P.2d at 353. Credibility of the parties was a key issue in this case. The trial court weighed the probative value of the evidence against its prejudicial effect and determined the evidence should not be excluded. There was no abuse of discretion.

2. *Attorney Fees*

The issue raised by defendant is that the trial court abused its discretion in awarding

attorney fees approximately double the amount of the jury verdict.

It is well-settled that, absent statutory authority or rule of court, attorney fees are not recoverable as an item of damages. *Hiatt v. Keil,* 106 N.M. 3, 4, 738 P.2d 121, 122 (1987); *Riggs v. Gardikas,* 78 N.M. 5, 8, 427 P.2d 890, 893 (1967). The attorney's fee section of the legislation on materialmen's liens, NMSA 1978, Section 48–2–14 (Repl.Pamp.1987), provides that the court may allow a reasonable attorney's fee in an action to enforce the liens in the trial and appellate courts. Under this statute, the allowance of attorney fees is discretionary, but the exercise of that discretion must be reasonable when measured against objective standards and criteria. *Ulibarri v. Gee,* 106 N.M. 637, 639, 748 P.2d 10, 12 (1987). "The award of an attorney's fee, like the award of other costs of litigation, is not the same question as the determination of reasonableness of a fee as between the attorney and client * * *." *Id.* Factors that have been considered in determining the reasonableness of attorney fees as between attorney and client 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. *Thompson Drilling, Inc. v. Romig,* 105 N.M. 701, 705, 736 P.2d 979, 983 (1987); *see also* SCRA 1986, 16–105 (Repl.Pamp. 1988). We have also stated that time spent and quality of representation are not always dispositive of the amount of attorney fees to be awarded in the successful enforcement of liens. *Ulibarri,* 106 N.M. at 639, 748 P.2d at 12 (net cost to a plaintiff in enforcing a lien that is questionable in merit should be more than where the defense is frivolous); *Fryar v. Johnsen,* 93 N.M. 485, 487, 601 P.2d 718, 720 (1979). For example, when the plaintiff has sued for a small sum clearly owed, then a higher percentage of the award may be reasonable as an attorney's fee. When the sum is large and the defense is meritorious, then a smaller percentage may be reasonable. *Ulibarri,* 106 N.M. at 639, 748 P.2d at 12.

Under Section 48–2–14, the trial court permits recovery of a "reasonable attorney's fee" by the plaintiff-materialman from the owner. The reasonableness of the fee must be closely scrutinized if the amount is based on the defense of counterclaims and other questions collateral to the enforcement of the lien. *Id.*; *see Hiatt,* 106 N.M. at 4, 738 P.2d at 122.

In setting attorney fee awards, a trial court must make findings of fact on those factors on which the parties have presented evidence. *Woodson v. Phillips Petroleum Co.,* 102 N.M. 333, 339, 695 P.2d 483, 489 (1985). Without findings of fact and conclusions of law, this court cannot properly perform its reviewing function. *Fryar,* 93 N.M. at 488, 601 P.2d at 721.

In the present case at the hearing on attorney fees, plaintiff's counsel submitted an affidavit and was questioned by defense counsel on the reasonableness of the fees. Defense counsel argues that this case does not involve novel or difficult issues, does not vindicate any important public policy and does not advance any legal principle of pervasive applicability to entitle plaintiff's counsel to a strict percentage fee. Instead, defendant maintains the affidavit is replete with documentation of only a few pleadings prepared, which were amended and edited on numerous occasions; is replete with memoranda done and redone, conferences held again and again; shows trial preparation of 109.5 hours for a fourteen-hour trial; and even seeks reimbursement for mileage from counsel's office two blocks away. Plaintiff's counsel claims that at the hearing defendant had a full opportunity to cross-examine; plaintiff was billed for the time spent on the case based on the firm's hourly rates; defendant had set forth six counterclaims in his answer, which were not dropped until the morning of trial; and the fees charged were reasonable in light of the difficulty of proving the case. The trial court concluded the case was difficult because the veracity of the

two parties involved was crucial. Further, the trial judge stated, "the law is very clear in materialmen's and mechanic's lien type cases, that costs and attorney fees are to be recovered in a case where you are successful, over and above the actual amount of damage principle."

For purposes of an appeal, defense counsel requested the court make findings of fact. In declining to do so, the court said: "Findings of fact and conclusions of law are inappropriate in a jury trial. The jury found the facts and the law is contained in the judgment."

In light of the trial court's failure to make findings of fact and conclusions of law, we must determine if we can properly review the award without such findings or conclusions. While we are mindful that judicial economy is an important goal, especially because of the increase in litigation and appeals of attorney fees, we are hesitant to pick an arbitrary fee without findings and conclusions. Notwithstanding the trial judge's recent departure from the bench, we prefer to remand this case to the trial court to make these findings. We note that the time billed by plaintiff's attorney is not necessarily determinative of the reasonable amount of an award of attorney fees as costs. Moreover, the reasonableness of the fee awarded in this case must be closely scrutinized if based on the defense of the counterclaims. In *Ulibarri,* the award of over $30,000 in attorney fees was not substantiated by the evidence, but the evidence in the record did substantiate the reduced award of $10,000, which we did allow. Unlike *Ulibarri,* the record in the present case is insufficient for us to make the determination without findings and conclusions.

We affirm the jury verdict and remand the case to the district court for a rehearing based on the foregoing considerations. In light of SCRA 1986, 1–063, this rehearing will be a new trial on the issue of the amount of attorney fees to be awarded. *See Pritchard v. Halliburton,* 104 N.M. 102, 717 P.2d 78 (Ct.App.), *cert. denied,* 103 N.M. 798, 715 P.2d 7186216137 (1986). The parties will bear their own costs for this appeal.

IT IS SO ORDERED.

RANSOM and MONTGOMERY, JJ., concur.

782 P.2d 91

STATE of New Mexico, Plaintiff–Appellee,

v.

Charles Robert MOORE, Defendant–Appellant.

No. 10836.

Court of Appeals of New Mexico.

Aug. 29, 1989.

Certiorari Denied Oct. 18, 1989.

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Hal Stratton, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Jerry Todd Wertheim, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

MINZNER, Judge.

Defendant appeals from judgment and sentence on conviction after a jury trial. He asserts on appeal that the trial court erred in: (1) denying his motion to suppress a pistol seized by police and statements made to the police about the pistol; (2) denying his motion to suppress the in-court identification testimony of the two victims; (3) allowing the state's peremptory challenge of the only black member of the jury venire; (4) imposing consecutive sentences for two counts of armed robbery and for two counts of false imprisonment; and (5) denying his motion for a change of venue. We conditionally affirm, but we remand for a hearing with respect to the third issue.

Defendant's third issue was not raised in his docketing statement. During an extension of his briefing time, defendant moved to amend his docketing statement, claiming the issue was properly preserved below. Defendant had not, however, sought or secured an extension of time in which to move to amend, as most appellants now routinely do when they seek an extension of briefing time. The state claims defendant's motion is untimely. Defendant asserts the motion was made as soon as counsel discovered the issue on the tapes, which were lost until they were filed during the extension of briefing time. Defendant also contends the issue involves fundamental error. The state disagrees.

We take this opportunity to clarify the law relating to amending the docketing statement. We hold the motion was timely and that, notwithstanding that the motion may not have shown good cause for amending the docketing statement, we grant it nonetheless because we believe it is fairer to make our pronouncements in this case prospective. We discuss the motion to amend as the last issue in the opinion.

BACKGROUND

This case arises out of an early evening robbery at the home of Ken and Ann Batson in Hobbs, New Mexico, as the Batsons were returning to their home. Mrs. Batson pulled into the garage, and Mr. Batson parked behind her. Mrs. Batson went into the house to turn off the burglar alarm, and Mr. Batson walked across the lawn to pick up the paper. As Mr. Batson turned to walk back into the garage, a tall, thin, black man with a gun jumped out from beside the house. A second man appeared, and the tall, thin man and his companion escorted Mr. Batson into the garage. As the tall, thin man came around Mrs. Batson's car, he pulled a stocking mask over his face. Mrs. Batson first saw the tall, thin man as she was going back into the garage and he was pulling the stocking mask over his face. At some point a third man appeared, and the men then escorted the Batsons into the house. At first they kept the Batsons in the hallway, and the tall, thin man guarded them while the others searched the house. The men handcuffed the Batsons together and bound them with duct tape. After searching the house, the men took guns, cash, and jewelry away with them. The men were at the house approximately ten to fifteen minutes.

A few days later members of the Hobbs Police Department entered the house where defendant was staying for a few weeks. The house was rented and occupied by Malora Lacy. Although the police

had a search warrant, it is undisputed on appeal that it was invalid.

Both defendant and Ms. Lacy were present when the police arrived, and Ms. Lacy invited the police to enter. Once inside, Detective Knott sat at the kitchen table with Ms. Lacy, while other officers made a protective sweep. While the other officers were occupied, Ms. Lacy told Detective Knott that there was a gun under her bed, that defendant had given her the gun and some money, and that he said he had obtained the money and the gun in a robbery. Subsequently, Mr. Batson identified the gun as one taken during the robbery.

The Batsons saw defendant before trial. Mr. Batson saw him the day the preliminary hearing was postponed and again on the day of the rescheduled hearing six weeks later. Mrs. Batson saw defendant at the preliminary hearing. There was conflicting evidence on the issue of whether either victim saw defendant at the police station.

At trial, as well as at the preliminary hearing, the Batsons identified defendant as the tall, thin man who had held them at gunpoint. The record indicates defendant is six feet, two inches tall, weighs about 150 pounds, and is missing one eye.

Defendant was convicted of the five counts with which he had been charged: one count of aggravated burglary, contrary to NMSA 1978, Section 30–16–4 (Repl. Pamp.1984) and NMSA 1978, Section 31–18–16 (Repl.Pamp.1987); two counts of armed robbery, contrary to NMSA 1978, Section 30–16–2 (Repl.Pamp.1984) and Section 31–18–16; and two counts of false imprisonment, contrary to NMSA 1978, Section 30–4–3 (Repl.Pamp.1984) and Section 31–18–16. Defendant was sentenced to nine years on each of the three second degree felony counts and to eighteen months on both fourth degree felony counts. The trial court ordered that his sentences be served consecutively.

SUPPRESSION OF THE PISTOL AND MS. LACY'S STATEMENTS

Defendant's motion to suppress contended that the evidence obtained by police at the home of Ms. Lacy was the fruit of an unreasonable search and seizure under the fourth amendment. The record does not support defendant's contention. The trial court was entitled to find that Ms. Lacy voluntarily disclosed the location of the pistol as well as what defendant had told her. Under these circumstances, the trial court did not err in denying defendant's motion to suppress. *See State v. Barry,* 94 N.M. 788, 617 P.2d 873 (Ct.App. 1980). Once defendant disclosed inculpatory evidence to a third person, he could not prevent that person from divulging the information in willing cooperation with a police investigation. *See United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). In this case, defendant waived any expectation of privacy he might otherwise have had.

SUPPRESSION OF THE VICTIMS' IN-COURT IDENTIFICATION OF DEFENDANT

Defendant contends that the in-court identification of defendant by the victims should not have been allowed because there had been various pre-trial confrontations that were impermissibly suggestive. *See State v. Torres,* 81 N.M. 521, 469 P.2d 166 (Ct.App.1970). Even if there has been an improper extra-judicial identification, this fact does not require the exclusion of an independent in-court identification, which is not tainted by the prior identification. *Id.* We understand defendant's argument to be that the in-court identifications were tainted by suggestive and unreliable extra-judicial identifications. We disagree.

In this case, the trial court did not indicate whether it found there had been pre-trial confrontations or, if so, whether they had been impermissibly suggestive. Even where the trial court has found pre-trial confrontations were suggestive, however, the circumstances may support a finding that the identifications were sufficiently reliable to support a conclusion that the in-court identification was not tainted. *See State v. Nolan,* 93 N.M. 472, 601 P.2d 442

(Ct.App.1979). Based on the evidence offered at the motion to suppress hearing and at trial, the trial court was entitled to find that the in-court identifications were reliable. Thus, the trial court did not err in denying defendant's motion to suppress them.

The relevant factors supporting the reliability of the in-court identification include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description, the level of certainty demonstrated at the time of the confrontation, and the time elapsed between the crime and the confrontation. These factors are to be weighed against the potentially corrupting effect of the suggestive identification. *See Manson v. Brathwaite,* 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *State v. Nolan.* Under the relevant factors, the trial court could have found that the out-of-court identifications were sufficiently reliable to deny suppression of the in-court identification.

There is no question that the Batsons had ample time, in well-lit areas, to observe the man who held them at gunpoint while the others ransacked other rooms. They both testified at trial that the man kept threatening to blow their heads off if they looked at him and that this induced them to look at him more often. They also testified that they were "100 percent" certain of their identification of defendant because of their observation at the time of the crime. Mrs. Batson testified that, in spite of the stocking mask, she saw the man's facial features clearly. Both testified that they immediately and unquestionably recognized defendant when they saw him after the robbery in the magistrate courthouse. It is unclear exactly when the pre-trial confrontations occurred, but there is no question that they occurred between January 3, 1987, the date of arraignment, and February 23, 1987, when the preliminary hearing was finally held, from five days to seven weeks following the robbery.

Defendant argues that the victims failed to report that the tall, thin man was missing an eye. For this reason and others, he contends that the descriptions given the police were highly inaccurate. We disagree.

Although Mr. Batson saw the tall, thin man for a few moments before he pulled a stocking over his face, the man wore the stocking for most of the time that the victims had an opportunity to view his face. Mr. Batson testified that, although he noticed something was wrong with the perpetrator's eye, he thought it was caused by the stocking pulling the eye down. This is a plausible explanation for his failure to tell police about his observation. Mrs. Batson, on the other hand, told police that the stocking made the perpetrator look like he had a "gotch-eye," which she explained meant that the eye looked deformed; something seemed to be wrong with it. There would be no reason for her to describe such a deformity if all she thought she saw was distortion caused by the mask.

In considering the totality of the circumstances, it would be inappropriate for the trial court or this court to be concerned with minor inaccuracies in the victims' initial descriptions. Thus, for example, we believe it is not dispositive that Mr. Batson incorrectly estimated defendant's weight at 180 pounds. Having reviewed the circumstances known to the trial court, we conclude the trial court could have found the in-court identifications were reliable and independent of suggestive pre-trial confrontations.

THE STATE'S PEREMPTORY CHALLENGE

During voir dire, the state began with the following series of questions:

> Q: Have any of you people been questioned about contacts with the police department? Do any of you have family or close friends that have been a defendant in a criminal action, in a felony, let's start with a felony criminal action, that you know of? So no one here would have any leanings against the police department because of other dealings with someone in their family then?

Nothing further was said regarding this voir dire until the trial court, outside the presence of the jury, considered challenges for cause and peremptory challenges. Upon inquiry from the trial court, counsel for the state and defendant indicated that they had no challenges for cause. The trial court then asked for peremptory challenges. The state sought to strike only Ms. Goree, the only black member of the venire. If the state had not successfully challenged her, Ms. Goree would have been the twelfth juror chosen. The tape reveals the following colloquy during jury selection in chambers:

> Ct: Number 25, Kay Goree.
>
> P: State strike, your Honor. And also for the record your Honor, we would ... be willing to strike her based on information we have from ... outside sources that she had relatives in the penitentiary. She responded "no" to that question concerning whether or not she had specifically relatives who had ever been criminal defendants and that would be the basis for that strike.
>
> D: I want to note that Ms. Goree is the only black juror we have. And the question was, I don't recall the exact question but, I think she answered it properly.
>
> Ct: I'm going to allow the strike.

Defendant contends that when the prosecutor peremptorily struck the only black juror in the venire, he was denied his right to equal protection of the law secured by the fourteenth amendment. On the present record, we are not able to evaluate the merits of this contention. We explain in the discussion that follows.

In *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court reaffirmed the principle that a " 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.' " *Id.* at 84, 106 S.Ct. at 1716, quoting *Swain v. Alabama,* 380 U.S. 202, 203–04, 85 S.Ct. 824, 826–27, 13 L.Ed.2d 759 (1965). The *Batson* majority significantly modified the rules applicable to a prosecutor's use of peremptory challenges in criminal cases. The Court held 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 in the defendant's case. This was a modification of the rule in *Swain,* which courts had interpreted to mean that a defendant must show systematic exclusion of minorities from the juries in other cases as well as his or her own case.

This court first applied *Batson* in *State v. Sandoval,* 105 N.M. 696, 736 P.2d 501 (Ct.App.1987). As noted in *Sandoval, Batson* imposes on defendant the obligation to establish a prima facie case of discriminatory purpose. He (1) must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of his racial group, (2) may rely on the fact that peremptory challenges constitute a jury selection practice that permits those who are of a mind to discriminate to do so, and (3) 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 shared race. If defendant makes this showing, the necessary inference of purposeful discrimination arises. In considering whether defendant has made the required showing, the trial court should consider all relevant circumstances. *See State v. Jim,* 107 N.M. 779, 765 P.2d 195 (Ct.App.1988); *State v. Hall,* 107 N.M. 17, 751 P.2d 701 (Ct.App.1987). Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation.

Under *Batson,* the trial court has multiple obligations if a prima facie showing is made. The court must evaluate the showing, require an explanation from the prosecutor if it determines a prima facie showing is made, evaluate the explanation, and ultimately determine if defendant has carried the burden of persuasion.

In *State v. Goode,* 107 N.M. 298, 756 P.2d 578 (Ct.App.1988), this court most re-

cently discussed the factors to be considered in determining whether a prima facie case of discriminatory challenges has been made. In that case, the court also discussed the state's obligation to provide a racially neutral explanation for challenging members of the defendant's racial group. Defendant contends that under *Goode,* a prima facie case was made, and the explanation given was insufficient to dispel the inference that it was racially motivated. Defendant also argues that under *Goode,* to the extent further inquiry is necessary to determine the sufficiency of the explanation, the trial court failed in its obligation to examine the explanation and determine whether it was genuine.

We agree with defendant that the prima facie showing required of him was probably present and could have been made. *See id.* However, the record on appeal is not sufficient to allow us to determine what the trial court's ruling actually meant. On these facts, we cannot say the trial court implicitly found defendant failed to make a prima facie case or that the court found defendant's prima facie showing adequate but found the prosecutor's pre-challenge statements were sufficient to overcome the inference of discriminatory conduct. We are not even sure that the trial court in fact understood defendant was raising a *Batson* issue. We conclude the case must be remanded for a hearing. *See Batson v. Kentucky; State v. Jones,* 293 S.C. 54, 358 S.E.2d 701 (1987).

Under *Batson, Goode,* and *Sandoval,* the trial court's determination of whether defendant has made a prima facie case is a factual determination, not a question of law. As an appellate court, we cannot make that determination initially. Further, the trial court's determination of whether defendant has made a prima facie showing is the mechanism by which the prosecutor becomes obligated to give a further explanation. Until the court makes that determination, the prosecutor may not have notice that the burden of production has shifted. *See People v. Turner,* 42 Cal.3d 711, 728–29, 230 Cal.Rptr. 656, 667, 726 P.2d 102, 113 (In Bank) (Panelli, J., concurring).

Similarly, the trial court must evaluate the explanation offered in response to the trial court's request and decide whether defendant has carried the ultimate burden of persuasion. If the constitutional guarantee articulated in *Batson* is to have real meaning, the trial court must play a primary role. The role of the appellate court is to review the trial court's factual findings and legal conclusions.

We cannot hold as a matter of law that the state's "advance explanation" satisfied the *Batson* requirement for a race-neutral explanation. The burden that shifts to the state is a burden of production. *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In Title VII cases, it has been said that placing the burden of production on defendant, who is analogous to the state in this context,

> serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Id. at 255–56, 101 S.Ct. at 1094–95. We believe the same analysis applies to the race-neutral explanation required of the prosecutor under *Batson.*

The explanation given at trial was that Ms. Goree did not respond truthfully to the voir dire question. On appeal the state relies on Ms. Goree's failure to admit her relationship to persons in the penitentiary as its reason for the challenge. Thus, we assume the state contends that she had not responded truthfully, because she had been asked whether she was related to persons in the penitentiary and had not responded with the information the prosecution possessed.

The state is correct that there is "nothing inherently suspect" in its use of

outside sources to gain information about jurors. However, if Ms. Goree was singled out for special inquiry because she is black, the inquiry itself was racially motivated. Defendant may be correct in suggesting that inquiry was made into Ms. Goree's family on the assumption that, because she is black, there was a good chance that she had relatives in the penitentiary; a reverse assumption may have been made about white panel members. If defendant is correct, then the explanation given by the state would be race-related, and the reason given would be linked to the prosecution's assumption based on race.

If the prosecution had treated Ms. Goree differently from white panel members, that would have been a strong indication that the reason given for the challenge was not genuine and that the challenge was made for discriminatory purposes. *See Gamble v. State,* 257 Ga. 325, 357 S.E.2d 792 (1987) (varying treatment of white and nonwhite panel members a significant factor in determining whether state's explanation is pretextual). *See also Floyd v. State,* 511 So.2d 762 (Fla.Dist.Ct.App.1987) (black student challenged because prosecutor did not like to have students on jury, but white student not challenged); *People v. Turner* (black juror made mistakes in answering long, extremely formal voir dire question; white jurors who also made mistakes not challenged).

Batson lightens the evidentiary burden imposed on defendants, but it does not eliminate defendant's obligation to alert the trial court to the facts on which the prima facie case depends. In an appropriate case, the *Batson* rules shift the burden of producing a satisfactory explanation to the prosecutor. They also impose an obligation on the trial court to evaluate the explanation and, if the reasons given are either implausible or suggestive of bias, to make further inquiry. Under these rules, the trial court's ruling on the sufficiency of defendant's prima facie case has important procedural consequences. Because of these procedural consequences, in the future we will expect a defendant who wishes to raise a *Batson* issue to clearly make a prima facie case that shifts the burden of production. Here, it is arguable that defendant did not make his case with sufficient clarity to shift the burden of production. Nevertheless, we think he said enough to merit a hearing. *See State v. Jones.* Thus, we remand to permit defendant to state the facts on which he relies and for the trial court to make the necessary rulings. If the trial court ultimately finds that defendant carried his burden of persuasion, defendant's conviction must be set aside, and a new trial ordered. If not, his conviction will stand.

CONSECUTIVE SENTENCING ON TWO COUNTS OF ARMED ROBBERY AND TWO COUNTS OF FALSE IMPRISONMENT

Defendant contends that the trial court erred in ordering his sentences on armed robbery and false imprisonment to run consecutively, because, on the facts of this case, the offense of false imprisonment merged into the armed robbery offense. Merger is an aspect of double jeopardy. *State v. Gammil,* 108 N.M. 208, 769 P.2d 1299 (Ct.App.1989). Double jeopardy applies to subsequent prosecutions; merger applies to the concept of multiple punishments when multiple charges are brought in a single prosecution. *Id.* The test to determine whether one offense necessarily includes another also requires an examination of the statutory elements of each offense in light of the evidence and the particular facts of each case. *Id.* (citing *State v. DeMary,* 99 N.M. 177, 655 P.2d 1021 (1982) and *State v. Sandoval,* 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977)).

In this case, the evidence showed that both Batsons were robbed by the use of force by someone armed with a deadly weapon. *See* § 30–16–2. The evidence also showed that each was confined or restrained without consent and without lawful authority. *See* § 30–4–3. Since the elements of the two crimes are dissimilar and the evidence required to establish each crime is independent, it is clear the crimes do not merge even when considered in light of the facts. *See State v. Corneau,* 109

N.M. 81, 781 P.2d 1159 (Ct.App.1989). Further, there were separate and distinct offenses as to each victim. Where there are multiple victims, the societal harm is greater. *State v. Johnson,* 103 N.M. 364, 707 P.2d 1174 (Ct.App.1985). The evidence showed four separate acts, so defendant's sentence was not unlawful. *See generally State v. Dunlop,* 721 P.2d 604 (Alaska 1986) (majority of states have held that multiple punishments for multiple victims of single criminal act do not violate double jeopardy).

CHANGE OF VENUE

Defendant moved for a change of venue, on the ground that the reputation and influence of the victims, prejudice against blacks in the county, and extensive media coverage made a fair trial impossible. The trial court denied the motion and made specific findings that a fair and impartial trial was possible.

Defendant asks this court to consider whether the trial court abused its discretion by using facts not alleged in the motion to decide the motion. He also asks us to consider whether the facts used were so irrelevant as to make the trial court's decision an abuse of discretion. We conclude the trial court did not abuse its discretion. Co-defendant's acquittal was not irrelevant to the court's decision and was not improperly considered. *See* SCRA 1986, 11–201(C) (a judge or court may take judicial notice, whether requested to or not).

MOTION TO AMEND THE DOCKETING STATEMENT

The last issue we must confront is the timeliness of defendant's motion to amend the docketing statement. Our cases hold that motions to amend in cases assigned to a nonsummary calendar must be made during original briefing time. *State v. Hicks,* 105 N.M. 286, 731 P.2d 982 (Ct. App.1986). This rule originated in *State v. Jacobs,* 91 N.M. 445, 575 P.2d 954 (Ct.App. 1978), and was adopted as a means of limiting amendments to docketing statements to those that would not be contrary to the concepts behind the rules of appellate procedure. Foremost among those concepts is that the issues are to be raised by the trial attorney, not by the appellate attorney after picking through the transcript for possible error. *Id.; see also State v. Ramming,* 106 N.M. 42, 738 P.2d 914 (Ct.App.1987).

After *Jacobs,* we decided *State v. Rael,* 100 N.M. 193, 668 P.2d 309 (Ct.App.1983). *Rael* outlines the procedure to be used in attempting to amend the docketing statement. Although *Rael* did not alter the timeliness requirement, it added some more substantive provisions designed to limit amendments to docketing statements and to insure that motions to amend were not being filed contrary to concepts underlying the appellate rules. The more substantive provisions make the time limitation set forth in *Jacobs* appear technical and mechanistic.

If the goal is to prevent the raising of issues by the appellate attorney after picking through the transcript for possible error, it is difficult to see how a rule allowing amendments during original briefing time achieves that goal. The requirements of *Rael* are much more efficient at limiting amendments of docketing statements. Moreover, as a practical matter, most appellants represented by experienced counsel now routinely accompany their motions for extension of briefing time with motions for extension of time to file motions to amend. In light of *Rael*'s more efficient way of limiting docketing statement amendments, we no longer see the utility of a rule which distinguishes between those amendments allowed to be granted and those not granted on the basis of factors relating to the experience of the appellant's attorney rather than on factors relating to whether the purposes of the rules are served.

Therefore, we overrule *Jacobs* and subsequent cases to the extent they hold that motions to amend the docketing statement must be made within the original briefing time. Hereafter, motions to amend will be considered timely for cases assigned to the nonsummary calendar when they are filed with the brief-in-chief.

Similarly, motions to amend will be considered timely for cases assigned to the summary calendar when they are filed with the party's first memorandum in opposition to the proposed disposition in the calendar notice. *See State v. Smith,* 102 N.M. 350, 695 P.2d 834 (Ct.App.1985).

By adopting this position, we do not abandon our commitment to the principle that issues raised by the appellate attorney after picking through the transcript are disfavored. Accordingly, we view our holding as establishing an outside time limit beyond which the motion to amend will ordinarily be denied without considering other factors. However, the earlier a motion to amend can be filed, the more likely it will be that this court will determine the motion is being filed for reasons other than that appellate counsel discovered a new issue.

For these reasons, we hold the motion to amend was timely filed in this case. We now measure the motion to amend by the factors outlined in *Rael. Rael* contains two essential holdings and a recapitulation that laid out five criteria, which must be met before we will allow an amendment. The recapitulation contains some language that may have caused confusion. We take this opportunity to clarify the recapitulation and to further explain why *Rael*'s requirements are more functionally related to the showing of good cause that motivates us to exercise or not exercise our discretion to allow docketing statement amendments.

In *Rael,* we deemed two requirements to be essential to a showing of good cause for our allowance of a docketing statement amendment: (1) the motion to amend must be timely, and (2) the motion must show the new issue sought to be raised was either (a) properly preserved below or (b) allowed to be raised for the first time on appeal. *Id.* at 195, 668 P.2d at 311. Later in the opinion, we held that the issues sought to be presented must be viable. *Id.* at 197, 668 P.2d at 313. By viable, we meant to describe an argument that was colorable, or arguable, and to distinguish arguments that are devoid of any merit.

Issues range on a continuum from those that are completely devoid of merit to those that are clearly reversible error of a fundamental or jurisdictional variety. Somewhere along the continuum toward the side of the meritless issues are those issues that are not viable; in the middle are viable issues that do not result in reversible error; farther along are issues that, if properly raised, would result in reversible error.

Under *Rael* and *State v. Doe,* 92 N.M. 100, 583 P.2d 464 (1978), cited therein, it is our duty to reverse on issues of demonstrated fundamental or jurisdictional error. However, as *Rael* demonstrates, it is not every allegation of such error that will be found to amount to such error. Thus, some of the five criteria set forth in *Rael* are designed to assist us in determining whether such error in fact exists. These criteria help us in assessing the viability of the issues. Nonviable issues are not deserving of being added to the docketing statement, even if they allege fundamental or jurisdictional error.

Thus, we should deny motions to amend that raise issues that are not viable and we should grant motions to amend that raise issues of demonstrated fundamental or jurisdictional error. In between these two extremes is an area committed to our discretion. We may wish to address viable issues that do not result in reversible error for reasons concerning the development of the law. For the same reason, we may wish to address issues that are not properly raised but if properly raised would result in reversible error even if we affirm in the particular case. The *Rael* criteria will assist us in exercising our discretion in these cases. Thus, the *Rael* criteria should be addressed by counsel in each and every case in which appellant seeks to amend the docketing statement.

In this case, in terms of the two essential *Rael* holdings, the motion was timely and it alleged error that was in fact preserved; it showed an issue that was viable. In terms of the recapitulation, the motion attempted to address all criteria. Although the state does not argue against granting the motion on this ground, we note that the motion's

attempt to comply with the fourth *Rael* criterion—a showing of good cause for failure to raise the issue initially—is a simple recitation that the omission from the docketing statement was "inadvertent." We recently held, *see State v. Gallegos,* 109 N.M. 55, 781 P.2d 783 (Ct.App.1989), that merely reciting that the omission of the issue was inadvertent did not demonstrate good cause to allow a docketing statement amendment.

One can read *Rael* and *Gallegos* to say that new issues alleging jurisdictional or fundamental error should be added without a showing of good cause, i.e., that the good cause requirement applies only to other viable or reversible issues. We believe this would be an erroneous interpretation of our cases. Good cause is a basic requirement for all docketing statement amendments. SCRA 1986, 12-208(C). Good cause is established when the issue is demonstrated to be meritorious fundamental or jurisdictional error. Good cause may be established in other ways when the issue is not meritorious fundamental or jurisdictional error.

The point of *Rael*'s requirement, that the motion to amend recite the reason why the new issue was not originally raised, is to allow this court insight into trial counsel's evaluation of the issue, which may bear on our own assessment of the issue's viability. For example, there is an obvious difference between a situation in which the issue was not included because trial counsel's secretary inadvertently omitted a paragraph when typing the draft, and a situation in which trial counsel deliberately omitted the issue because he or she thought it frivolous or thought it had not been preserved.

The new issue sought to be raised in *Rael* was sufficiency of the evidence. Our discussion of the requirement at issue intimates that, in that case, we expected trial counsel to say the issue was not raised because he thought certain specific facts provided sufficient evidence. We expected to be informed of those facts, together with appellate counsel's argument about why those facts were insufficient. *See State v. Rael,* 100 N.M. at 196, 668 P.2d at 312.

Gallegos was decided after the motion to amend was filed in this case. The state does not argue that the motion to amend was deficient for failure to show good cause. The requirement of candidly and honestly stating why the issue was not raised earlier is designed to allow us to better exercise our discretion by assisting us in assessing the viability of an issue. In this case, we have exercised our discretion and granted the motion to amend. However, in future cases, we may well do as we did in *Gallegos* and deny motions to amend that simply recite the inadvertent omission of an issue.

CONCLUSION

Defendant's judgment and sentence are conditionally affirmed, and the case is remanded for further proceedings not inconsistent with this decision.

IT IS SO ORDERED.

BIVINS, C.J., and CHAVEZ, J., concur.

[redacted]

782 P.2d 385

STATE of New Mexico,
Plaintiff-Appellee,

v.

Ron SWAFFORD, Defendant-Appellant.

No. 10972.

Court of Appeals of New Mexico.

Aug. 15, 1989.

Hal Stratton, Atty. Gen., Margaret McLean, Asst. Atty. Gen., Santa Fe, N.M., for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, N.M., for defendant-appellant.

OPINION

ALARID, Judge.

Defendant appeals from his convictions for criminal sexual penetration in the third degree, incest, assault with intent to commit a violent felony (CSP in the third degree), and false imprisonment. On appeal defendant claims that the trial court erred in (1) suppressing evidence of the victim's prior sexual history; (2) refusing defendant's tendered instruction on simple assault; (3) denying defendant's motion for recusal; and (4) refusing to accept a plea and disposition agreement. Defendant also raises two additional issues pursuant to *State v. Franklin,* 78 N.M. 127, 428 P.2d 982 (1967), *cert. denied* 394 U.S. 965, 89 S.Ct. 1318, 22 L.Ed.2d 566 (1969). We find no basis for reversal in defendant's claims of error, and affirm the convictions and sentence.

I. Suppression of Evidence

By way of an *in camera* hearing, defendant sought to introduce evidence of a past sexual encounter of victim and a third party during which victim allegedly affixed the ropes found on the bed to restrain the third party in the course of consensual sexual activity. The trial court ruled that any mention of the origin of the ropes would not be allowed, finding that such disclosure "would advance no legitimate claim or defense available to the Defendant, unnecessarily confuse the jury, inject a false issue into the case, unreasonably humiliate and embarrass [victim], and run directly counter to the policies sought to be furthered by [NMSA 1978, Section 30-9-16 and SCRA 1986, 11-413]." The trial court expressly concluded that the proffered evidence was not relevant to any material issue in this case; and, even if relevant, such relevance was marginal at best and any probative value it may have was outweighed by its prejudicial impact.

Defendant argues the trial court's suppression of the evidence and denial of his motion to elicit evidence of the victim's past sexual conduct pursuant to Evidence Rule 11-413 deprived him of due process, a fair trial, and the right to confront witnesses against him. He contends the proffered evidence was material, relevant, and that its probative value outweighed any prejudice to victim. Defendant submits that because he was not allowed to tell the jury that victim had affixed the ropes to the bed prior to the incident at issue and to elicit evidence of the victim's prior sexual conduct, then the jury was left with the "damaging misconception" that defendant had placed the ropes on the bed, and "is therefore a pervert" "who had prepared a 'bondage bed' in his own home[.]" Defendant claims that "the [proffered] evidence was necessary to dispel a damaging image of defendant left by silence on the issue." He submits the error was not harmless and requests a new trial at which he be permitted to "explain [the] damaging evidence."

We note that defendant testified at trial that he was interested in bondage sex; he also said he did not keep his interest a secret, and that other people did know about it. It seems that if, as defendant suggests, the jury was inclined to view defendant as a "pervert" based on the "unexplained" presence of the ropes found by police during the investigation, then the jury would likely have had the same "damaging image" of defendant based on his own trial testimony. Furthermore, because the critical issues at trial were whether defendant intentionally and forcibly restrained and criminally sexually penetrated victim, defendant's half-sister, against her will, we find no abuse of discretion in the trial court's determination that evidence concerning the origin of the ropes was not relevant, and even if marginally relevant, its prejudicial impact outweighed any probative value. *See State v. Boeglin,* 105 N.M. 247, 731 P.2d 943 (1987).

In determining whether the trial court abused its discretion in excluding evidence, an appellate court may consider the probative value of the item of evidence. *See State v. Schifani,* 92 N.M. 127, 584 P.2d 174 (Ct.App.1978). Defendant's proffered evidence concerning the origin of the ropes was collateral, at best, to the determination of whether defendant used the ropes to forcibly restrain victim and carry out the

events described by her. And, if defendant had been allowed to assert that victim affixed the ropes to the bed on a prior occasion of consensual activity with another man, then, as defendant phrases it, the jury may have thought of victim as a "pervert" who had prepared a "bondage bed."

"It is not the province of the jury to pass moral judgment on the victim, and the court should remove the temptation to do so wherever possible." *State v. Romero,* 94 N.M. 22, 26, 606 P.2d 1116, 1120 (Ct. App.1980). Because defendant consistently has denied tying victim to the bed and denied having intercourse with her, victim's past sexual conduct indicates nothing concerning any defense offered by defendant. *See generally State v. Herrera,* 92 N.M. 7, 582 P.2d 384 (Ct.App.1978) (past sexual conduct of victim irrelevant to defendant's defense that victim consented). We believe the proffered evidence had no probative value with respect to defendant's guilt or innocence of the charges against him and, therefore, would have been an unwarranted invasion into the private affairs of victim, contrary to the policy sought to be furthered by Section 30–9–16. *See State v. Romero.* The information defendant sought to present to the jury would have served only to provide an improper opportunity for the jury to pass moral judgment on victim. *See id.* In light of the above, we find no abuse of discretion in the trial court's decision to suppress the information concerning the origin of the ropes unless the state attempted to claim that defendant affixed the ropes to the bed.

We hold that the trial court was within its discretion in its suppression of this evidence, since it was irrelevant to defendant's culpability for the crimes charged, advanced no legitimate defense, excuse, or justification for the crimes charged, and were likely to inject false issues and confuse the jury. We find no basis for reversal in the trial court's determination that such information should be excluded because, even if some relevance is assumed, any probative value it may have had was outweighed by its prejudicial impact. *See State v. Boeglin.* Absent some showing by the defendant of evidence sufficient to raise an issue concerning the relevancy of the prior sexual conduct of the victim, questions concerning past sexual conduct are properly excluded. *State v. Herrera.* We also note that the trial court's decision to exclude the proffered evidence provided that if the information became relevant, then defendant could assert that he did not place the ropes on the bed without necessarily "delving into allegations of consensual sex between [victim] and another man on another occasion."

In accordance with the above, we further hold that suppression of the evidence did not deprive defendant of due process, a fair trial, or an opportunity to confront witnesses against him; notably, defendant has not otherwise asserted that he was deprived of an opportunity to fully cross-examine victim and other witnesses during the trial. *See generally State v. Herrera* (where trial court properly suppressed evidence concerning victim's past sexual conduct, there was no deprivation of due process and no denial of defendant's right to confront witnesses against him).

II. Refused Jury Instructions

Defendant's second issue claims the trial court erred in refusing his tendered jury instruction on the charge of simple assault as a lesser included offense of the charge of assault with intent to commit a violent felony. An instruction on a lesser included offense is only appropriate if there is evidence tending to establish the lesser offense and there is some view of the evidence which could sustain a finding that the lesser offense was the highest degree of the crime committed. *See State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985).

In this case, defendant's testimony and victim's testimony conflict with respect to what occurred during the incident underlying this action. Defendant testified that he was checking on victim when she awoke and became violent; he said he then hit victim four or five times and did so only to get her to quit biting him. Defendant denied tying her to the bed and denied having intercourse with her. In contrast, victim

said that she awoke as defendant was tying one of her wrists with a rope and that a struggle ensued during which defendant hit her several times and she bit and scratched defendant; eventually, defendant managed to restrain her arms and legs with rope and committed the CSP.

Notwithstanding the conflicts in the testimony, the undisputed evidence before us on appeal is that the results of a rape kit, taken at the hospital where victim was taken by police, showed that Type B semen was in victim's vagina and on her underwear and shorts; it is also undisputed that the evidence showed defendant is a "Type B secretor," and that only 8% of the population is of that type. In addition, defendant testified at trial that from early afternoon the day before the incident until victim left defendant's residence following the incident, he and victim were alone together, drinking and talking; defendant's testimony did not indicate or suggest that he or victim left the residence, or that anyone came to the residence, at any time during that period of approximately 14 hours. Also, police photographs admitted at trial, and not at issue on appeal, showed rope burns on victim, and scratches, abrasions, and a bite mark on defendant. We note that defendant has not raised any challenges to the sufficiency of the evidence underlying his convictions.

Although defendant's testimony was evidence tending to establish the lesser offense of simple assault, *see State v. Fish,* the inquiry of whether defendant was entitled to have the jury instructed on that offense as a lesser included offense of assault with intent to commit a violent felony also requires a look at the second prong of *Fish,* i.e., whether there is some view of the evidence which could sustain a finding that the lesser offense was the highest degree of the crime committed. It is clear from *Fish* that an appellate court looks at more than just defendant's testimony in determining whether the two prong test is met so as to entitle a defendant to a lesser included offense instruction.

Our supreme court cases have indicated that a failure to instruct the jury on a lesser included offense is reversible error where there is some evidence tending to support the instruction and defendant has tendered an appropriate requested instruction. *See State v. Reynolds,* 98 N.M. 527, 650 P.2d 811 (1982); *State v. Benavidez,* 94 N.M. 706, 616 P.2d 419 (1980). However, as we will explain, *Reynolds* and *Benavidez* are sufficiently distinguishable so as to preclude their dispositions from controlling our disposition of this issue in the case at bar.

In *Reynolds,* defendant was convicted of first-degree murder and aggravated battery. Our supreme court reversed the murder conviction and remanded for a new trial on only the homicide charge due to a failure to instruct the jury, as defendant requested, on voluntary manslaughter as a lesser included offense. The court determined that from the evidence presented at trial, the jury could have found voluntary manslaughter, and that this option should have been presented to the jury. In *Benavidez,* defendant was charged only with first-degree murder, and convicted on that charge. The supreme court held that because the evidence presented could have sustained a conviction for voluntary manslaughter, it was reversible error for the trial court to have refused defendant's requested instruction on voluntary manslaughter.

In *Reynolds,* the erroneously refused instruction related to the greatest offense charged and on which defendant was convicted. In *Benavidez,* the defendant was charged only with first-degree murder and convicted in the absence of a lesser included offense instruction on voluntary manslaughter. In contrast, in the present case, defendant's allegation of error in the trial court's failure to give an instruction on simple assault as a lesser included offense of assault with intent to commit a violent felony does not relate to the greatest offense, or the only offense, for which defendant was found guilty. The jury here determined that defendant also committed the separate and greater offense of CSP, as well as false imprisonment and incest. Based on this distinction, in addition to the reasons that follow, we find that neither

Reynolds nor *Benavidez* requires reversal in the instant case for the trial court's failure to give defendant's requested instruction.

The United States Supreme Court has instructed that, in federal court, a "defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States,* 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973). *Keeble* was cited with approval by our supreme court in *State v. Boeglin,* 105 N.M. at 250, 731 P.2d at 946, regarding an issue involving lesser included offense instructions; our supreme court indicated that the law in New Mexico regarding when a lesser included offense instruction is appropriate is the same as in federal court. Additionally, Senior Justice Sosa, in a dissenting opinion in *State v. McCrary,* 100 N.M. 671, 677, 675 P.2d 120, 126 (1984), cited *Keeble* for the proposition that "an instruction on a lesser included offense must be given where the evidence would permit a jury to rationally find a defendant guilty only of that lesser offense." Notably, the majority opinion in *McCrary* did not hold otherwise, but instead ruled that the defendant had waived any error in the trial court's failure to give the state's requested instruction on second-degree murder as a lesser included offense by objecting to the state's tendered instruction.

■ Applying the above to the present case, we are persuaded that because the jury found defendant guilty of the separate and greater offense of CSP, and guilty of false imprisonment and incest, and in light of the undisputed evidence in this case as set out above, the jury could not rationally have found defendant guilty of only simple assault, and acquitted him of the greater assault charge, even if it had been given the option by the court's giving defendant's requested instruction; such a verdict would be inconsistent with the jury's determination that defendant was culpable on the other charges specified above. As a result, we do not believe that defendant was entitled to have the jury instructed on simple assault as a lesser included offense of assault with intent to commit a violent felony. *See State v. Boeglin* (citing with approval *Keeble v. United States*).

III. Trial Judge's Failure to Grant Recusal Motion

Defendant next asserts that he was deprived of due process and a fair trial because the trial judge did not recuse himself upon defendant's filing of a motion for recusal. Defendant quotes a particular comment made by the judge in support of the claim that the judge had a strong personal bias and as a basis for the assertion that there was a reasonable factual basis for doubting the judge's impartiality. Defendant also submits that the judge's refusal to accept a plea agreement, suppression of evidence, and imposition of the maximum sentence demonstrate that the judge was biased. Defendant cites SCRA 1986, 21–400 and *State ex rel. Bardacke v. Welsh,* 102 N.M. 592, 698 P.2d 462 (Ct.App. 1985), in support of his argument.

■ While defendant correctly argues that a judge should recuse himself in a proceeding in which he has a personal bias or prejudice, the comment and conduct of the judge relied upon by defendant do not establish such a bias or prejudice. In *Welsh,* this court looked for actual bias or prejudice against the party seeking the judge's disqualification in determining whether there was merit to the claim that the judge should have disqualified himself; the same standard applies in this case because defendant argues the judge should have recused himself.

In *Welsh,* the judge was quoted as saying "there's a natural bias against a pro se pleading[;]" Welsh was pro se. *Id.* at 605, 698 P.2d at 475. Also, the newspaper article involved in *Welsh* reported that the judge had said Welsh was taking too much of his time. This court found that the article did not show the judge was biased or prejudiced against Welsh. In this case, defendant relies upon, and quotes the following comment of the judge: "at the time when I took the plea [agreement] there

were red flags that popped up all over this courtroom * * * as counsel are well aware, defense counsel, how I feel about violent crimes once there's been a conviction, especially rape cases I have strong feelings about them * * * * " This comment of the judge merely refers, in a general way, to the judge's feelings about violent crimes once a conviction is obtained. The judge's comment does not even suggest that the judge had a personal bias or prejudice against defendant during the trial. Applying *Welsh* to the case at bar, we find no abuse of discretion in the trial court's denial of defendant's motion for recusal and, thus, no basis for reversal in this argument insofar as it relies upon the above quoted comment of the trial judge.

With respect to defendant's claim that the judge demonstrated his prejudice by not allowing admission of the proffered evidence discussed above, we find no merit in this argument in light of our holding that the suppression of the evidence was not an abuse of discretion. Furthermore, defendant has not claimed that the sentence imposed was illegal, and it is well settled that a claim of judicial bias cannot be based upon the imposition of the maximum legal sentence. *State v. Williams,* 105 N.M. 214, 730 P.2d 1196 (Ct.App.1986). Defendant's reliance on the judge's refusal of the plea and disposition agreement as a basis for asserting judicial bias is also the basis for his fourth issue, which claims error in the refusal of the plea agreement. For the reasons that follow, we find no abuse of discretion in the trial court's refusal to accept the tendered plea agreement.

IV. Refusal of Plea and Disposition Agreement

In asserting error in the court's refusal to accept the tendered plea agreement, defendant's brief argues that there was a possibility the agreement had been subverted in bad faith by the prosecutor. Defendant claims "there is a suggestion that the state subverted the plea agreement * * * * "

When the plea and disposition agreement was tendered to the trial court, the judge reserved ruling on it until he could consider a presentence report, information on treatment programs, and written statements from victim and her other brother, Martin Swafford, regarding their feelings and views on the proposed disposition. This was not improper; under SCRA 1986, 5-304(B), the trial judge has the discretion to defer its decision on whether to accept or reject a plea agreement "until there has been an opportunity to consider the presentence report."

Defense counsel at trial "raised the possibility that the victim and Martin Swafford had been misled by the prosecutor" because their written statements indicated they wanted defendant punished, rather than the deferred sentence and probation incorporated in the tendered plea agreement. It was suggested in the trial court that the prosecutor was trying to subvert the plea agreement by providing the court with letters from victim and her brother Martin to prejudice the court against defendant. This latter argument ignores the fact that the trial court expressly requested written statements from victim and Martin Swafford before he would decide whether to accept the plea agreement. Because the trial court requested written statements from victim and Martin Swafford, we find no basis for defendant's "suggestion" of subversion by the prosecutor providing the court with letters from them.

The fact that defense counsel raised a mere "possibility" or "suggestion" of bad faith by the prosecutor does not establish an abuse of discretion by the trial court in its refusal to accept the plea agreement, particularly in light of the prosecutor's response that there had been no attempt to influence the family members and no attempt to subvert any agreement. Considering the totality of the facts and circumstances relating to this claim of error, we find no abuse of discretion in the trial court's refusal of the plea agreement. *See State v. Holtry,* 97 N.M. 221, 638 P.2d 433 (Ct.App.1981) (trial judge has discretion to accept or reject plea and his ruling will not be disturbed on appeal absent an abuse of

discretion), and thus there is no merit in defendant's assertion that refusal of the plea agreement demonstrated judicial bias or prejudice.

V. Claim of Prosecutorial Bias

Continuing to rely upon the allegation of bad faith subversion of the plea agreement, defendant also contends that the district attorney's office should have disqualified itself because of personal bias and misconduct. Defendant submits that the failure of the district attorney's office to disqualify itself deprived defendant of due process and a fair trial. We disagree.

Our review is limited to the record presented on appeal. *State v. Kenneman,* 98 N.M. 794, 653 P.2d 170 (Ct.App.1982). Nothing in the record before us establishes that there was any misconduct by the district attorney's office, or any bias; the trial court made no such finding, and defense counsel's allegations of bias and misconduct are insufficient to support such a determination. *See State v. Roybal,* 107 N.M. 309, 756 P.2d 1204 (Ct.App.1988) (argument of counsel is not evidence to be considered by this court). We find there is no basis for reversal in the failure of the district attorney's office to disqualify itself from the prosecution of this case.

VI. Due Process Claim

Defendant's final argument asserts that he was denied due process and a fair trial because Deputy John Mares perjured himself. We have been referred to no evidence, or finding of the trial court, in support of this claim nor to any portion of the transcript which may support it. *See State v. Reese,* 91 N.M. 76, 570 P.2d 614 (Ct.App. 1977) (absent reference to relevant portions of transcript, this court will not address issue). Moreover, in a prior pleading filed with this court, appellate counsel for defendant admitted that there was "no factual support for this argument" and noted that the issue was raised at defendant's insistence and submitted to this court pursuant to *Franklin.* We hold that this issue fails to support a reversal of defendant's convictions, and it does not establish that defendant was denied either due process or a fair trial.

CONCLUSION

Based on all of the foregoing, defendant's convictions and sentence are affirmed.

IT IS SO ORDERED.

DONNELLY and APODACA, JJ., concur.

782 P.2d 391

Martha LOVATO, Claimant–Appellant,

v.

MAXIM'S BEAUTY SALON, INC. and Fireman's Fund Insurance Company, Respondents–Appellees.

No. 11285.

Court of Appeals of New Mexico.

Oct. 10, 1989.

Narciso Garcia, Jr., Garcia Law Firm, Albuquerque, N.M. for claimant-appellant.

H. Kevin Haight, Miller, Stratvert, Torgerson & Schlenker, P.A., Albuquerque, N.M., for respondents-appellees.

OPINION

APODACA, Judge.

Claimant Martha Lovato (claimant) appeals the denial of her claim for benefits under the Workers' Compensation Act, NMSA 1978, Sections 52-1-1 to -68 (Cum. Supp.1986) (Interim Act). The hearing officer concluded that her claim was barred by the going and coming rule and that her injury did not occur on the premises of her employer as the term was defined in *Dupper v. Liberty Mutual Insurance Co.*, 105 N.M. 503, 734 P.2d 743 (1987). We disagree with the hearing officer's determination and hold that the claim falls within an exception to the going and coming rule. We thus remand for the entry of findings and conclusions on the merits of claimant's claim.

Claimant was employed by Maxim's Beauty Salon, Inc. (Maxim's), a national chain of beauty salons that leases space in department stores. She worked in the salon located on the lower level of the Montgomery Ward department store (Montgomery Ward), an anchor store that occupies a part of a large shopping mall. Maxim's employees were instructed to park in the parking lot immediately east of Montgomery Ward and to walk through the store to get to the salon.

On the day of the accident, claimant parked in the designated location and walked into the shopping mall. Although claimant's brief-in-chief states that after parking, claimant "walked into the Montgomery Wards Store to go to work," Maxim's takes issue with this rendition of the facts. Instead, Maxim's maintains, claimant, having parked in the designated area, entered the mall not through Montgomery Ward but through another separate public and common entrance.

Once inside the mall, Maxim's contends, claimant met a coworker and they stopped at a mall restaurant for coffee. Afterwards, they walked through the mall and then entered Montgomery Ward through the inside mall entrance. Because of the basis for our disposition of this appeal, we believe that it makes no difference whether claimant entered Montgomery Ward immediately after parking her car, or whether the facts are as related by Maxim's in its answer brief. In the store, she slipped, fell and was injured. From claimant's deposition testimony, we understand that she was in a portion of the store in which she would have been had she gone directly to work and that she slipped on a heavily waxed floor. As a result, she received workers' compensation benefits from Maxim's for a temporary period.

The going and coming rule is codified at Section 52-1-19. That statute provides that the term " 'injury by accident arising out of and in the course of employment' " does not include injuries to a worker "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."

In *Dupper*, our supreme court adopted the premises rule as an exception to the going and coming rule. The court held 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 * * * is engaged in a necessary incident of

employment." *Id.* at 506, 734 P.2d at 746. *Dupper* also held that "[t]he 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." *Id.* at 506–7, 734 P.2d at 746–7 (emphasis in original).

The hearing officer found that: (1) claimant's accident occurred before she had reached the premises of her work place and before she had assumed her employment duties; (2) the accident did not occur within the course and scope of her employment; and (3) the accident did not happen on Maxim's premises. He then concluded that the claim was barred under the going and coming rule and that the accident did not occur on Maxim's premises within the meaning of *Dupper.*

Claimant raises two issues on appeal: (1) whether her claim was barred under the going and coming rule; and (2) whether this court, on review, can make its own findings as a basis for entering judgment for claimant.

For purposes of the rule adopted in *Dupper,* "premises" includes "parking lots intended for employees or customers, whether 'within the main company premises or separated from it.' " *Id.* at 506, 734 P.2d at 746 (*quoting* 1 A. Larson, *The Law of Workmen's Compensation* § 15.42(a) at 4–98 (1985)). This is the rule in the majority of jurisdictions and is not limited to parking lots owned, controlled, or maintained by the employer. 1 A. Larson, *The Law of Workmen's Compensation* § 15.42(a) (1989). "The doctrine has been applied when the lot, although not owned by the employer, was exclusively used, or used with the owner's special permission, or just used, by the employees of this employer." *Id.* at 4–98 to –99 (footnotes omitted).

Parking lots in shopping malls have been held to be part of the premises of employers whose main premises are located within the mall. *See, e.g., De Hoyos v. Industrial Comm'n,* 26 Ill.2d 110, 185 N.E.2d 885 (1962) (whether employer owns parking lot immaterial so long as employer has provided the parking lot for its employees), *holding limited by Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989); *May Dep't Stores Co. v. Harryman,* 307 Md. 692, 517 A.2d 71 (1986) (shopping mall parking lot constituted "premises" and injuries sustained on parking lot by employee of store in mall covered by workers' compensation); *Berry v. B. Gertz, Inc.,* 21 A.D.2d 708, 249 N.Y.S.2d 285 (1964) (injury suffered by employee of department store located in shopping center in parking area intended for shopping center employees as well as customers arose out of and in course of employment although parking area was not owned, controlled or maintained by employer); *Frishkorn v. Flowers,* 26 Ohio App.2d 165, 270 N.E.2d 366 (1971) (injury occurring in parking lot was covered by workmen's compensation where employer was located in shopping center that had control over parking area for entire center).

Maxim's concedes that if claimant's injury had taken place in the parking lot itself, the accident would be deemed to have occurred on the premises and thus come under the *Dupper* exception. The question presented to us in this appeal, however, is whether the claim was barred simply because the accident occurred *after* claimant had left the parking lot but *before* she had arrived at Maxim's. More precisely, is there an exception to the going and coming rule that applies to the facts of this appeal? We believe that there is.

A well-recognized exception to the going and coming rule is travel between two parts of an employer's premises. *See* Larson, *supra,* § 15.14(a). Because a parking lot is generally treated as part of the premises, most courts hold that an injury occurring in a public street or other off-premises location between the place of business and the parking lot is on a necessary route between the two portions of the premises and thus is in the course of employment. *Id.,* § 15.14(b). *See id.,* § 15.21 (criticizing any distinction between public and private property in this situation as irrelevant in

workers' compensation cases). *See also Adair v. Metropolitan Bldg. Co.*, 38 Mich. App. 393, 196 N.W.2d 335 (1972) (employee who, while walking to parking lot maintained by employer, slipped and fell in driveway that was not owned by employer, was within "zone, environments and hazards" of employee's labor at time of fall so as to be considered on premises for workers' compensation purposes).

We agree with the observation made in *Harryman.* In that case, the Maryland court stated that "it would be unreasonable to hold that injuries sustained by [the worker] on the parking lot or between the building entrance and the time clock would be compensable, but injuries sustained between the parking lot and the building entrance would not be compensable." *Id.* at 695–6, 517 A.2d at 73 (*quoting Proctor–Silex v. Debrick,* 253 Md. 477, 489, 252 A.2d 800, 807 (1969)). We thus hold that claimant's right to compensation was not barred by Section 52–1–19.

Maxim's nonetheless argues that Section 52–1–19 requires an injured employee to prove the employer's negligence for an injury sustained while the employee is on the way to or from work, but off the employer's premises. Under *Dupper,* however, negligence need be shown only if the injury does not fall within one of the generally recognized exceptions to the going and coming rule. Because we hold that claimant's injury does fall within such an exception, proof of such negligence is not required.

Maxim's further contends that, in relying on several cases cited in her brief-in-chief, claimant has attempted to come under the special hazards exception to the going and coming rule. *See* Larson, *supra* § 15.13 *et seq.* A special hazard arises when the employer subjects the employee to a particular risk beyond those risks shared by the general public. *Id.,* § 15.13. We have not viewed claimant's argument on appeal as relying solely on the special hazards exception. Neither does our disposition depend on such exception. Instead, we have based our holding on another, distinct exception, that of an employee traveling between two parts of an employer's premises. We believe that our holding in this appeal is but a reasonable extension of the *exceptions principle* enunciated in *Dupper* to facts not present there.

Under her second issue, claimant contends we can determine independently that the evidence established she was totally disabled. Claimant relies on *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct.App.1988) for the principle that we, as a reviewing court, can make independent findings. Maxim's likewise maintains on appeal that this court, under SCRA 1986, 12–201(C), can affirm the hearing officer's decision for reasons other than that the claim was barred by the going and coming rule. *See also Frederick v. Younger Van Lines,* 74 N.M. 320, 393 P.2d 438 (1964). Apparently, Maxim's argues, as does claimant, that we can independently determine the merits of claimant's claims, even though the hearing officer, based on his holding that the claim was barred, found it unnecessary to enter findings and conclusions on the merits. Specifically, Maxim's asserts the evidence supports a conclusion that claimant failed to prove causation under the Interim Act.

In *Tallman,* we spoke of independent findings in conjunction with the question of substantial evidence and the whole record standard of review. Here, we are not presented with a substantial evidence question, since the hearing officer did not enter findings and conclusions on claimant's disability. We believe the hearing officer should be given the opportunity to enter such findings and conclusions and that, as a reviewing court, we should not usurp this function. Neither do we interpret Rule 12–201(C) to permit us to affirm under such circumstances. We therefore remand for entry of such findings. *See* SCRA 1986, 1–052; *Hickey v. Griggs,* 106 N.M. 27, 738 P.2d 899 (1987).

In summary, we reverse the hearing officer's determination that the claim was barred by the going and coming rule. We remand for entry of findings and conclu-

sions on the merits of claimant's disability. Claimant is awarded appeal costs.

IT IS SO ORDERED.

ALARID and MINZNER, JJ., concur.

782 P.2d 395

Joe JOJOLA, Claimant,

v.

AETNA LIFE AND CASUALTY and Twin Mountain Construction, Respondents-Appellants,

v.

The NEW MEXICO SUBSEQUENT INJURY FUND, Respondents-Appellees.

No. 11352.

Court of Appeals of New Mexico.

Oct. 12, 1989.

Maureen S. Reed, Christopher W. Nickels, Beall, Pelton, O'Brien & Brown, Albuquerque, N.M., for respondents-appellants.

Nathan H. Mann and M. Clea Gutterson, Gallagher, Casados & Mann, P.C., Albuquerque, N.M., for respondents-appellees.

OPINION

HARTZ, Judge.

The Workers' Compensation Division (the WCD) dismissed employer's claim against the New Mexico Subsequent Injury Fund (the Fund) on the ground that employer had not filed a certificate of pre-existing impairment prior to worker's subsequent injury, as required by a statute that became effective after the subsequent injury but before employer filed its claim against the Fund. Employer appeals. We reverse.

FACTS

Because the Fund did not challenge the facts stated in employer's docketing statement, we accept those facts as true for purposes of this appeal. *See State v. Calanche,* 91 N.M. 390, 574 P.2d 1018 (Ct. App.1978). Worker suffered an accidental work-related injury on July 21, 1987. Prior to that injury he had sustained an injury that caused a permanent physical impairment. Although employer had actual knowledge of the pre-existing physical impairment, at the time of worker's subsequent injury it had not yet filed a certificate attesting to the pre-existing impairment. On September 23, 1987, worker

filed a compensation claim against employer. Employer brought in the Fund as a party to the action on April 12, 1988.

Under the law in effect at the time of worker's subsequent injury, employer could recover from the Fund even though prior to the injury it had not filed a certificate of pre-existing impairment, as long as employer had actual knowledge of worker's pre-existing condition. *See Fierro v. Stanley's Hardware,* 104 N.M. 50, 716 P.2d 241 (1986). In 1988, however, the legislature amended the Subsequent Injury Act to forbid an employer from recovering from the Fund for the subsequent injury unless a certificate had been filed *before* the subsequent injury. NMSA 1978, § 52-2-6(D) (Supp.1988) (Subsequent Injury Act is applicable only to disability arising out of accident taking place after certificate of pre-existing impairment has been filed). This amendment was effective March 8, 1988. 1988 N.M. Laws, ch. 109, § 4.

Acting on the Fund's motion for summary judgment, the WCD decided that the amendment should apply in this case and dismissed employer's claim against the Fund. Thus, employer's claim was extinguished even though at the time of the subsequent injury it had no reason to know that it would be held to a prior-filing requirement.

DISCUSSION

Starting from the proposition that the filing requirement is a procedural matter, *see City of Roswell v. Chavez,* 108 N.M. 608, 775 P.2d 1325 (Ct.App.1989) (filing certificate is procedural prerequisite to recovery from the Fund), the Fund argues that the amendment to the filing requirement is a change in procedure, rather than substantive rights, and therefore should be applied retroactively. *See Wilson v. New Mexico Lumber & Timber Co.,* 42 N.M. 438, 81 P.2d 61 (1938) (statutes dealing only with remedial procedure are generally given retroactive effect).

Nevertheless, in workers' compensation cases the uniform rule in this state has been that a claim for benefits is governed by the law in effect at the time the cause of action accrued. *See Noffsker v. K. Barnett & Sons,* 72 N.M. 471, 384 P.2d 1022 (1963) (amount of medical expenses recoverable without court approval); *Davis v. Meadors-Cherry Co.,* 65 N.M. 21, 331 P.2d 523 (1958) (worker's right to an additional award because of aggravation of injury); *Wilson v. New Mexico Lumber & Timber Co.* (statute of limitations); *Bateman v. Springer Bldg. Materials Corp.,* 108 N.M. 655, 777 P.2d 383 (Ct.App.1989) (worker's right to attorney fees); *Strickland v. Coca-Cola Bottling Co.,* 107 N.M. 500, 760 P.2d 793 (Ct.App.1988) (definition of disability). Amendments to the Workers' Compensation Act have been applied only prospectively. *Jaramillo v. Kaufman Plumbing & Heating Co.,* 103 N.M. 400, 708 P.2d 312 (1985) is not in point. The passage from that opinion quoted in the special concurrence related to whether a district court could determine that the worker had not been disabled in the past and then require the worker to repay prior disability benefits. The statute at issue had been enacted decades earlier, so there was no question as to "retroactive" application of the statute in the sense that we confront in this case.

This uniformity in result follows from the *sui generis* nature of the Workers' Compensation Act. *See Bateman v. Springer Bldg. Materials Corp.* As stated in *Davis v. Meadors-Cherry Corp.,* 65 N.M. at 24, 331 P.2d at 525, "We are firmly committed to the doctrine that the remedy in a Workmen's Compensation case is a part of the right[.]" For example, even though a statute of limitations is often considered a matter of remedial procedure and therefore applied retroactively, *see, e.g., Standard Acc. Ins. Co. v. Miller,* 170 F.2d 495 (7th Cir.1948), the New Mexico Supreme Court has held that the statute of limitations in our Workers' Compensation Act is "a limitation upon the right as well as the remedy" and should not be applied retroactively. *Wilson v. New Mexico Lumber & Timber Co.,* 42 N.M. at 442, 81 P.2d at 64. Therefore, we believe that it is not fruitful to analyze whether a provision of the Workers' Compensation Act is a matter of remedial procedure in determining

whether it should be applied retroactively. The teaching of our cases can be expressed in a simple rule upon which the legislature and litigants can rely: in the absence of express statutory language or compelling reasons to the contrary, any new provisions of the Workers' Compensation Act shall apply only to causes of action accruing after the effective date of the provision.[1]

The same rule should apply to the Subsequent Injury Act. Employers' claims for reimbursement under the Subsequent Injury Act, NMSA 1978, Sections 52-2-1 to 52-2-14 (Repl.Pamp.1987 and Supp.1988), are dependent on claims for benefits filed under the Workers' Compensation Act. *See* § 52-2-5 (Supp.1988) (payments from subsequent injury fund may be made as reimbursement to employer for benefits paid under Workers' Compensation Act). Because of the relationship between workers' compensation claims and claims against the Fund, it is appropriate to apply equivalent rules of construction in interpreting the two acts. *See Rader v. Don J. Cummings Co.,* 109 N.M. 219, 784 P.2d 38 (App.1989).

Turning to the dispute before us, the statute does not provide explicitly for retroactive application of the filing requirement. Nor is there any compelling reason to apply the requirement retroactively. On the contrary, we would find it offensive to impose a statutory requirement retroactively when the affected party, as in this case, would have had no reason to know of the requirement in time to comply with it, particularly when compliance would have been relatively easy. *See* 2 N. Singer, *Sutherland Statutory Construction* § 41-05 (Sands 4th ed.1986) (a decision regarding retroactivity properly rests on subtle judgments concerning fairness).

We reverse the grant of summary judgment and order the hearing officer to reinstate employer's claim against the Fund.

IT IS SO ORDERED.

ALARID, J., concurs.

DONNELLY, J., specially concurs.

DONNELLY, Judge (Specially Concurring).

I concur with the majority that the workers' compensation hearing officer erred in dismissing the employer's claim against the Subsequent Injury Fund. I do not join in the majority's promulgation of a rule of construction applicable to future legislative amendments to the Workers' Compensation or Subsequent Injury Acts because the rule as stated is dicta and departs from controlling precedent.

I respectfully disagree with that portion of the majority decision which goes beyond construction of the applicable statute in this case and seeks to declare a controlling rule of statutory construction applicable to future legislative amendments to the Workers' Compensation Act and Subsequent Injury Act. In my opinion, the rule of statutory construction adopted by the majority departs from controlling precedent in *Wilson v. New Mexico Lumber & Timber Co.,* 42 N.M. 438, 81 P.2d 61 (1938). *Wilson,* relying upon numerous decisions from other jurisdictions and prior New Mexico precedent, discussed a general rule of statutory construction applied by the courts for discerning legislative intent in order to determine whether an amendment to the workers' compensation statute was intended by the legislature to be accorded retroactive or prospective effect. There, the supreme court recognized that in determining whether a statute should be construed so as to have retroactive effect, other factors must also be considered, including determination of whether the legislation affects existing or substantive rights, or whether the act is one dealing with remedial procedure. I am unable to agree with the majority that "it is not fruitful to analyze whether a provision of the Workers' Compensation Act is a matter of remedial procedure in determining whether it should be applied retroactively."

1. We note that this rule is consistent with the result in *Canton Textile Mills, Inc. v. Lathem,* 253 Ga. 102, 317 S.E.2d 189 (1984), cited by the special concurrence, because the language of the statute was explicit.

The oft stated rule of statutory construction followed by the courts in New Mexico is that statutes, except those dealing with remedial procedure, are to be construed as prospective rather than retroactive unless there is a clear legislative intention to the contrary. *Hansman v. Bernalillo County Assessor*, 95 N.M. 697, 625 P.2d 1214 (Ct. App.1980). Nevertheless, statutes, including amendments to the Workers' Compensation Act, may be given retroactive application where a reviewing court determines that this was the legislative purpose. *See Jaramillo v. Kaufman Plumbing & Heating, Co.*, 103 N.M. 400, 708 P.2d 312 (1985) (adopting special concurrence of Judge Bivins); *Wilson v. New Mexico Lumber & Timber Co.*, (discussing exception to general rule of prospectivity, in specific instances, where statute deals with "remedial procedure"); *Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 317 S.E.2d 189 (1984) (recognizing retroactivity of provision of workers' compensation statute). *See also Standard Acc. Ins. Co. v. Miller*, 170 F.2d 495 (7th Cir.1948) (applying workers' compensation statute retroactively). In *Jaramillo* the supreme court adopted the following:

> While [the statute] does not expressly provide for retroactive application and, given the short intervals when applications for changes in compensation may be made, such would not ordinarily be contemplated; nevertheless, *equitable principles may warrant retroactive application* in an appropriate case. [Emphasis added.]

Id. at 407, 708 P.2d at 319.

The court in *Standard Accident Insurance Co. (quoting with approval from Connecticut Mutual Life Insurance Co. v. Talbot*, 113 Ind. 373, 378, 14 N.E. 586, 589 (1887)), I submit, voiced the correct rule to be applied in such cases, observing that:

> The better rule of construction, and the rule peculiarly applicable to remedial statutes, however, is that a statute must be so construed as to make it effect the evident purpose for which it was enacted; and if the reason of the statute extends to past transactions as well as to those in the future, then it will be so applied, although the statute does not, in terms, so direct, unless to do so would impair some vested right, or violate some constitutional guaranty.

Id. at 498. Similarly, as observed in *Canton Textile Mills, Inc.:*

> The general rule is that laws prescribe only for the future, and usually will not be given retrospective operation. They will be given a retrospective operation, however, when the language imperatively requires it, or when an examination of the act as a whole leads to the conclusion that such was the legislative purpose. It is at last and always a question of legislative intent.

Id. at 104, 317 S.E.2d at 191.

Applying the above authorities to the case before us, I agree with the majority that the cause should be reversed and that the employer's claim should be reinstated against the Fund. I disagree with the rule of statutory construction promulgated by the majority.

782 P.2d 904

Jerry MARTINEZ, Petitioner,

v.

DARBY CONSTRUCTION COMPANY and Mountain States Mutual Casualty Company, Respondents.

No. 18171.

Supreme Court of New Mexico.

Nov. 21, 1989.

Montoya, Murphy, Kauffman & Garcia, Donald D. Montoya, Santa Fe, for petitioner.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., Terry S. Kramer, Albuquerque, for respondents.

OPINION

SOSA, Chief Justice.

This case is before the Court on writ of certiorari to the court of appeals in which an opinion was entered reversing the decision of the Workers' Compensation Division to award benefits to Jerry R. Martinez (claimant). The opinion addressed the issue of timeliness of notice to the employer as required by NMSA 1978, Section 52–1–29 (Repl.Pamp.1987). In making its determination that the claimant failed to give timely notice, the court focused upon the standard of knowledge required by a worker and ruled that the claimant possessed sufficient recognition of the "probable compensable character of the injury" as of the day of the accident, June 10, 1986. On this basis the court concluded "[b]ecause he did not give his employer notice until almost six months later, he failed to comply with the thirty-day limitation of Section 52–1–29(A)."

In his petition, the claimant raises several issues concerning the Section 52–1–29 notice provision and the applicable standard of review. For the reasons set forth below, we reverse the ruling of the court of

appeals and reinstate the award of benefits as determined by the hearing officer.

The findings entered by the hearing officer reveal the claimant was employed by Darby Construction Company as a welder when, on June 10, 1986, the claimant suffered an accident while in the course and scope of his employment. The claimant was hit on the head with the shovel of a backhoe. During the period from the date of the accident until December 3, 1986, "when the claimant could no longer perform his job because of the original accident ... and the eventual disabling pain caused thereby," he continued to work while performing all of the tasks of his job.

The record indicates on June 14, 1986, the claimant received a chiropractic examination and treatment for a cervical injury. He complained about slight pain in the neck, and headaches and dizziness when he turned his head. The diagnosis revealed the claimant had limited motion in the neck to the left side, slight limitation of motion in the thoracic spine, muscle tension bilaterally in the cervical, thoracic and lumbar regions of the spine, and slight pain into both arms upon lifting above the head. The claimant received a second treatment on September 13, and a third on December 12; no x-rays were taken during the course of these treatments. In his deposition, the health care provider stated his recommendation included cervical traction and therapy to the cervical region at least three times a week. The advice was rejected by the claimant who preferred to continue working. As stated by the practitioner, "[h]e indicated that he needed to be working because he was having a financial problem."

The claimant worked without absence from June 10 until December 3, 1986, and discussed the incident with no one. During this six-month period of time the claimant passed a mandatory welders' certification test in August 1986, despite the fact he had a "slight problem" with it due to the pain. At the time of the next certification test on December 3, the pain had worsened to the point that he was unable to successfully pass the test. On December 5 the claimant sought medical and emergency room treatment, and after an examination and x-rays, was found to have a minimal disc protrusion of the cervical vertebrae at C5–6 and C6–7—a diagnosis consistent with that made by the first practitioner. He was advised to discontinue work and referred to medical specialists for treatment. The claimant did not return to work.

Darby Construction first learned of the claimant's injury on December 5 when hospital personnel contacted it regarding the claimant's visit. A December 22, 1986 letter by the claimant's attorney, the receipt of which was acknowledged on January 5, 1987, informed Darby Construction of the circumstances surrounding the claimant's injuries.

A claim for worker's compensation was filed on April 13, 1987. The hearing officer based the award of benefits upon the finding that "[i]t was not until December 3, 1986 that the Claimant knew or should have known the nature, seriousness and probable compensable character of his injury," thus commencing the thirty-day period in which to give written notice to the employer.

This appeal is governed by the whole record standard of review. *See Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n,* 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984); *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct.App.), *cert. denied,* 109 N.M. 33, 781 P.2d 305 (1988). This standard was recently addressed in *National Council on Compensation Insurance v. New Mexico State Corp. Commission,* 107 N.M. 278, 756 P.2d 558 (1988).

In *Duke City Lumber Co. v. New Mexico Environmental Improvement Board,* 101 N.M. 291, 681 P.2d 717 (1984), this Court held that for purposes of reviewing administrative decisions the substantial evidence rule is expressly modified to include whole record review. *Id.* at 294, 681 P.2d at 720. Under whole record review, the court views the evidence in the light most favorable to the agency decision, *Wolfley v. Real Estate Comm'n,* 100 N.M. 187, 668 P.2d 303

(1983), but may not view favorable evidence with total disregard to contravening evidence. *New Mexico Human Servs. Dep't v. Garcia,* 94 N.M. 175, 608 P.2d 151 (1980).

To conclude that an administrative decision is supported by substantial evidence in the whole record, the court must be satisfied that the evidence demonstrates the reasonableness of the decision. No part of the evidence may be exclusively relied upon if it would be unreasonable to do so. The reviewing court needs to find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency.

Id. at 282, 756 P.2d at 562.

Accordingly, our review on certiorari, as on direct appeal, requires an independent examination of the entire record to determine whether substantial evidence exists to support the reasonableness of the hearing officer's decision to award benefits to the claimant. In other words, "[t]he focus of the review is on the decision of the administrative agency and this Court must make the same review of the [agency's] determination as [did] the [court of appeals]." *Groendyke,* 101 N.M. at 477, 684 P.2d at 1142. We ultimately must decide whether the court of appeals was correct in finding an absence of substantial evidence. *See* 107 N.M. at 282, 756 P.2d at 562.

In this case we believe the court of appeals misapplied the whole record standard of review by substituting its determination for that of the hearing officer because, when viewed in the appropriate manner, substantial evidence existed to support the reasonableness of the hearing officer's award of benefits, or, more specifically, the finding that December 3, 1986, was the date upon which the period for giving notice began to run. Alternatively stated, we believe the record contains evidence which reasonably could support the finding that the claimant knew, or should have known by the exercise of reasonable diligence, he was suffering a probable compensable injury by accident in the course of his employment no earlier than December 3, 1986.

The Worker's Compensation Act expresses the intention and policy of this state that employees who suffer disablement as a result of injuries causally connected to their work shall not become dependent upon the welfare programs of the state, but shall receive some portion of the wages they would have earned, had it not been for the intervening 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). Our statutory provision, NMSA 1978, Section 52-1-29, which requires notice to an employer of a work-related accident and injury provides as follows:

A. Any workman claiming to be entitled to compensation from any employer shall give notice in writing to his employer of the accident and of the injury within thirty days after their occurrence; unless, by reason of his injury or some other cause beyond his control, the workman is prevented from giving notice within that time, in which case he shall give notice as soon as may reasonably be done, and at all events not later than sixty days after the occurrence of the accident.

B. No written notice is required to be given where the employer or any superintendent or foreman or other agent in charge of the work in connection with which the accident occurred had actual knowledge of its occurrence.

The purpose of this section is to enable the employer to investigate the facts and circumstances in order to protect against fictitious, simulated, or aggravated claims, *Herndon v. Albuquerque Pub. Schools,* 92 N.M. 635, 593 P.2d 470 (Ct.App.1978); *Clark v. Duval Corp.,* 82 N.M. 720, 487 P.2d 148 (Ct.App.1971), and, if necessary, to allow the employer to provide medical care for the employee so as to speed his recovery. *Beckwith v. Cactus Drilling Corp.,* 84 N.M. 565, 505 P.2d 1241 (Ct.App. 1972), *cert. denied,* 84 N.M. 560, 505 P.2d 1236 (1973).

Although the hearing officer entered a finding that "[t]he employer had

actual notice of the accidental injury suffered by the Claimant within thirty (30) days of December 3, 1986," it is undisputed that Darby Construction had no actual knowledge of the accident prior to December 1986. Only the thirty-day notice provision of Section 59-1-29(A) is applicable to this appeal.

> This requirement means: "The period limited for this notice begins to run from the time the workman knows, or should know by the exercise of reasonable diligence, that he has sustained injury by accident in the course of his employment." *Montell v. Orndorff,* 67 N.M. 156, 353 P.2d 680 (1960). The knowledge of a workman with which this rule is concerned, is knowledge of a compensable injury. *Langley v. Navajo Freight Lines, Inc.,* 70 N.M. 34, 369 P.2d 774 (1962). "The period for written notice does not begin to run until [the claimant] is charged with such knowledge." *Rohrer v. Eidal Int'l,* 79 N.M. 711, 449 P.2d 81 (Ct.App.1968).

Anaya v. Big Three Indus., Inc., 86 N.M. 168, 170, 521 P.2d 130, 132 (Ct.App.1974). That is, "the time for notice ... does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." *Montell v. Orndorff,* 67 N.M. 156, 160, 353 P.2d 680, 682-83 (1960) (quoting 2 A. Larson, *Larson's Workmen's Compensation Law* at p. 260 [now vol. 2B, § 78.40 (1989)]). A compensable injury requires some legal disability or inability to perform work, *Anaya v. New Mexico Steel Erectors, Inc.,* 94 N.M. 370, 372, 610 P.2d 1199, 1201 (1980), as statutorily defined. *See* NMSA 1978, §§ 52-1-25, 52-1-26 (Repl.Pamp.1987). Therefore, for purposes of notice to the employer actual disability is not required but only that the claimant has knowledge, or with the exercise of reasonable diligence should have knowledge, that more likely than not he is impaired and unable, at least to some percentage extent, to perform work for which he is suited.

In *Sedillo v. Levi-Strauss Corp.,* 98 N.M. 52, 644 P.2d 1041 (Ct.App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982), the court of appeals held that the claimant was not disabled until approximately fifteen months after the occurrence of the accident during which time she was able to perform her regular duties. The issue presented was whether the date of disability, upon which the rate of compensation was to be based, occurred on the day of the accident or on the day the claimant was unable to get out of bed. The court, quoting *Cardenas v. United Nuclear Homestake Partners,* 97 N.M. 46, 49, 636 P.2d 317, 320 (Ct.App.1981), stated that " '[t]he concept of "compensable disability" intrinsic to our workmen's compensation law is that in order to be entitled to an award of compensation benefits a workman must not only suffer a physical impairment, but also be unable to perform work.' " Not unlike the present case, the claimant in *Sedillo* received limited medical treatment at one point during the fifteen month period of employment, but was not advised that she had suffered a compensable injury (disability). The court held that the claim for compensation was filed within the time limitation after the claimant knew or had reason to know she had suffered a compensable injury upon being advised by a health care provider.

Likewise, in *Langley v. Navajo Freight Lines, Inc.,* 70 N.M. 34, 369 P.2d 774 (1962), it was found that the first time the claimant realized he had suffered a compensable injury was when he consulted a health care provider approximately one month and five days after the alleged accident and immediately was hospitalized. *Cf. Sanchez v. City of Albuquerque,* 75 N.M. 137, 401 P.2d 583 (1965) (injury gradually progressed to compensability fourteen years after commencement of employment when claimant consulted doctor who first advised him to discontinue working, and when he first knew or should have known by exercise of reasonable diligence that he was suffering any compensable injury by accident in the course of his employment). While we recognize the issue in the present case concerns the time period in which to notify the employer, and not the time period in which to file a claim, this Court has

stated that "[t]he principles ... concerning the timeliness of claims ... apply with equal reason and force in considering the timeliness of notice of accident and injury." *Montell,* 67 N.M. at 161, 353 P.2d at 683–84.

There is no dispute that the claimant suffered neck pain following the June 10, 1986 accident. However, the evidence concerning his ability to perform his regular duties, albeit in pain, indicates that no special accommodations were made for the claimant. Nor is it suggested that he did less work or put in fewer hours after the accident than before. Despite the recommendation by the health care provider four days after the incident to schedule treatment visits, the claimant's belief that it was not until December that he had a probable compensable injury or disability (when he could no longer perform his duties and was advised to discontinue working and obtain medical treatment) is within the bounds of reason. Under these circumstances, the claimant, in the exercise of reasonable diligence, may not have possessed the requisite knowledge necessary to trigger the notice period until December 3, 1986, the last day he was able to perform his duties. Accordingly, the hearing officer could find that it was reasonable for the claimant to believe that so long as he was able to perform his regular welding duties, notice to the employer was unnecessary. Consequently, the December 22 letter constituted written notice to the employer of the accident and injury and was timely under Section 52–1–29(A).

Based upon the above, the decision of the hearing officer to award worker's compensation benefits to the claimant is hereby reinstated and the opinion of the court of appeals is reversed.

IT IS SO ORDERED.

RANSOM, MONTGOMERY and BACA, JJ., concur.

782 P.2d 1348

In the Matter of Michael D. C'DE BACA, Esq., An Attorney Admitted to Practice before the Courts of the State of New Mexico.

No. 18460.

Supreme Court of New Mexico.

Nov. 22, 1989.

Virginia Ferrara, Chief Disciplinary Counsel, Charles A. Wyman, Deputy Disciplinary Counsel, Albuquerque, for Board.

Michael D. C'de Baca, Albuquerque, pro se.

OPINION

PER CURIAM.

This matter is before the Court following disciplinary proceedings conducted pursuant to the Rules Governing Discipline, SCRA 1986, 17–101 through 17–316 (Repl. Pamp.1988 & Supp.1989), wherein attorney Michael D. C'de Baca was found to have committed various violations of the Rules of Professional Conduct, SCRA 1986, 16–101 through 16–805 (Repl.Pamp.1988). We adopt the Disciplinary Board's findings of fact, conclusions of law and recommendations for discipline.

In early 1986, C'de Baca met Mrs. Mary Frampton during church activities and subsequently agreed to prepare a will for her. In the course of this representation, he learned that Mrs. Frampton recently had been widowed and that she had bank certificates of deposit (CDs) totaling more than $100,000 which represented the proceeds of her deceased husband's life insurance policy. Mrs. Frampton used the interest earned on these deposits to make the mortgage payments on her home.

A few months after Mrs. Frampton's will was completed, C'de Baca approached her and recommended that she invest in his personal business venture for which he and other nonlawyer partners were attempting to raise capital. C'de Baca promised almost immediate returns on her investment with high earnings. He failed to advise her of the risks involved and failed to advise her to seek independent counsel.

Based on C'de Baca's advice over the next several months, Mrs. Frampton used her CDs as collateral to borrow several times from her bank and make several loans to C'de Baca for his business ventures in gold ore processing and a private pay-phone company. On all but one occasion C'de Baca prepared a promissory note to her signed by himself and his partners. These notes, however, did not provide for interest and did not protect Mrs. Frampton in the event of default. During the preparation of the promissory notes, C'de Baca was representing his partners as their attorney but failed to disclose this fact to Mrs. Frampton. She trusted C'de Baca as her friend and attorney and believed her investments were safe. After exhausting her ability to borrow against her savings, Mrs. Frampton lastly agreed to take out a loan on a car for which she held clear title and to give the proceeds to C'de Baca in exchange for another deficient note which consisted of the business partners' promise to make the monthly car loan payments.

C'de Baca and his partners never made a payment on any of their notes to Mrs. Frampton, except that they did make the car payments. As a result of their defaults, she was unable to repay her own bank loans and could not make her mortgage payments. She subsequently lost her home in foreclosure proceedings. Upon consultation with another attorney, Mrs. Frampton filed a civil suit in Bernalillo County District Court for "debt and money due, conspiracy and fraud." After a bench trial, she was granted judgment against C'de Baca for compensatory damages totaling $94,069.82 and punitive damages of $75,000, with statutory interest.

This judgment, filed on February 1, 1989, included a specific finding that C'de Baca had defrauded Mrs. Frampton. Twenty days later, C'de Baca appeared before a hearing committee on an unrelated disciplinary charge alleging that he had lied under oath at his own deposition during his personal bankruptcy proceedings. We note that for this and other misconduct which he admitted, C'de Baca was suspended for a period of six months, effective July 1, 1989. However, despite the February 1st judgment, C'de Baca told the committee members on February 21, 1989, that Mrs. Frampton's judgment did not involve a finding of fraud. After the filing of disciplinary charges in the present matter, C'de Baca failed to file an answer or appear at the committee hearing set for July 13, 1989, for consideration of any aggravating or mitigating circumstances.

Accordingly, with regard to his conduct towards Mrs. Frampton, we conclude that C'de Baca violated the following Rules of Professional Conduct: (1) Rule 16–109(B) in that he wrongfully used information relating to his former representation of Mrs. Frampton to her disadvantage and consequent financial ruin; (2) Rule 16–801(A) in that he knowingly made a false statement of material fact to the hearing committee when he stated that Mrs. Frampton's judgment did not involve a finding of fraud; (3) Rule 16–804(C) in that he engaged in conduct involving dishonesty or misrepresentation in his dealings with Mrs. Frampton; (4) Rule 16–804(D) in that he engaged in conduct that is prejudicial to the administration of justice; and (5) Rule 16–804(H) in that he engaged in conduct that adversely reflects on his fitness to practice law.

The present disciplinary matter also included charges unrelated to Mrs. Frampton's case. Dr. Joe L. Kast complained in April 1989 that C'de Baca failed to pay him certain funds which reportedly were withheld for him from the settlement funds of three of C'de Baca's clients, who were also Dr. Kast's patients. Those clients were Sonia DeLeon, Noel Chavez and Juanita Chavez. The total amount allegedly withheld by C'de Baca for payment to Dr. Kast was $2,630.

After many unsuccessful attempts, Dr. Kast, in March 1989, finally reached C'de Baca, who told him that he already had spent those particular funds but would be able to pay the amount owed as soon as he received money in another settlement. C'de Baca never paid him, however, and when Dr. Kast complained to the disciplinary authorities, C'de Baca failed to respond to the Board's inquiries. As noted earlier, C'de Baca failed to answer these disciplinary charges or appear before the hearing committee.

In connection with Dr. Kast's complaint, we conclude that C'de Baca violated the following Rules of Professional Conduct: (1) Rule 16–115(A) in that he failed to hold his clients' funds separately from his own and failed to appropriately safeguard such funds; (2) Rule 16–115(B) in that he failed to promptly notify a third person, Dr. Kast, of his receipt of the funds in which Dr. Kast had an interest, and he failed to promptly deliver the funds Dr. Kast was entitled to receive; (3) Rule 16–115(C) in that he failed to keep the funds belonging to another separately, when both he and another person claimed an interest in those funds, until there was a proper resolution or severance of those interests; (4) Rule 16–803(D) in that he failed to give full cooperation and assistance to the Disciplinary Board and its counsel in discharging their respective functions and duties with respect to discipline and disciplinary procedures; (5) Rule 16–804(C) in that he engaged in conduct involving dishonesty; (6) Rule 16–804(D) in that he engaged in conduct prejudicial to the administration of justice; and (7) Rule 16–804(H) in that he engaged in conduct that adversely reflects on his fitness to practice law.

In the past C'de Baca has received a formal reprimand as well as the suspension previously noted. In the present matter it is apparent that C'de Baca engaged in a pattern of misconduct including false testimony, fraud, dishonesty, misuse and conversion of client funds, breach of fiduciary duties, and other conduct prejudicial to the administration of justice. Such misconduct demonstrates that C'de Baca is not fit to practice law in this state.

IT IS THEREFORE ORDERED that Michael D. C'de Baca be and hereby is disbarred pursuant to SCRA 1986, 17–206(A)(1).

IT IS FURTHER ORDERED that Michael D. C'de Baca not be permitted to apply for reinstatement pursuant to SCRA 1986, 17–214(A), for a minimum period of three years and not until he has furnished proof to the Disciplinary Board of the following: (1) full satisfaction of the civil judgment in favor of Mrs. Mary Frampton including the statutory interest thereby awarded, (2) full restitution to Dr. Joe L. Kast, and (3) payment of all costs assessed in this case.

IT IS FURTHER ORDERED that as of October 25, 1989, the Clerk of the Supreme Court shall strike the name of Michael D. C'de Baca from the roll of those persons permitted to practice law in New Mexico.

IT IS FURTHER ORDERED that the discipline hereby imposed shall be published in *New Mexico Reports* and the *Bar Bulletin* and shall be filed in the Office of the Supreme Court Clerk pursuant to SCRA 1986, 17–206(D).

The costs of these proceedings assessed against C'de Baca are in the amount of $357.92.

IT IS SO ORDERED.

783 P.2d 465

Elmer and Phil SANCHEZ, Plaintiffs–Appellants,

v.

Lorenzo HERRERA, et al., Defendants–Appellees.

No. 17999.

Supreme Court of New Mexico.

Nov. 30, 1989.

James A. Burke, Santa Fe, for plaintiffs-appellants.

Sommer, Udall & Hardwick, P.A., Eric Sommer, Kimball Udall, Santa Fe, for defendants-appellees.

OPINION

BACA, Justice.

The Sanchez family appeals from a declaratory judgment in favor of State Farm Mutual Insurance Company on two issues: first, whether a gunshot accident within the insured's truck falls within the liability coverage on the truck; and second, whether the insured can stack the limits of medical payments coverage from five separate policies. The parties are in agreement on facts sufficient to decide the legal question of the insurer's duty to the insured for this type of accident. There is also no dispute that in order for the Sanchezes to stack medical payments from five policies, there must, as a matter of law, exist some ambiguity in those policies. We hold the Sanchez' policy offers coverage for this type of accident, but that the policies unambiguously precluded the stacking of medical payments. Accordingly, we reverse in part and affirm in part, and remand to the trial court for further proceedings.

FACTS

Plaintiff Elmer Shanchez, his friend Mario Herrera, and a third companion were returning from a three-day hunting trip in a pickup truck owned by Elmer's father, Phillip Sanchez. They were carrying their guns loaded in the cab. Seeing what they took to be a Game and Fish Department roadblock, the young men braked the pickup, and with the engine still running, attempted to empty their guns and avoid a possible fine. While emptying his gun inside the truck, Herrera accidently fired and a bullet passed through Elmer Sanchez' foot.

Phillip Sanchez carried liability insurance on the truck that provided coverage for damages "caused by accident resulting from the ownership, maintenance or use of

your car." Sanchez also carried medical coverage up to a limit of $5,000.00 on the truck, and he carried identical coverage with varying limits on four other family vehicles under separate policies. All of this insurance was with one company, State Farm. After the accident, claims were made against the truck's liability coverage, the medical payments coverage, and against the four other policies' medical payments provisions.

State Farm paid $5,000.00, the limit under the truck's medical coverage. State Farm refused to pay any money under liability because, State Farm argued, the accident did not result from use of the truck. State Farm also refused to pay medical benefits based on the other four policies. It argued that those policies restricted coverage to owned vehicles listed on each policy, and did not cover Sanchez vehicles generally.

COVERAGE

The parties agree that coverage extends only over those activities that are connected with use of the vehicle. They also agree that use of a pickup for hunting is foreseeable, and that transportation of guns would be incident to use of the vehicle for hunting. The parties disagree, however, both on whether emptying guns within the pickup's cab could be considered incident to the vehicle's use for hunting, and on what degree of connection is required between the use of the vehicle and the injury. State Farm maintains the proper test in New Mexico is whether the use of the vehicle is the "efficient and predominating cause" of the accident, citing *Pecos Valley Cotton Oil, Inc. v. Fireman's Fund Ins. Co.*, 780 F.2d 892, 894 (10th Cir.1986). Sanchez argues the connection should be considered in terms of the duty owed by the insurer, and not in terms of proximate causation.

Efficient and predominating cause does not apply.

Pecos Valley, cited by State Farm, involved a truck driver who was injured as he was unloading cottonseed into a bin. An iron door used to cover the bin was in an open position, but due to an improper weld, the door fell and injured the truck driver. The question before the Tenth Circuit was whether the truck's liability policy, which contained a loading and unloading limitation clause, would cover the accident, or whether coverage should be under the seed bin's insurance. The federal court held that for automobile liability insurance coverage to extend in New Mexico, the use of the vehicle must be the "efficient and predominating cause" of the accident, citing *Southern California Petroleum Corp. v. Royal Indem. Co.*, 70 N.M. 24, 369 P.2d 407 (1962). *Pecos Valley,* 780 F.2d at 894. The federal court noted that this court's discussion of the test in *Southern California Petroleum Corp.,* while providing some guidance, was dictum. *Id.* at 894 n. 3.

In *Southern California Petroleum Corp.,* a drilling company's negligence created a hazardous condition that led to an explosion when other subcontractors were pouring a mixture of concrete and water into a well casing. The trial court held that the antecedent negligence was the "efficient and predominating cause" of the accident. 70 N.M. at 27, 369 P.2d at 410. The managing oil company, held responsible for the negligence in the trial court, then sought a declaratory judgment that it was insured under the vehicle liability coverage of its subcontractors who poured the concrete and water. The appellate court noted argument that the pumping operation was part of the chain of causation, but cited to an annotation of "loading and unloading" cases that set forth the "efficient and predominating" causation test. 70 N.M. at 30, 369 P.2d at 413. This court held, however, that it need not reach the issue of causation in that case.

Whether or not the "efficient and predominating" test for causation in loading and unloading cases has been adopted in New Mexico, a question we find not well settled, the test should not be applied to these facts. In both *Pecos Valley* and *Southern California Petroleum Corp.,* the issue before the court clearly dealt with a commercial context in which one compa-

ny's business operation overlapped another's. Insurance had specifically foreseen this problem, and the vehicle insurance contained a specific clause to define the company's limits in the "loading and unloading" context. In the case before us, there is no issue of overlapping liability in a commercial setting. This is also not a "loading and unloading" case, as those terms are generally understood in the insurance context.[1]

There must be a reasonable causal connection between use of the vehicle and the injury.

Other jurisdictions have addressed the question of causation for fact patterns similar to the one before us. Generally, courts have firmly rejected any notion of proximate causation and have required instead only that there be some causation between the injury and the use of the vehicle. *Quarles v. State Farm Mut. Auto. Ins. Co.,* 533 So.2d 809 (Fla.Dist.Ct.App.1988) (finding a significant causal connection without stating a general standard); *Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co.,* 521 A.2d 308 (Me.1987) (reasonable causal connection between use of vehicle and injury); *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.,* 318 N.C. 534, 350 S.E.2d 66 (1986) (test is not proximate cause, but causal connection); *Kohl v. Union Ins. Co.,* 731 P.2d 134 (Colo.1986) (en banc) (injury must be causally related to a conceivable use of the vehicle). We agree with these courts that the proper inquiry in hunting accidents involving automobiles is whether the use made of the vehicle at the time of the accident logically flows from and is consistent with the foreseeable uses of that vehicle.

Reasonable causation applied.

In reviewing hunting accidents, courts have identified at least five fact patterns, which are listed here in descending order of judicial preference for extending coverage: 1) accidents in which the actual movement of the vehicle caused the firing of the gun, as in transport; 2) accidents in which the discharged gun was being removed from or placed in a gun rack in the vehicle; 3) accidents in which the gun was being loaded into or unloaded from the vehicle; 4) accidents arising from use of the vehicle as a gun rest; and 5) accidents in which the vehicle is described as a "mere situs" for the accident, such as when children play with guns in a standing vehicle. *See Quarles,* 533 So.2d 809, 811–12. Clearly, this case does not involve either gun play or use of the vehicle as a gun rest. It is more analogous either to the accidental discharge of a gun while a vehicle is in motion, or to the loading and unloading of guns into or from a vehicle. Under recognized categories, we conclude this accident was reasonably connected with use of a vehicle.

If we analyze these facts without reference to other jurisdictions, we still conclude that emptying a gun within the cab of a pickup truck is foreseeably incident to use of that vehicle for hunting. Inclement weather is a frequent condition of hunting trips, and a vehicle is a logical shelter. It is foreseeable that, however unwise it may be, some hunters will load and unload their guns within their trucks. Therefore, by applying the test that we adopt today of reasonable causation between the use of the vehicle and the injury, we hold there is coverage.

1. The parties referenced "loading and unloading" cases track fact patterns of hunters getting in and out of trucks. The better rule appears to be that all activities are analyzed in terms of being incident to hunting and thereby covered under vehicular liability. However, at least one court has considered "loading and unloading" for hunting to be a separate "use" and then analyzed whether the particular activity in question bore a close enough causal connection to "loading and unloading." *See Toler v. Country Mut. Ins. Co.,* 123 Ill.App.3d 386, 78 Ill.Dec. 790, 462 N.E.2d 909 (1984) ("loading and unloading" clause held at issue with inquiry whether there was a causal connection between injury and "loading or unloading"). This seems an unnecessary step, particularly when there is no "loading and unloading" clause in the pertinent insurance contract. In addition, there would be superfluous confusion in this case because emptying a gun is synonomous with "unloading".

STACKING OF MEDICAL PAYMENTS PROVISIONS

Sanchez also appeals the district court's summary judgment in favor of State Farm on the issue of stacking. Stacking involves adding the maximum coverage under one policy to the maximum of a second policy until the insured's damages are fully compensated or his or her combined policy limits are exhausted. *See Lopez v. Foundation Reserve Ins. Co.,* 98 N.M. 166, 168, 646 P.2d 1230, 1232 (1982). Sanchez argues that he should be able to add the coverage provided by each of five policies carried with State Farm on separate family vehicles for total medical coverage of $21,000.00. State Farm paid out $5,000.00 on the truck in which the accident occurred, but argues that each of the other policies clearly restrict coverage to only that vehicle, owned by the insured, that is listed on *that particular policy.* The district court held the policies were unambiguous, and, because the policies precluded stacking, the court granted summary judgment for State Farm. We affirm.

The question of whether medical payments provisions in insurance policies should be stacked has not previously been considered in New Mexico. In a series of opinions, however, this court has addressed the issue of stacking uninsured motorist benefits under automobile policies. *Lopez,* 98 N.M. 166, 646 P.2d 1230 (stacking of uninsured motorist coverage not precluded by the policy terms and should be allowed); *Schmick v. State Farm Mut. Ins. Co.,* 103 N.M. 216, 704 P.2d 1092 (1985) (New Mexico's statute mandating uninsured motorist coverage was intended to cover accidents with underinsured motorists as well); *Jimenez v. Foundation Reserve Ins. Co.,* 107 N.M. 322, 757 P.2d 792 (1988) (stacking should be allowed pursuant to New Mexico's statute even when the insurance contract clearly precludes stacking).

State Farm argues these cases are distinguishable from the present issue because the legislature mandated uninsured motorist coverage in NMSA 1978, Section 66–5–301(B), whereas medical coverage exists only by virtue of contracts freely entered into between the insured and State Farm. We agree, and find that our prior decisions concerning stacking are not directly analogous to the present case, because of the strong public policy in New Mexico regarding uninsured motorist coverage. We thus resort to traditional methods of contract interpretation to assist our resolution of this issue.

This court has established two principles for analyzing stacking questions, and both are applicable in the absence of a statute. First, an insurance company may have a duty specifically to exclude stacking if the policy as a whole encourages the insured to expect coverage. *Lopez,* 98 N.M. at 168, 646 P.2d at 1232. Second, such exclusionary provisions will be enforced only if they are both unambiguous *and* not in conflict with statutory public policy. *Jimenez,* 107 N.M. at 324, 757 P.2d at 794. Therefore, in this case a failure by State Farm to exclude the stacking of medical payments could make the contract ambiguous as a matter of law, requiring reversal.

The relevant portions of the insurance policy at issue state:

> We will pay for medical expenses for *bodily injury* sustained by:
>
> 1. a. the first *person* named in the declarations;
>
> b. his or her *spouse;* and
>
> c. their *relatives.*
>
> These *persons* have to sustain the *bodily injury:*
>
> a. while they operate or occupy a vehicle covered under the *liability* section.... [Emphasis in original.]

Further, the liability section of each policy purchased by Sanchez provides:

> We will:
>
> 1. pay damages which an *insured* becomes legally liable to pay because of:
>
> a. *bodily injury* to others, and
>
> b. damage to or destruction of property, including loss of its use, caused by accident resulting from the ownership, maintenance or use of *your car....* [Emphasis in original.]

"Your car," as defined by the policy, is the vehicle described on the "Declarations

Page" of each policy. The declarations page of each policy owned by Sanchez lists only one vehicle—the sole vehicle insured by that policy.

Additionally, each policy contains an exclusionary clause, as follows:

> THERE IS NO COVERAGE:
>
> 4. FOR MEDICAL EXPENSES FOR BODILY INJURY:
>
> a. SUSTAINED WHILE OCCUPYING OR THROUGH BEING STRUCK BY A VEHICLE OWNED BY YOU, YOUR SPOUSE, OR ANY RELATIVE, WHICH IS NOT INSURED UNDER *THIS COVERAGE;* .... [Emphasis added.]

We examine this language for ambiguity and to determine whether it specifically rejects stacking.

Standard for ambiguity in the context of insurance contracts.

When this court reviews a contract for ambiguity, it examines the entire document in an attempt to ascertain the intent of the parties, and it will not find ambiguity unless the contract is "reasonably and fairly susceptible of different constructions." *Levenson v. Mobley,* 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). If the contract is unambiguous, the court is bound to enforce its terms. *CC Housing Corp. v. Ryder Truck Rental, Inc.,* 106 N.M. 577, 746 P.2d 1109 (1987).

When a court examines the words of an insurance contract for ambiguity, a particular concern arises due to the nature of the contract. Modern contract theory emphasizes the importance of the bargain as an element of a typical contract. *See e.g. Restatement (Second) of Contracts* § 17 (1981). This model of a bargained-for enterprise carried out by, if not equally shrewd, at least free-willed parties, does not fit insurance contracts. The typical insured does not bargain for individual terms within policy clauses; the insured makes only broad choices regarding general concepts of coverage, risk, and cost. Not only does the insurance company draft the documents, but it does so with far more knowledge than the typical insured of the consequences of particular words.

New Mexico law recognizes the special nature of insurance contracts and has developed principles of construction that favor both the insured and the avowed purpose of insurance, the provision of coverage. *See e.g. King v. Travelers Ins. Co.,* 84 N.M. 550, 505 P.2d 1226 (1973) (if one party prepares an instrument, ambiguities construed against drafter); *Anaya v. Foundation Reserve Ins. Co.,* 76 N.M. 334, 414 P.2d 848 (1966) (ambiguities construed in favor of the insured). *See also* 7 S. Williston, *A Treatise on the Law of Contracts,* § 900 (3d ed. 1963) (courts construe insurance contracts in favor of their purpose—coverage of the insured).

Thus, our analysis of the insurance contract at issue turns on whether the relevant provisions create an ambiguity or a reasonable expectation that coverage will be stacked. If they do, we interpret the contract against the insurer; if not, absent any countervailing legislative pronouncement evincing public policy regarding medical payments, we interpret the contract according to its plain meaning.

Expectations of the insured.

In *Lopez,* the sole apparent cause of ambiguity arose from the payment of separate premiums. Separate premiums give rise to expectations of greater coverage. *See Jimenez,* 107 N.M. 322, 324–25, 757 P.2d 792, 794–5; *see also Lopez,* 98 N.M. at 170, 646 P.2d at 1234. The reasonable expectations of the insured thus provide the criteria for examining an insurance contract on the basis both of the actual words used and of unresolved issues that the insurance company has an obligation to address.

Sanchez argues that expectations arise not only because of separate premiums paid, but also because of the nature of uninsured motorist coverage. As this court has previously discussed, a problem with uninsured motorist coverage is that a pedestrian, killed by an uninsured driver, could have collected on more than one vehicle or policy (separate premiums paid in both cases), but if that same person were in

an insured vehicle, he or she only could have recovered under that one policy or vehicle. *See Lopez,* 98 N.M. at 169, 646 P.2d at 1233. This would have lead to the insured's being better covered as a pedestrian or in an unowned vehicle.

Medical payments, like uninsured motorist coverage, follow the person, leading to the same incongruities, and the same frustration of the insured's expectations. If the insured paid premiums on two cars and is injured while *outside* of one car, he or she could recover under *both* policies, whereas if injured inside one car, the insured could recover only under that car's policy. Because most people would expect to carry their maximum amount of coverage while inside an insured car, the preclusion of medical payments recovery would, like with uninsured motorist coverage, frustrate the insured's legitimate expectations. The insurance company's failure to explicitly address those expectations became its failure to clarify ambiguity under *Lopez.* State Farm argues here, however, that two policy sections unambiguously precluded stacking, making any contrary intention of the insured unreasonable, and we agree.

Exclusionary clause is unambiguous.

The relevant portions of the policy, *supra,* clearly indicate that medical coverage is for the vehicle described in the policy only and, therefore, unambiguously rejects stacking. Faced with this clear and unambiguous language, any contrary reading by Sanchez clearly was not reasonable, and he could not have reasonably understood the policy to provide for stacking under these circumstances.

The policies state that State Farm will pay medical expenses to certain enumerated parties while they operate a vehicle covered under the liability section. The liability section obligates the insurer to pay for loss resulting from the use of "your car," which is defined as the one car owned by Sanchez that the policy covers. The policy further excludes injury sustained while occupying any vehicle owned by Sanchez that is not insured by the coverage of the policy.

We find that this language clearly and unambiguously excludes stacking of medical coverage. The four other policies on vehicles owned by appellant's father specifically exclude medical coverage for injury incurred through the use of any vehicle owned by Sanchez but not listed on the policy. *Compare Lopez,* 98 N.M. at 168, 646 P.2d at 1232 (rejecting insurer's contention of unambiguity because the policy did not consider multiple premiums).

Sanchez contends, nevertheless, that the exclusionary clause is subject to an alternative interpretation. He maintains that the term "coverage" in the clause, "[t]here is no coverage: ... [f]or medical expenses for bodily injury (a) sustained while occupying ... a vehicle ... which is not insured under *this coverage*" (emphasis added) can be interpreted not to refer to the single policy, but to all policies purchased from State Farm. Thus, the exclusion refers to vehicles owned by Sanchez but insured by an alternative carrier; the clause can be read as an attempt by State Farm to capture all of the family's insurance business. Sanchez cites *Schmick* as authority that "coverage" is susceptible to plural as well as singular meaning. *See* 103 N.M. at 219, 704 P.2d at 1095.

We reject this attempt to demonstrate an ambiguity. To hold otherwise would require an unreasonable construction that would import different meanings to the two uses of the term "coverage" in the same sentence.

Thus, we hold that the insurance policy unambiguously reflects the agreement of the parties to exclude stacking of medical coverage. Because we are not faced with any countervailing legislative policy mandating a different interpretation, we abide by the canons of contract construction and find that the unambiguous terms should be enforced.

State Farm is entitled to preclude stacking. We hold the medical payments from the Sanchez' five policies may not be stacked. Accordingly, we affirm this portion of the trial court's rulings.

We remand to the district court for further proceedings in accord with the first part of this opinion.

IT IS SO ORDERED.

SOSA, C.J., and RANSOM, J., concur.

783 P.2d 471

Jimmy and Elizabeth NEZ, husband and wife, Plaintiffs–Appellants,

v.

Max FORNEY, d/b/a Albuquerque Recovery Bureau, and "M" Bank, formerly known as State National Bank, Defendants–Appellees.

No. 18228.

Supreme Court of New Mexico.

Dec. 5, 1989.

Robert Finkelstein, San Juan County Legal Services, Farmington, for plaintiffs-appellants.

Celia F. Rankin, Albuquerque, for defendants-appellees.

OPINION

BACA, Justice.

Plaintiffs, Jimmy and Elizabeth Nez (Nez), appeal the district court's order granting summary judgment in favor of defendants M Bank and Max Forney. M Bank is a Texas corporation with its principal place of business in El Paso, Texas. Max Forney does business as Albuquerque Recovery Bureau. Nez raises two issues on appeal: (1) whether the district court should apply the New Mexico or Texas statutes of limitation in the instant case; (2) if the Texas statutes of limitation are applicable, whether the two-year or four-year statute of limitations should be used. We reverse.

In 1982, Nez entered into a retail installment contract with Kemp Ford, Inc., in El Paso, Texas, to purchase a Ford truck and listed an El Paso address below the buyer's signature line. Kemp Ford assigned the contract to M Bank. This contract contained a clause stating: "This contract shall be governed by the laws of the State of Texas." Subsequently, Nez moved to New Mexico and resided within the territorial jurisdiction of the Navajo Nation. On September 25, 1985, Bradford Clement, an agent of M Bank, repossessed Nez' truck from their house on the Navajo reservation. M Bank denies that Bradford Clement was its agent.

On April 26, 1988, approximately two and one-half years after the repossession, Nez filed a complaint in district court alleging

conversion, wrongful repossession, an unfair trade practice violation, and violation of Navajo Tribal Code Section 607. Nez sought actual and punitive damages under the conversion count; various statutory damages under NMSA 1978, Sections 55–9–502 and 55–9–504 to 55–9–507 (Repl.Pamp. 1987) of the Uniform Commercial Code; $300 or three times actual damages under NMSA 1978, Section 57–12–10 (Repl.Pamp. 1987) of the Unfair Practices Act; and statutory damages under the Navajo Tribal Code Section 609. Defendants then moved for summary judgment against Nez with a supporting brief. In their brief, defendants argued summary judgment was proper on all claims because Nez brought suit after the time expired under a Texas statute of limitations. Defendants also asserted that Nez could not base his claims on violations of New Mexico law because New Mexico had no connection with the transaction at issue. Defendants contended that Texas law should apply, and the parties' choice of law provision should be honored. We do not reach this second argument. This opinion only turns on the question of the applicability of the statute of limitations. The court granted defendants' motion, and Nez appealed.

■ We first address defendants' argument in its brief-in-chief that, as the parties chose to be governed by Texas substantive and remedial law pursuant to the choice of law provision, application of Texas statutes of limitation barring Nez' claims was appropriate. Nez correctly asserts that we have viewed statutes of limitation as procedural for choice of law purposes. In *Sierra Life Ins. Co. v. First National Life Ins. Co.*, 85 N.M. 409, 512 P.2d 1245 (1973), plaintiff Sierra Life, a New Mexico corporation, brought an action for breach of contract or, alternatively, for specific performance, against defendant First National, an Arizona corporation, in a New Mexico district court. First National argued to the trial court that Arizona's four-year statute of limitations was applicable, and therefore, plaintiff's claims were barred. On appeal, we ruled that under New Mexico law statutes of limitation are procedural and that the law of the forum governs matters of procedure. Thus, we held that plaintiff's claims were not barred, applying a six-year New Mexico statute of limitations. *See also Slade v. Slade,* 81 N.M. 462, 468 P.2d 627 (1970) (statutes of limitation are not substantive in nature, and the law favors the right of action, not the right of limitation). Texas courts also view statutes of limitation as procedural for choice of law purposes. *See, e.g., Los Angeles Airways, Inc. v. Lummis,* 603 S.W.2d 246, 248 (Tex.Civ.App.1980), *cert. denied,* 455 U.S. 988, 102 S.Ct. 1610, 71 L.Ed.2d 847 (1982). Finally, our holdings are consistent with a recent Supreme Court opinion, *Sun Oil Co. v. Wortman,* 486 U.S. 717, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988). In *Sun Oil,* the Supreme Court held that traditionally statutes of limitation are procedural; therefore, a Kansas forum did not violate the Due Process and Full Faith and Credit clauses by applying its own longer statute of limitations to a claim governed by the substantive law of other states.

■ Defendants also assert that New Mexico recognizes parties may include remedial law in their choice of law agreement, citing to *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 533 P.2d 751 (1975). We faced facts similar to the instant case in *Jim.* Jim, a Navajo, purchased a truck in Farmington, New Mexico, and CIT financed the purchase. Later, Jim defaulted on his payments. While Jim resided on the Navajo reservation in New Mexico, two agents of CIT repossessed the truck on the reservation without Jim's written consent. Subsequently, Jim brought suit in the district court for violations of Navajo Tribal Code Sections 307 and 309 (now Sections 607 and 609). CIT responded, filing a motion for failure to state a claim upon which relief can be granted, which was apparently based on the theory that New Mexico, not Navajo law, applied and under NMSA 1953, Section 50A–9–503 of the Uniform Commercial Code, CIT had the right to self help repossession without breach of the peace. The court, treating the defense as a motion to dismiss, dismissed the case with prejudice.

We held in *Jim* that parties can choose by contract a law to govern the performance and enforcement of contractual arrangements between them, quoting from NMSA 1953, Section 50A-1-105 of the Uniform Commercial Code for support. Unfortunately, this court did not have either a copy of the conditional sales contract between Jim and CIT before it, or any other evidence indicating the parties' choice as to the applicable law governing the contract. We, therefore, held the court erred in dismissing Jim's complaint and remanded with the following directions:

> Perhaps the contract will conclusively answer the question as to whether the parties made a choice, not only as to the law governing the validity and interpretation of the contract, but also as to that governing the remedies for an admitted breach of an admittedly valid contract. Failing such provision in the contract, it is only then that a choice of law analysis, would come into play.

Id. at 364, 533 P.2d at 753.

We recognized in *Jim* that parties may include a time to sue provision in a contract. In other words, parties can put their own statute of limitations period in a contract, and our courts will honor it. *See Electric Gin Co. v. Firemen's Fund Ins. Co.*, 39 N.M. 73, 39 P.2d 1024 (1935) (fire insurance policy contained a provision that a suit must be commenced within twelve months after loss, which this court upheld); *Turner v. New Brunswick Fire Ins. Co.*, 45 N.M. 126, 112 P.2d 511 (1941) (insurance policy provision stipulating a one-year limitation period is not void when it shortens a general six-year contract statute of limitations period); *Wiseman v. Arrow Freightways, Inc.*, 89 N.M. 392, 552 P.2d 1240 (Ct.App.), *cert. denied*, 90 N.M. 9, 558 P.2d 621 (1976) (trial court erred in failing to give effect to a time to sue provision found in an insurance policy). However, in *Sandoval v. Valdez*, 91 N.M. 705, 580 P.2d 131 (Ct.App.1978), our court of appeals held that a one-year limitation period in an insurance contract was not controlling when it conflicted with New Mexico public policy set forth in our uninsured motorist statute. Therefore, in *Sandoval*, without deciding if the applicable time limitation should be based on the personal injury or contract statute of limitations, the court of appeals concluded that the plaintiff's personal injury suit was not barred.

Here, we observe that the choice of law provision only stated that the retail installment contract would be governed by Texas law. It failed, however, to include a statute of limitations/time to sue provision. In line with *Jim* and time to sue cases, we believe a choice of law provision *must* specifically describe remedial limitations, if such aspects are to be covered in addition to substantive aspects of the contract. The choice of law provision in the instant case should be limited only to substantive matters, such as contractual interpretation. We conclude that the district court erred as a matter of law in not applying a New Mexico statute of limitations here, because New Mexico courts should apply the forum state's statute of limitations.

Having found that the district court should have applied a New Mexico statute of limitations, we must determine which statute is appropriate. This action is primarily one for wrongful repossession, which arises from plaintiffs' and defendants' execution of a security agreement creating a security interest in the sellers. The Nezes granted sellers a purchase money security interest. In *Bank of New Mexico v. Sholer*, 102 N.M. 78, 691 P.2d 465 (1984), we implicitly interpreted a security agreement to be a contract. *See First City Bank-Farmers Branch, Texas v. Guex*, 677 S.W.2d 25 (Tex.1984); *Texas Nat'l Bank v. Karnes*, 717 S.W.2d 901 (Tex.1986) (actions seeking recovery for wrongful repossession and other repossession-related U.C.C. violations sound in contract). Nez, in his docketing statement and brief-in-chief, argued that the New Mexico contractual statute of limitations, NMSA 1978, Section 37-1-3 or 37-1-4 should be applied. Because we find that Nez brought claims within the applicable New Mexico statute of limitations period under either statute, we do not decide which statute the district court should have applied. We simply hold that Nez' claims were not barred under

either statute. We, therefore, do not reach the issue of which Texas statute of limitations is applicable here.

IT IS SO ORDERED.

RANSOM, J., concurs.

MONTGOMERY, J., specially concurs.

MONTGOMERY, Justice (specially concurring).

I concur in the result in this case as set out in the plurality opinion, but I do not concur in all of the rationale.

The elusiveness of the distinction between "substance" and "procedure" is well known, especially as that distinction relates to statutes of limitations. *Sun Oil*, as the plurality opinion points out, stands for the notion that statutes of limitations are often viewed as "procedural" as a matter of tradition. But *Sun Oil* more starkly stands for the proposition that much confusion exists because statutes of limitations can be *both* procedural *and* substantive, depending upon context. The Supreme Court noted that whether or not a statute of limitations is substantive or procedural depends upon whether the question is being asked for conflict of laws, full faith and credit or *Erie* doctrine purposes. Justice Scalia said that, "[e]xcept at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil*, 486 U.S. 717, 726, 108 S.Ct. 2117, 2124. In his concurrence, Justice Brennan amplified on this chameleon-like dichotomy.

> Statutes of limitations ... defy characterization as either purely procedural or purely substantive. The statute of limitations a State enacts represents a balance between, on the one hand, its substantive interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law. A State that has enacted a particular limitations period has simply determined that after that period the interest vindicating claims becomes outweighed by the combination of the interests in repose and avoiding stale claims. One cannot neatly categorize this complicated temporal balance as either procedural or substantive.

Id., 486 U.S. at 736, 108 S.Ct. at 2129.

We need not and should not rely on the tenuous difference between substance and procedure to decide this case. In an appropriate case, a foreign state's statute of limitations might very well be applied to a claim asserted in this forum, even though statutes of limitations are generally regarded as "remedial."

To illustrate: It is undisputed that Mr. and Mrs. Nez were residents of El Paso at the time they purchased the truck. If they had remained residents of El Paso and defendants had repossessed the truck during a casual visit by the Nezes to some friends in San Juan County, and if Mr. and Mrs. Nez had thereafter brought suit in San Juan County against defendant M Bank for breach of contract, we might well hold that the Texas statute of limitations was applicable to this breach-of-contract claim. In that case New Mexico would have very little relation to the parties' dispute; the lawsuit would be between residents of Texas suing for breach of a Texas contract.

Thus, I disagree with the statement in the plurality opinion that a choice-of-law provision *must* specifically describe remedial limitations and that, absent such a specific reference to remedial matters, the choice-of-law provision relates only to substantive matters such as interpretation of the contract. I see no reason why the contract must spell out in detail everything covered by the provision and why a simple statement such as "This contract shall be governed by the laws of the State of Texas" should not, in an appropriate case, be given effect and applied to all disputes based on the contract. This would include disputes about the validity and interpretation of the contract, as well as questions concerning its performance or breach, and might even include questions concerning the statute of limitations applicable to a claim arising from a breach.

Here, however, Mr. and Mrs. Nez were residents of New Mexico at the time the truck was repossessed and when suit was brought. They sued for conversion and for violations of the New Mexico Uniform Commercial Code and the New Mexico Unfair Practices Act. (In addition, they sued under the Navajo Tribal Code for wrongful repossession; but we need not, on this appeal, consider any questions of choice of law which might arise in applying Navajo law in a New Mexico court.) In other words, New Mexico residents sued in a New Mexico court for violations of New Mexico law. In these circumstances I see no reason not to give them the benefit of the New Mexico statute of limitations on their claims, assuming it is longer than the corresponding Texas statute.

Mr. and Mrs. Nez also sued for breach of contract, and this might raise the question whether the New Mexico or the Texas statute of limitations on claims for breach of contract is applicable. However, it appears that the Texas limitations period for actions sounding in contract is four years (Tex.Civ.Prac. & Rem.Code Ann. § 16.004 (Vernon 1986)), whereas the two-year period relied on by defendants and the district court applies to the torts of trespass, conversion, taking or detaining of personal property of another, personal injury, forcible entry and detainer, and forcible detainer (*id.* § 16.003(a)). Thus, even if the Texas statute of limitations for breach of contract applies, the Nez' claims for breach of contract were timely filed.

Accordingly, focusing on plaintiff's claims for various torts (injuries to property) under New Mexico law, I would hold that the New Mexico four-year statute of limitations (NMSA 1978, § 37–1–4) applies. Focusing on plaintiffs' breach-of-contract claims, I conclude that those claims were timely filed under either the Texas statute or New Mexico's six-year statute of limitations (NMSA 1978, § 37–1–3). I therefore agree that the summary judgment below was erroneous.

783 P.2d 475

The FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff–Appellee,

v.

ALTO CONSTRUCTION COMPANY, INC., et al., Defendants–Appellants.

No. 18320.

Supreme Court of New Mexico.

Dec. 5, 1989.

Hawthorne & Hawthorne, P.A., Richard A. Hawthorne, Ruidoso, for defendants-appellants.

Underwood, Dutton & Griffin, Ltd., Don Dutton, Ruidoso, for plaintiff-appellee.

OPINION

RANSOM, Justice.

Defendants George Cliff (Cliff), Thomas Deason and George Slaughter appeal a summary judgment entered in favor of plaintiff Federal Deposit Insurance Corporation (FDIC) on a claim for a $152,424.75 deficiency judgment, plus interest, arising from a mortgage foreclosure. We affirm.

Cliff, Deason and Slaughter, along with Hal Cliff, were the four shareholders of Alto Construction Company, a New Mexico corporation principally involved in construction of residential homes in Ruidoso, New Mexico. Hal Cliff was the president of the corporation and ran its day-to-day operations until the latter part of 1985. He is not a party to the present appeal.

In November 1982, Deason executed an unlimited guaranty in favor of First City National Bank[1] (bank) guaranteeing the indebtedness of Alto Construction Company. In May 1984, Cliff and Slaughter executed identical guaranties in favor of the bank. The guaranties covered "any and all existing and future indebtedness and any liability of any kind, nature, [or] character ... from the debtor [Alto Construction] to bank, howsoever and whensoever created, or advised, or evidenced, or acquired, including but not limited to those as maker, drawer, principal, surety, or guarantor * * * *"

Sometime prior to June 1, 1984, purportedly without the prior knowledge of the other shareholders of Alto Construction, Hal Cliff entered into a partnership on behalf of the corporation with several other individuals and business entities. The resulting general partnership was named "Westsun Group." Westsun's purpose was to undertake real estate investments, and it borrowed $178,562.50 from the bank to purchase a parcel of real estate in Ruidoso. To secure the note, Westsun gave to the bank the mortgage in question. Additionally, various Westsun partners gave personal guaranties on the note. Hal Cliff also gave his personal guaranty. The appellants did not directly participate in these transactions, nor did they give guaranties specifically to secure the Westsun note.

Westsun subsequently defaulted on the promissory note. In addition, Alto Construction defaulted on three other notes held by the bank. In August 1985, the bank sent a letter to appellants and Alto Construction demanding payment of the Westsun note. Later that month, Deason and Slaughter met with the president of the bank to discuss the Westsun loan and the other outstanding obligations of Alto Construction. At this meeting, Deason and Slaughter acknowledged that the Westsun note was an obligation of Alto Construction, but the bank stated that it intended to seek repayment only from those persons who signed guaranties on behalf of Westsun. The bank entered into an agreement with Deason and Slaughter to restructure the remaining three notes, and Deason and Slaughter executed new guaranties to cover those notes. The Westsun loan was not covered under this agreement or the new guaranties.

In December 1985, FDIC closed the bank and began liquidation of its assets. In November 1986, FDIC filed suit against

1. First City National Bank changed its name, first to Moncor Bank, then to First National Bank of Lincoln County.

Westsun, the partners of Westsun, including Alto Construction, and various individuals whose guaranties were alleged to cover the Westsun note, including Cliff, Deason, and Slaughter. The suit sought foreclosure of the mortgage on the Westsun property and money damages. In May 1987, the parties agreed there were no legal defenses to the foreclosure suit, and the court entered a judgment of foreclosure on the property. The May judgment reserved the court's jurisdiction on the issue of individual liability for any deficiency remaining after the foreclosure sale. It also provided that such issues, along with various counterclaims and cross-claims were "reserved * * * for trial by jury at a date to be set by the Court in the future." In October 1987, however, the court granted FDIC's motion for summary judgment on the individual liability of defendants, including Cliff, Deason and Slaughter.

Appellants argue the court erred for two reasons in granting summary judgment. First, they argue, genuine issues of material fact remained regarding whether they intended the facially unlimited guaranties executed prior to the formation of Westsun to secure Alto's obligations as a partner of Westsun. Second, they argue, the May 1987 judgment of foreclosure was a stipulated judgment, and the trial court was bound to enforce its terms by allowing the issue of appellant's individual liability to be tried by a jury.

Summary judgment proper under federal law. Summary judgment should be granted when no genuine issue of material fact exists that requires a jury trial. SCRA 1986, 1–056(C). When a party makes a prima facie showing of no genuine issue of material fact, the nonmovant has the burden to come forward with affidavits or other documentation sufficient to raise a reasonable doubt that such an issue exists. *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972).

In response to FDIC's motion for summary judgment, appellants presented affidavits stating that, at the time each executed the facially unlimited guaranties to the bank, they intended the guaranties to cover only those obligations of Alto Construction that related to its home building activities. In their brief in chief, appellants argue these affidavits created an issue of fact regarding whether there was a meeting of minds on the extent of the guaranties. Since guaranties are a species of contract, they argue, if there was no meeting of minds over the subject of financial obligations unrelated to Alto Construction's home building activities, then the guaranties do not cover such activities,[2] and FDIC is precluded, as successor in interest of the bank, from enforcing them in this case.

At oral argument, appellants reframed their argument, alleging the bank understood and agreed that the guaranties only would cover Alto Construction's home building activities. We note that the statements of the bank president at the August 1985 meeting to restructure the corporation's debt and the resulting agreement could be interpreted as indicating the existence of such a prior understanding. Nonetheless, we conclude that summary judgment was proper under applicable federal law.

The Federal Deposit Insurance Act, 12 U.S.C. Section 1823(e), provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of

2. There is no claim that the guaranties were of no legal effect by reason of a failure in mutuality of intent. *Cf. Langley v. FDIC,* 484 U.S. 86, 91, 108 S.Ct. 396, 402 (fraud inducing a party to sign an instrument without knowing its true nature or contents would render that instrument void, and such a defense can be raised against FDIC in a suit to enforce said instrument).

directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of execution, an official record of the bank.

One policy animating this section is to allow both federal and state bank examiners to rely completely on a bank's records when evaluating its assets pursuant to liquidation of assets or to providing financing for purchase of assets and liabilities by another bank.[3] *Langley v. FDIC,* 484 U.S. 86, 91, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987). The latter sort of evaluations "must be made 'with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services.' " *Id.* (quoting *Gunter v. Hutcheson,* 674 F.2d 862, 865 (11th Cir.), *cert. denied,* 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982)). Such evaluations would be impossible if "seemingly unqualified notes * * * are in fact subject to undisclosed conditions." *Id.* Because of such considerations, certain defenses that may be available to a debtor if sued by a bank are not available against FDIC. In short, FDIC "does not simply step into the private shoes of the local bank * * * * " *FDIC v. Tito Castro Constr. Co.,* 548 F.Supp. 1224, 1226 (D.P.R.1982), *aff'd,* 741 F.2d 475 (1st Cir.1984). *See also, FDIC v. Cardinal Oil Well Serv. Co.,* 837 F.2d 1369 (5th Cir.1988) (in light of the unequivocal language in guaranties securing corporation's debts, court would not look to extraneous evidence of intent).

In *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), the Court held that a debtor could not assert against the FDIC a defense of no consideration based on an undisclosed side agreement with the failed bank not to enforce a particular obligation, because such an agreement would tend to mislead banking authorities. Similarly, the *Langley* Court reasoned the defense that a mortgage note was subject to an unwritten condition precedent could not be used to defeat a claim brought by FDIC subsequent to its appointment as receiver for a failed bank, because "one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities." 484 U.S. at 93, 108 S.Ct. at 402.

Appellants assert that the understanding they had with the bank limiting the scope of the facially unlimited guaranties does not constitute an "agreement" within the meaning of Section 1823(e) because there was no intent to defraud FDIC. Such an intent is not necessary to the application of the rule in question. The *D'Oench* court held that a debtor could not assert a "secret" agreement as a defense against suit by FDIC even when there was no intent to deceive banking authorities. 315 U.S. at 457–58, 62 S.Ct. at 679–80.

We conclude that the unwritten condition alleged by appellants, whether a secret agreement with the bank or their own unilateral understanding, does not provide a defense against FDIC. Like the unwritten agreements considered in *D'Oench, Duhme & Co.* and *Langley,* appellants' asserted defense would tend to diminish or defeat the interest of FDIC and mislead banking authorities as to the true status of a bank's assets. We also note that, as the August 1985 agreement restructuring Alto Construction's debt with the bank took place subsequent to the execution of the original guaranties, it also cannot be raised as a defense against FDIC under 12 U.S.C. Section 1823(e)(2). Therefore, we hold the claim that the guaranties were intended only to cover the home building activities of Alto Construction did not give rise to an issue of material fact.

3. These policies were first recognized as implicit in federal banking law by the Supreme Court prior to the passage of Section 1823(e). *See D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 457–62, 62 S.Ct. 676, 679–82, 86 L.Ed. 956 (1942). The FDIC need not show reliance in fact as a condition precedent to application of the prophylactic rule announced in *D'Oench* and now codified by Section 1823(e). *Id.* at 458, 62 S.Ct. at 679–80; *Langley v. FDIC,* 484 U.S. at 93–95, 108 S.Ct. at 402–03 (FDIC entitled to rely on face of note and collateral mortgage, notwithstanding that FDIC had actual notice of the allegations of fraudulent oral warranty made by bank prior to FDIC's appointment as receiver upon bank's closure).

Stipulated judgment did not necessitate a jury trial. Assuming that the May 1987 judgment was a "stipulated judgment" and hence a contract that the trial court was obliged to enforce, we nonetheless hold the court acted correctly in refusing to conduct a jury trial on the issues here appealed. *See Owen v. Burn Constr. Co.,* 90 N.M. 297, 563 P.2d 91 (1977) (stipulated judgment is a contract between the parties). The power of the parties to enter into a binding contract does not extend to obligating the trial court to act in contravention of the rules of civil procedure, under which we have held summary judgment was appropriate in this case. Moreover, we do not construe the language of the May judgment as implying such an obligation. The judgment expressly reserved *the court's jurisdiction* on the question of individual liability, and reserved these issues for jury trial *to be set by the trial court at a future date.* We construe this language to imply that the trial court reserved for itself the power to decide, as provided by the rules of civil procedure, *if and when* a jury trial would be necessary.

For the foregoing reasons, the judgment is affirmed.

IT IS SO ORDERED.

SOSA, C.J., and MONTGOMERY, J., concur.

783 P.2d 479

STATE of New Mexico, Plaintiff-Appellant,

v.

John LOPEZ, Defendant-Appellee.

No. 10800.

Court of Appeals of New Mexico.

April 13, 1989.

Certiorari Quashed Nov. 19, 1989.

Hal Stratton, Atty. Gen., Margaret McLean, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Appellate Defender, Santa Fe, Dennis W. Montoya, Asst. Public Defender, Las Vegas, for defendant-appellee.

OPINION

MINZNER, Judge.

This case raises important questions concerning the distinction between police en-

counters with citizens that do not implicate the fourth amendment, *see United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), and those that do. *See, e.g., Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The state appeals an order of the trial court suppressing "all evidence resulting from the police stop and seizure of defendant's 1974 GMC pickup truck." Relying on *State v. Powell,* 99 N.M. 381, 658 P.2d 456 (Ct.App.1983), and *State v. Montoya,* 94 N.M. 542, 612 P.2d 1353 (Ct.App.1980), the state argues that the police officers did not seize defendant within the meaning of the fourth amendment until after the officers saw the contraband in plain view as a result of an encounter not implicating the fourth amendment. Finding *Powell* and *Montoya* distinguishable, we affirm.

The state vigorously argues the issues in this case are legal issues, freely reviewable by this court. *See Boone v. State,* 105 N.M. 223, 731 P.2d 366 (1986) (reviewing court not bound by a trial court's ruling that is predicated on a mistake of law). Defendant equally vigorously argues the issues are factual, requiring deference to the trial court's ruling. *See State v. Harge,* 94 N.M. 11, 606 P.2d 1105 (Ct.App. 1979), *overruled on other grounds, Buzbee v. Donnelly,* 96 N.M. 692, 634 P.2d 1244 (1981) (rulings on motions to suppress governed by the substantial evidence standard). Therefore, it is first necessary to determine whether we are reviewing a legal issue or a factual issue.

Terry states, "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." 392 U.S. at 16, 88 S.Ct. at 1877. *See also State v. Frazier,* 88 N.M. 103, 537 P.2d 711 (Ct.App.1975). The restraint on the person's freedom of movement may be effected either by physical force, *id.,* or a show of authority. *United States v. Mendenhall,* 446 U.S. at 553, 100 S.Ct. at 1876. *Mendenhall* in fact provides examples as well as a guideline:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. [Footnote omitted.]

Id. at 554, 100 S.Ct. at 1877 (opinion of Stewart, J.). Although only one other justice joined this portion of *Mendenhall,* the Supreme Court has since adopted this test. *Michigan v. Chesternut,* 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *I.N.S. v. Delgado,* 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984); *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion).

Under *Mendenhall,* a person is seized within the meaning of the fourth amendment when, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. Based on these statements, as a matter of law, a person is seized when the facts show accosting and restraint such that a reasonable person would believe he is not free to leave. However, we believe the question of whether the facts show such accosting and restraint is factual in nature. We are supported in this belief by *State v. Swise,* 100 N.M. 256, 669 P.2d 732 (1983). There the supreme court treated the question of whether the defendant was deprived of freedom in some significant way as a factual question and applied the substantial evidence test to it.

Thus, we conclude the question of whether defendant was seized, thereby invoking fourth amendment protections, is a legal question. However, whether defendant was accosted and restrained such that a reasonable person in the same circumstances would believe he was not free to leave is a factual question. We now apply the appropriate standards to the issues in this case.

Federal and state courts have found it useful in analyzing claims based on the fourth amendment to distinguish among three levels of police/citizen encounters. *See, e.g., United States v. Black,* 675 F.2d 129 (7th Cir.1982), *cert. denied,* 460 U.S. 1068, 103 S.Ct. 1520, 75 L.Ed.2d 945 (1983); *United States v. Berry,* 670 F.2d 583 (5th Cir.1982); *see also Wilson v. Superior Court of Los Angeles County,* 34 Cal.3d 777, 195 Cal.Rptr. 671, 670 P.2d 325 (1983) (In Bank), *cert. denied,* 466 U.S. 944, 104 S.Ct. 1929, 80 L.Ed.2d 474 (1984). Our cases are consistent with this approach.

At one extreme is a full-scale arrest that must be supported by probable cause. *See State v. Frazier.* At the other extreme is an approach in a non-coercive manner, during which the individual approached is free to leave. *See United States v. Mendenhall.* In between these two extremes lie a variety of confrontations amounting to seizures that must be justified by something less than probable cause but more than an inarticulate hunch. *See State v. Cohen,* 103 N.M. 558, 711 P.2d 3 (1985), *cert. denied,* 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986); *State v. Ray,* 91 N.M. 67, 570 P.2d 605 (Ct.App.1977). Neither unsupported intuition nor an inarticulable hunch is enough. *See State v. Galvan,* 90 N.M. 129, 560 P.2d 550 (Ct.App.1977).

The state argues this case is at the extreme of non-coercive approach, and that the police officers' actions do not involve the fourth amendment. Defendant argues this case is a seizure not amounting to an arrest, thereby requiring the officers to justify it by a reasonable suspicion that the law is being or has been violated. Although the state argues the police legally approached defendant in furtherance of an investigation, it does not argue the officers possessed the requisite reasonable suspicion to justify a mid-level seizure or a *Terry* stop. Therefore, the only question we address is whether, as the state contends, there was no seizure under the facts of this case.

Having determined that the question of whether defendant was accosted and restrained such that a reasonable person would not have felt free to leave is a factual question, we review the evidence in the light most favorable to defendant, in whose favor the court below ruled. *Cf. State v. Anderson,* 107 N.M. 165, 754 P.2d 542 (Ct. App.1988) (consent to search is a factual question, the resolution of which is reviewed on appeal for substantial evidence). A reviewing court must determine whether the trial court's result is supported by substantial evidence, not whether the trial court could have reached a different conclusion. *Id.* Factfinding frequently involves selecting which inferences to draw. *Id.* The possibility that on similar facts another trial court may have drawn different inferences does not mean we must reverse here. *Id.*

In making the determination of whether a reasonable person would have felt free to leave, the trial court considers the factual circumstances of each case, considering specifically the following factors: (1) the conduct of the police, (2) the person of the individual citizen, and (3) the physical surroundings of the encounter. *E.g., United States v. Black,* 675 F.2d at 134. The reviewing court looks at the same factors.

Viewed in the light most favorable to defendant, the facts before the trial court were as follows. Defendant and his companion, Sanchez, were parked lawfully in a pickup on a dead-end street in Albuquerque. Defendant's vehicle was parked facing away from the dead end. While they were parked on the side of the road, not blocking traffic, a gray van carrying four police detectives drove up and parked directly in front and about a car length away from the pickup. The van was angled in front of the pickup. Four police detectives got out of the van and came toward defendant's vehicle. At least two of the four detectives were displaying their police badges at shoulder height. Detective Haury testified that he went to the passenger side of the vehicle, and, while standing next to it, he noticed contraband, specifically a syringe, a bottle cap, and a piece of foil containing a brownish powder residue, on the seat between defendant and Sanchez. (Although the parties do not emphasize it on appeal, we note the evidence was con-

flicting concerning the location in the vehicle of at least the syringe and the bottle cap, and thus it is possible that the trial court did not believe Detective Haury's testimony concerning the fact that the items were in plain view.)

On the facts of this case, the trial court could have found that a reasonable person in defendant's position would not have believed he was free to leave. The police officers used their vehicle to block defendant's vehicle, there were four police officers approaching the pickup truck, and the officers were invoking their authority as police officers by displaying badges.

Blocking a subject's vehicle is a form of physical restraint. *Cf. Brower v. County of Inyo,* 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (stopping of motorist by means of roadblock established for that purpose is seizure within meaning of fourth amendment). Ordinarily, a driver and passenger in a car whose progress is blocked by police would not believe themselves free to leave within the meaning of the fourth amendment. *See People v. Guy,* 121 Mich.App. 592, 329 N.W.2d 435 (1982) (officer seized occupant of car within meaning of the fourth amendment when the vehicle was parked in a driveway and the officer parked his own vehicle behind it, partially blocking the driveway, and then approached the defendant's vehicle); *see also United States v. Pavelski,* 789 F.2d 485 (7th Cir.), *cert. denied,* 479 U.S. 917, 107 S.Ct. 322, 93 L.Ed.2d 295 (1986) (seizure within the meaning of the fourth amendment occurred when several police vehicles were parked around defendant's vehicle). On the facts of this case, there was sufficient evidence to support a finding of physical restraint and a show of authority. Thus, the evidence supports a determination that a reasonable person would not have believed himself free to leave. *Compare United States v. Pajari,* 715 F.2d 1378 (8th Cir.1983) (where police officers parked behind defendant in parking lot and walked up to his car, there was no detention until they ordered defendant to raise his hands and get out of the car) *and State v. Marks,* 226 Kan. 704, 602 P.2d 1344 (1979) (no seizure within the meaning of the fourth amendment where officer approached parked car and asked questions but there was no evidence that police blocked the progress of the vehicle or otherwise suggested that defendants were not free to leave) *with State v. Epperson,* 237 Kan. 707, 703 P.2d 761 (1985) (defendants, who had parked their car and were walking away, were seized within the meaning of the fourth amendment when officer left the door of his police vehicle open, blocking the lane in which defendants' car was parked, approached the men, and addressed them).

The state argues that *Montoya* is closely analogous to this case. We disagree. In *Montoya,* the police officers approached defendant while he was sitting in his vehicle and saw the evidence while they were standing next to the vehicle. In *Montoya,* however, we noted there was no showing that the officers exercised any physical force or show of authority, or restrained the defendant prior to the time they observed the contraband in plain view. Thus, *Montoya* is distinguishable on its facts. *Powell* is also distinguishable because that case involved a valid stop.

The state appears to argue, in the alternative, that the protections of the fourth amendment do not apply because the police officers in this case approached Sanchez, the passenger in defendant's vehicle, to ask him questions concerning the possible whereabouts of a fugitive the police officers wanted to apprehend. The state contends that when the police are investigating a matter, they need neither probable cause nor a reasonable suspicion that an individual is involved in criminal activity in order to question him. In support of this argument, the state cites *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), and *People v. Jordan,* 43 Ill.App.3d 660, 2 Ill.Dec. 182, 357 N.E.2d 159 (1976). Neither case supports the proposition that the police may restrain a person in order to question him, which is the critical issue in this case.

In *Dunaway,* the United States Supreme Court rejected the contention that police officers could take a suspect into custody for questioning on something less than a showing of probable cause sufficient to

support an arrest. Similarly, *Jordan* involved probable cause to arrest. In upholding the arrest as supported by probable cause, the Illinois appellate court emphasized that the initial encounter between the police and the defendant in that case, which consisted of the police leaning out of the squad car to ask defendant why he was running, was neither an arrest nor a *Terry* stop because there was nothing showing either an assertion of the officer's authority or a restraint on defendant. The court observed that an officer may ask questions of citizens, provided he does not confine or restrain the citizen without the citizen's consent.

In short, neither of these cases supports the proposition that a police officer may use force or restraint to detain a person in order to question him, even if the person is the suspect in a crime, unless the officer has a reasonable suspicion, based on articulable facts, that the law is being or has been broken. *See Florida v. Royer; Terry v. Ohio; see also State v. Cobbs,* 103 N.M. 623, 711 P.2d 900 (Ct.App.1985). If this is true of those suspected of a crime, it must be equally true of those the police do not suspect of a crime.

On the evidence presented at the hearing, viewed in the light most favorable to defendant, the trial court could correctly find that the police officers used both a show of force and a show of authority to restrain defendant, and that a reasonable person in defendant's position would not have believed he was free to leave. Thus, as a legal issue, the trial court was correct in ruling defendant was seized by the police within the meaning of the fourth amendment prior to the time Detective Haury stood next to the vehicle and noticed the contraband, allegedly in plain view. Accordingly, we affirm the order of the trial court suppressing the evidence in this case.

IT IS SO ORDERED.

BIVINS, C.J., and ALARID, J., concur.

783 P.2d 483

STATE of New Mexico, Plaintiff-Appellee,

v.

Merrill Burrous CHAMBERLAIN, Defendant-Appellant.

No. 11402.

Court of Appeals of New Mexico.

Oct. 3, 1989.

Certiorari Denied Nov. 15, 1989.

Jacquelyn Robins, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HARTZ, Judge.

Defendant appeals his convictions of aggravated assault with intent to commit a violent felony upon a peace officer, misdemeanor assault, and misdemeanor battery. The second calendar notice proposed summary affirmance. Defendant has timely responded to that proposal. Not being persuaded by his arguments, we affirm.

FACTS

Defendant was convicted on charges arising from two closely related episodes. First, defendant committed battery on a prostitute in his home. She managed to escape to a bathroom, where she called the police emergency number on a portable telephone. By the time Officers John Carrillo and John Messimer arrived at defendant's home, defendant was alone. Defendant invited the officers into his home, stated that there were no women there, and asked the officers if they wanted to take a look. Officer Carrillo activated a portable tape recorder attached to his gun belt. The officers discovered a woman's comb on a bed. After being questioned about the comb, defendant stated that he would not answer any further questions without his attorney and requested the officers to leave the house. They did not leave. Defendant unsuccessfully tried to reach his attorney by telephone. Shortly thereafter a gun battle ensued. Officer Carrillo was killed. Defendant fired several shots at Officer Messimer.

ADMISSIBILITY OF TAPE RECORDING

Defendant's principal contention is that the district court should have suppressed the portion of the tape recording from the time defendant stated that he wished to see an attorney and told the officers to leave his home. First, he argues that the tape was made during an illegal search. Defendant agrees that the police were originally lawfully in his house, either by consent or because of an emergency. He contends, however, that once (1) the police officers had searched his home without finding anything to indicate a real emergency and (2) he had withdrawn his consent, then the police officers were illegally in his home and any evidence obtained after that time should have been suppressed. We do not agree.

We need not decide whether the officers were lawfully on defendant's premises after he told them to leave. Assuming that the officers remained on the premises unlawfully, we must still determine " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ' *Wong Sun v. United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963) (quoting J. Maguire, *Evidence of Guilt* § 5.07, at 221 (1959)). By that test, the evidence should be admitted. We find it bizarre to think that the officers "exploited" the allegedly unlawful entry in order to be shot at.

Our conclusion is supported by the other courts that have considered the admissibility of evidence of a crime committed upon law enforcement officers who may have conducted an unlawful search or seizure. *See United States v. Bailey,* 691 F.2d 1009 (11th Cir.1982) (defendant forcibly resisted unlawful arrest), *cert. denied,* 461 U.S. 933, 103 S.Ct. 2098, 77 L.Ed.2d 306 (1983); *Napageak v. State,* 729 P.2d 893 (Alaska Ct.App.1986) (assault after officers unlawfully entered defendant's home); *State v. Wren,* 115 Idaho 618, 768 P.2d 1351 (Ct. App.1989) (battery on officer after unlawful arrest of defendant in his home); *People v. Klimek,* 101 Ill.App.3d 1, 56 Ill.Dec. 403, 427 N.E.2d 598 (1981) (battery on officers unlawfully within defendant's apartment); *State v. Boilard,* 488 A.2d 1380 (Me.1985) (assault after officers unlawfully entered defendant's home); *Commonwealth v. Saia,* 372 Mass. 53, 360 N.E.2d 329 (1977) (assault and battery on officers who may have unlawfully entered defendant's home); *State v. Kittleson,* 305 N.W.2d 787 (Minn.1981) (assault on officer who may have unlawfully entered defendant's room); *People v. Townes,* 41 N.Y.2d 97, 359 N.E.2d 402, 390 N.Y.S.2d 893 (1976) (defendant drew gun after officers unlawfully told him to "freeze"); *State v. Miller,* 282 N.C. 633, 194 S.E.2d 353 (1973) (murder of officer conducting unlawful search); *State v. Saavedra,* 396 N.W.2d 304 (N.D. 1986) (disorderly conduct by defendant—predicated upon scuffle with an officer—who had been arrested unlawfully); *State v. Burger,* 55 Or.App. 712, 639 P.2d 706 (1982) (assault after officers unlawfully entered defendant's home and arrested him); *State v. Aydelotte,* 35 Wash.App. 125, 665 P.2d 443 (1983) (assault after officers entered defendant's property); 4 W. LaFave, *Search and Seizure* § 11.4(j) n. 370 (2d ed. 1987). *Cf. United States v. King,* 724 F.2d 253 (1st Cir.1984) (unlawful shooting was intervening act that provided probable cause even if shooting resulted from unlawful police conduct); *United States v. Nooks,* 446 F.2d 1283 (5th Cir.) (similar to *King*), *cert. denied sub nom. Hughes v. United States,* 404 U.S. 945, 92 S.Ct. 299, 30 L.Ed.2d 261 (1971).

We agree with the view expressed by the North Carolina Supreme Court in refusing to suppress evidence of the murder of an officer who had been conducting an unlawful search: "Application of the exclusionary rule in such fashion would in effect give the victims of illegal searches a license to assault and murder the officers involved—a result manifestly unacceptable * * *." *State v. Miller,* 282 N.C. at 641, 194 S.E.2d at 358. *Cf. State v. Doe,* 92 N.M. 100, 583 P.2d 464 (1978) (private citizen cannot use force to resist a search by authorized police officers even if arrest is illegal). We seriously doubt that suppression in such cases would advance the goal of deterring violations of the fourth amendment (made applicable to the states through the fourteenth amendment). *See United States v. Calandra,* 414 U.S. 338, 347–48, 94 S.Ct. 613, 619–20, 38 L.Ed.2d 561 (1974) (purpose of suppression of evidence is to deter violations of fourth amendment). Nothing in this case suggests that the officers engaged in unlawful conduct with the purpose of inducing criminal acts by defendant.

Although none of the cases cited above involved the admissibility of a tape recording of an attack on an officer, a tape recording poses no special fourth amendment problem when it is made with the consent of a party to the conversation. A

police officer or agent does not violate the fourth amendment by electronically recording or transmitting his conversations with another person. *See United States v. White,* 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); *State v. Hogervorst,* 90 N.M. 580, 586, 566 P.2d 828, 834 (Ct.App. 1977).

Defendant also contends that admission of the tape recording violated his fifth amendment right not to incriminate himself and his sixth amendment right to counsel (both rights being applicable to state conduct through the fourteenth amendment). His fifth amendment claim is predicated on the failure of the officers to give him *Miranda* warnings after he asked them to leave. Such warnings are required only for custodial interrogation. *See Armijo v. State ex rel. Transp. Dep't,* 105 N.M. 771, 737 P.2d 552 (Ct.App.1987). Although defendant claims that he was not free to leave and therefore was in custody, the evidence that has been presented to us by defendant does not compel that conclusion. In *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983), the Court said, "[T]he ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (Quoting *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977).) The district court could properly have found that defendant was not in custody. *See Armijo v. State ex rel. Transp. Dep't.* In any event, defendant points to no interrogation that took place after he asked the officers to leave. *Miranda* warnings are not required in the absence of interrogation.

Defendant apparently bases his sixth amendment claim on the officers' remaining in his home after he stated that he wished to consult his attorney. The sixth amendment right to counsel does not attach, however, until judicial proceedings have been initiated against the suspect, such as by way of indictment or preliminary hearing. *See Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Kirby v. Illinois,* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). The right to counsel upon which defendant must be relying actually derives from the fifth amendment privilege against self-incrimination. The fifth amendment privilege is safeguarded by guaranteeing a right to counsel at the time of custodial interrogation. *See Edwards v. Arizona,* 451 U.S. 477, 481–82, 101 S.Ct. 1880, 1883–84, 68 L.Ed.2d 378 (1981). Again, however, defendant does not point to any interrogation that took place after he expressed his wish. Also, if defendant was not in custody, the officers did not have a duty to cease questioning after defendant requested counsel. *See id.*

Therefore, the tape recording was admissible on the charge of assault with intent to kill Officer Messimer. Although the recording may not have been admissible to prove the assault and battery on the prostitute, defendant did not seek a limiting instruction, so we need not address that matter. *See State v. Padilla,* 90 N.M. 481, 565 P.2d 352 (Ct.App.1977) (not error to admit evidence that is admissible for one purpose but not for another); *State v. Turner,* 97 N.M. 575, 642 P.2d 178 (Ct.App.1981) (failing to instruct jury as to the limited purpose for which evidence was admitted is not error when no request for instruction was made).

ISSUES ANSWERED SUMMARILY

Defendant continues to argue that unsolicited trial testimony of the prostitute was inadmissible because it suggested that defendant frequented prostitutes and that defendant had ties to drug trafficking. Defendant still has not provided this court with the manner in which this testimony was elicited. Because of defendant's failure to provide us with a summary of all the facts material to consideration of this issue, as required by SCRA 1986, 12–208(B)(3), we cannot grant relief on this ground.

Defendant contends that the full jury knew about a communication to a juror from her husband concerning the penalty for second-degree murder. We fail to see how the communication could have prejudiced defendant because a mistrial was declared on the murder charge. Also,

the district court interviewed the juror and the jury foreman, who both said that the communication would not affect their verdicts. The record does not support defendant's contention that other jurors also learned of the communication. Thus, the district court did not abuse its discretion in denying defendant's request for a mistrial or a curative instruction.

CONCLUSION

Defendant has provided this court with no additional facts or authorities in support of his remaining issues. Therefore, for the reasons stated in our two calendar notices, we affirm.

Defendant's convictions are affirmed.

IT IS SO ORDERED.

BIVINS, C.J., and APODACA, J., concur.

783 P.2d 487

STATE of New Mexico, Plaintiff-Appellee,

v.

Timothy POST, Defendant-Appellant.

No. 11026.

Court of Appeals of New Mexico.

Nov. 7, 1989.

Hal Stratton, Atty. Gen., Patricia A. Gandert, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jerry Daniel Herrera, Albuquerque, for defendant-appellant.

OPINION

BIVINS, Chief Judge.

Defendant appeals his convictions for commercial burglary, NMSA 1978, § 30-16-3(B) (Repl.Pamp.1984), and contributing to the delinquency of a minor, NMSA 1978, § 30-6-3 (Repl.Pamp.1984). A Ciobla County jury acquitted him of two other charges, arson, NMSA 1978, § 30-17-5(A) (Repl.Pamp.1984), and conspiracy to commit arson, NMSA 1978, §§ 30-28-2 (Repl.Pamp.1984), 30-17-5(A). Defendant raises four issues, claiming trial court error in (1) failing to suppress a statement defendant gave the police after invoking his right to counsel; (2) admitting evidence of the extent and amount of damage caused by fire; (3) denying motion for mistrial based on claimed prosecutorial misconduct; and (4) denying motion for directed verdict based on insufficiency of the evidence.

We hold defendant's statements should have been suppressed. Because of acquittal on the arson charges, the evidentiary questions will not arise on retrial; therefore, we do not decide them. We hold the prosecutor's remarks during closing argument did not require a mistrial. Finally, we set aside the convictions of commercial burglary and contributing to the delinquency of a minor and remand for new trial on those counts without use of defendant's statements.

I. *Facts and Background*

On or about January 28, 1988, Belen High School sustained extensive fire damage. Suspecting arson, the Belen police investigated. A "Crimestoppers" tip identified defendant's son, Raymond Post, as the arsonist. Detective Sanchez interviewed Raymond, who confessed. Raymond implicated his father in the confession.

On February 1, 1988, Sanchez arrested defendant and obtained a statement in which defendant admitted participating with his son in burning the school.

II. *Discussion*

A. *Invocation of Right to Counsel*

Before interrogating defendant, Sanchez read defendant his "*Miranda* rights," *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), from a form. After the detective read the portion of the form that advised, "If you can not afford an attorney, one will be appointed for you at no cost to you," defendant said, "I will need an attorney." Sanchez continued reading the form, which advised defendant

if he decided to answer the questions now, without an attorney, he had the right to stop answering at any time until he could talk to an attorney. He then asked defendant if he understood his constitutional rights. Defendant initialed each question, indicating he did understand. At Sanchez's request, he then read and signed a waiver of rights, indicating his willingness to make a statement without an attorney present.

At the motion to suppress, defendant's attorney questioned Officer Sanchez and received the following responses:

Q: Before you [obtained a statement from defendant], do you recall you telling him if he could not afford an attorney as part of his Miranda warnings that an attorney would be appointed for him?

A: Yes.

Q: All right. Do you recall him telling you that he wanted to see an attorney and that he could not afford one?

A: He said he would need an attorney. He did not say he wanted an attorney at that point. He said he would need an attorney.

Q: Okay, you didn't make any effort at that time to stop the questioning to seek counsel for him, did you?

A: At that point, no. He didn't say he wanted an attorney at the time.

Defendant first denied any involvement in the arson, but upon being informed by Sanchez that Raymond had been taken into custody and had given a statement implicating his father, defendant made a verbal statement. After the *Miranda* rights had been read to him a second time, defendant gave a written statement concerning his part in breaking into the school, his actions at the school with his son, and his use of codeine.

Defendant moved before trial to suppress the oral and written statements given the police. In denying the motion, the trial court relied on *United States v. Obregon,* 748 F.2d 1371 (10th Cir.1984). The court's order denying the motion to suppress also contained a handwritten notation following the citation to *Obregon,* reading: "From the totality of the circumstances the Defendant knowingly an [sic] intelligently waived his right to counsel."

Waiver of counsel must be more than knowing and intelligent; it must be voluntary. In *Edwards v. Arizona,* 451 U.S. 477, 484–85, 101 S.Ct. 1880, 1884–85, 68 L.Ed.2d 378 (1981), the United States Supreme Court held:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.... [A]n accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation ... until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. [Footnote omitted.]

No claim is made that defendant initiated any communication, exchange, or conversation. Thus, we believe *Obregon* is distinguishable. The defendant in that case, who had requested an attorney, also indicated that he waived his rights on a form that included the text for an advice of rights as well as a place for a waiver of rights. The court in *Obregon,* however, held that the defendant had waived his rights not only because he signed the form but also because he had initiated further communication with the police, believing that making a statement would be to his advantage. *United States v. Obregon.* In this case, we have no evidence that defendant initiated communication with the police, only that he signed the waiver form. The record indicates that Sanchez asked defendant to sign the place indicating a waiver of his rights. In addition, defendant made a verbal statement in response to the police informing him that his son had made a statement implicating him. Under these circumstances, we conclude the record shows a continuation of questioning, or its equivalent, after defendant claims he asserted his right to counsel.

The critical question is therefore whether defendant sufficiently invoked his right to counsel when he said he would need an attorney. The state contends that defendant's request was equivocal. Detective Sanchez testified that he understood defendant to mean he wanted an attorney for trial, not at that moment. Defendant testified otherwise, but since the trial court denied the motion, we assume it accepted Sanchez's version of what occurred.

Miranda states that a suspect invokes his right to counsel when he "indicates in any manner" he wishes to consult an attorney. 384 U.S. at 444–45, 86 S.Ct. at 1612–13. *Edwards* speaks of a right that has been "specifically invoked," 451 U.S. at 482, 101 S.Ct. at 1883–84, and *Brewer v. Williams,* 430 U.S. 387, 404–05, 97 S.Ct. 1232, 1242–43, 51 L.Ed.2d 424 (1977), refers to clear expressions of desire for counsel. In *State v. Dominguez,* 97 N.M. 592, 642 P.2d 195 (Ct.App.1982), this court, applying the rule in *Miranda,* observed that if a defendant indicates that he wishes to consult with an attorney before speaking, there can be no questioning.

In light of these decisions, we hold that defendant here was attempting to assert his right to counsel and did not waive his right to an attorney. The response, "I will need an attorney," leaves little doubt as to defendant's wishes. *See Maglio v. Jago,* 580 F.2d 202, 203, 205 (6th Cir.1978) ("Maybe I should have an attorney" sufficient invocation of right to counsel).

Assuming the state is correct that defendant's statement was equivocal, the cases it relies on do not support its position. The fifth and ninth circuits hold that, where a suspect makes an equivocal assertion of right to counsel, all questioning must cease, except the police may attempt to clarify the suspect's desire for counsel. *See United States v. Fouche,* 776 F.2d 1398, 1404–05 (9th Cir.1985); *United States v. Cherry,* 733 F.2d 1124, 1130–31 (5th Cir. 1984); *Thompson v. Wainwright,* 601 F.2d 768, 772 (5th Cir.1979). Questions aimed at clarifying the desire for counsel must be strictly limited to that purpose, and if clarification reveals the suspect wants counsel, all interrogation must stop until counsel is provided. *United States v. Fouche,* 776 F.2d at 1405.

Even if defendant's response, "I will need an attorney," could be considered equivocal, the questions which followed did not meet the criteria of *Fouche* and *Cherry.* Detective Sanchez did not attempt to clarify defendant's desire for counsel. He continued to read the remaining rights, had defendant initial each, and then obtained a waiver of those rights from defendant. This is not a permissible method to either clarify an accused's equivocal request for counsel or to waive the accused's successfully invoked right to counsel. Thus, even under *Fouche* and *Cherry,* the statements given by defendant must be suppressed.

A heavy burden rests on the state to demonstrate an effective waiver of the fifth amendment right to counsel. *Miranda v. Arizona,* 384 U.S. at 475, 86 S.Ct. at 1628. The determination of the voluntariness of an alleged waiver of a suspect's right to counsel depends not merely upon a formal statement of waiver, but upon all the facts and circumstances of the particular case. *State v. Greene,* 92 N.M. 347, 588 P.2d 548 (1978). That burden was not satisfied here. The trial court erred in not suppressing defendant's statements.

B. *Prosecutorial Misconduct*

Defendant claims the prosecutor went "beyond the bounds of fair conduct" when, in closing argument, the prosecutor told the jury, in effect, not to let defendant avoid responsibility for his actions by hiding behind his codeine addiction. Defendant's defense was that he was unable to form the requisite specific intent to commit commercial burglary due to the effects of alcohol and codeine he had ingested that day. Defendant moved for a mistrial based upon the prosecutor's statement, which the trial court denied.

Because of the likelihood that on retrial defendant will assert the same defense, which may invite a similar remark, we address this issue. We hold that the extensive defense evidence regarding de-

fendant's prolonged codeine addiction following an ankle surgery in 1978 and his use of codeine and alcohol on the night of the arson effectively opened the door to the comment made by the prosecutor. *See State v. Taylor,* 104 N.M. 88, 717 P.2d 64 (Ct.App.1986) (where defendant opens the door to comments by the prosecutor, such comments are invited and do not constitute reversible error, even if otherwise improper).

We reject defendant's claim under this point and hold that the trial court did not err in denying the motion for mistrial.

C. *Sufficiency of the Evidence to Support Convictions*

Defendant contends that the verdicts of guilty on commercial burglary and contributing to the delinquency of a minor were against the weight of the evidence. He claims the trial court erred in denying his motion for a directed verdict.

In addressing this question, we are mindful of our holding herein that the state may not introduce defendant's statement on retrial. The question arises whether this case should be remanded for retrial without the statement, or whether defendant should be discharged because, without the statement, there is insufficient evidence to convict him.

A recent United States Supreme Court decision, *Lockhart v. Nelson,* 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), addressed this issue. The Court held that, when a trial court erroneously admits evidence that is excluded on appeal, and the remaining evidence is insufficient to support a verdict, double jeopardy does not preclude a retrial. Instead, the appellate court must consider all the evidence admitted by the trial court when deciding whether there was sufficient evidence to support a conviction. If all of the evidence, including the wrongfully admitted evidence, is sufficient, then retrial following appeal is not barred. Thus, the *Lockhart* decision allows the state to retry a defendant and introduce other evidence of guilt not introduced at the first trial that might replace the wrongly admitted evidence. *Cf. State v. Austin,* 104 N.M. 573, 725 P.2d 252 (Ct.App.1985) (reversing and discharging where without wrongfully admitted evidence there was insufficient evidence to support a conviction on retrial).

We find the *Lockhart* reasoning sound and adopt it as law. We will not speculate as to what additional evidence or alternate theories the state could have brought forward had the trial court properly excluded the inadmissible evidence. A contrary rule would force the state to "overtry" its cases, to introduce all its available evidence, however redundant, to ensure that it could retry a defendant if some of its evidence is held on appeal to be inadmissible. *United States v. Gonzalez-Sanchez,* 825 F.2d 572, 588 n. 57 (1st Cir.), *cert. denied sub nom. Latorre v. United States,* 484 U.S. 989, 108 S.Ct. 510, 98 L.Ed.2d 508 (1987). We recognize that the dissenting judges in *Lockhart* have suggested some distinction should be made between evidence that is suppressed due to its unreliability or lack of probative character and evidence that is stricken in compliance with evidentiary rules grounded in other public policies. We assume but need not decide that this distinction is appropriate. In this case, there is no suggestion that the evidence to be suppressed is unreliable or lacks probative value.

Following *Lockhart,* we consider all the evidence admitted at trial, including defendant's statements, in determining whether retrial is permissible. We hold that retrial is permissible. Defendant's own statement, coupled with testimony that entry was unauthorized and that defendant's son was a high school student, provides sufficient evidence to convict on commercial burglary and contributing to the delinquency of a minor.

According to the written statement, defendant had been taking codeine and drinking alcohol on the day of the incident. He was not "thinking straight" and both he and Raymond were in a "wild mood." Raymond said, "[T]he school is going down." Defendant stated he thought it wrong but was too intoxicated to understand. Raymond drove defendant's car to Belen High

School, told defendant to "watch out for him," jumped the fence, and "was breaking things & li[g]hting fires." Raymond returned, moved the car, and went back into the school building. Defendant wrote, "I know I should have stopped him but I was very drunk." Raymond came back to the car and told defendant, "[Y]ou should do something too." Defendant crossed the fence with his son's help and went inside. "I broke some windows while Raymond was setting fires," he wrote. When the alarm went off, the two left. A representative of the school testified that defendant had no authority to enter the school. Although there was no direct testimony that defendant's son was a minor, Raymond did testify that he was a high school student.

That evidence supports the convictions rendered. Reasonable minds could find that defendant entered Belen High School without permission; when defendant entered the high school he intended to commit arson; and defendant was capable of forming the intent to commit arson. Therefore, the trial court's denial of directed verdict on the commercial burglary charge was proper. Reasonable minds could also find that defendant helped or did not stop his son from committing arson; this encouraged his son to commit arson; defendant acted intentionally; and his son was under age eighteen. Therefore, the trial court's denial of a directed verdict on the charge of contributing to the delinquency of a minor was proper. Whether the state can replace it with other evidence is not to be decided on this appeal. *See Lockhart v. Nelson.*

III. *Conclusion*

Reversed and remanded for new trial consistent with this opinion.

IT IS SO ORDERED.

DONNELLY and MINZNER, JJ., concur.

783 P.2d 959

Baxter Edwin EVATT and Mary Claudine Evatt, his wife, Plaintiffs–Appellees,

v.

Duane E. STEELE and Chana Steele, his wife, Defendants–Appellants.

No. 18331.

Supreme Court of New Mexico.

Dec. 20, 1989.

Viramontes & Stewart, Thomas F. Stewart, Silver City, for defendants-appellants.

John W. Reynolds, Silver City, for plaintiffs-appellees.

OPINION

RANSOM, Justice.

Baxter and Mary Evatt sued for breach of a provision in the contract under which Duane and Chana Steele purchased from Evatts the B & E Hardware store. In question was a contractual provision involving payments to be made by Steeles to First National Bank in Albuquerque (bank)

for a leased computer used in the hardware store. The district court awarded Evatts compensatory damages for Steeles' refusal to complete the payments on the lease, and the Steeles appeal this award. We affirm.

Steeles, who had worked for Evatts for some years, decided to buy the store when Evatts talked of going out of business. Although Steeles initially were unwilling to assume the computer lease, Evatts insisted Steeles do so if they were to buy the store. Steeles eventually agreed, and the parties signed a real estate contract and an appended list of "fixtures," which included the provision that Steeles assume the computer lease.

Before they were sued by Evatts, Steeles never actually saw the lease in question and were unaware that the lease contained a provision precluding assignment without prior written approval by the bank. The lease also contained default provisions that allowed the bank to declare the lessee in default if, inter alia, the lessee ceased doing business or transferred possession of the computer equipment to another party.

After the real estate contract was closed, Steeles took possession of the store and "fixtures," including the computer. They began making monthly payments on the computer lease. Evatts contacted the bank and informed it that Steeles were to take over the lease. The bank, however, never responded and continued to send statements addressed to Evatts. The statements were rerouted when Steeles provided the bank with a new post office box number for B & E Hardware.

Seven months later, the computer broke and was in need of repairs. Steeles asked Evatts for a copy of the lease, but Evatts did not provide one. Steeles then contacted the bank requesting a copy of the lease agreement, but the bank refused because Steeles were not a party to the agreement. At this point, Steeles refused to make any more payments on the lease and, on advice of counsel, contacted Evatts to instruct them to come and pick up the computer. Evatts took possession of the computer and finished making the payments under the lease agreement. They then filed the present lawsuit against Steeles.

After a bench trial, the court awarded judgment in favor of Evatts. The court reasoned that, although the lease agreement called for the bank's prior written approval, under the circumstances the bank's silence could be construed as acquiescence in the assignment to Steeles. The court concluded that Steeles were liable for the payments made by Evatts on the computer subsequent to Steeles' refusal to make any more payments.

Bank's consent not condition precedent to formation of lease assumption agreement. On appeal, Steeles first argue that their agreement to assume the computer lease is not binding because, as the agreement was made subject to the consent of an additional party, it must be viewed as a conditional agreement. If the consent is not given, they argue, the agreement is not binding. The case relied upon by Steeles is *Wyrsch v. Milke,* 92 N.M. 217, 585 P.2d 1098 (Ct.App.1978).

Wyrsch, however, was reconsidered carefully in the recent case of *Western Commerce Bank v. Gillespie,* 108 N.M. 535, 775 P.2d 737 (1989). As in *Gillespie,* it is here argued that a condition precedent must be satisfied before a contract is formed. *Gillespie* took note of language in *Wyrsch* such as "fulfill the condition precedent which would have given rise to a binding contract." *Gillespie,* 108 N.M. at 537, 775 P.2d at 739 (quoting *Wyrsch,* 92 N.M. at 221, 585 P.2d at 1102). *Gillespie* held, however, that "[w]hether conditions precedent are considered prerequisites to formation of a contract or prerequisites to an obligation to perform under an existing agreement, is controlled by the intent of the parties." *Id.* Here, the evidence is without contradiction that the parties never contemplated that the formation of the lease assumption agreement was conditioned on the bank's consent.

Bank's consent not a constructive condition to Steeles' obligation to make payments on the computer lease. Although the existence of the lease assumption agreement was not conditioned

on the bank's consent, it remains to be determined whether the consent of the bank was a legal condition to Steeles' obligation under the lease assumption agreement to make payments. In this regard, the present case differs from *Wyrsch* in that there were no express provisions in the lease assumption agreement here which required Evatts to obtain the bank's consent. Steeles' argument that the bank's consent was a condition precedent may be interpreted as an argument that the bank's consent should be implied as a constructive condition to Steeles' obligation to perform, because, without the bank's consent, Evatts could not transfer their rights under the computer lease to Steeles. *See Montgomery v. Cook,* 76 N.M. 199, 413 P.2d 477 (1966) (in appropriate instances, condition precedent may be deduced from construction of entire contract in order to reach most equitable result); *see generally* 3A A. Corbin, *Corbin on Contracts* § 653 (1960). A contracting party may repudiate performance under the contract if a condition precedent to that performance cannot be satisfied. *Enerdyne Corp. v. Wm. Lyon Development Co.,* 488 F.2d 1237 (10th Cir. 1973).

This argument, however, fails to take into account that Evatts sued Steeles for breach of an isolated provision in a bilateral contract containing a number of promises. As previously noted, the assignment was a relatively small part of the agreement to buy the store. We cannot isolate Evatts' promise to transfer their rights under the lease as the sole consideration that supported Steeles' promise to assume payment of the lease, as we might had the assignment been a separate agreement. *See Acme Cigarette Servs. Inc. v. Gallegos,* 91 N.M. 577, 577 P.2d 885 (Ct.App. 1978) (in a bilateral agreement, promise of one party may support one or more promises to other party). Indeed, the circumstances surrounding the sale and assignment indicate that Steeles were willing to take over the lease because Evatts expressed a willingness only then to sell them the store.

Any failure by Evatts to perform under the assignment provision, therefore, was but a partial failure of the consideration supporting the contract as a whole. In cases of partial failure of the plaintiff to perform, a defendant generally may not raise as a defense that his promise constructively was conditioned on a reciprocal performance by the plaintiff when, given the subject matter of the contract, full and just compensation can be made by the payment of money damages. *See Wilson v. Wilson,* 157 Me. 119, 170 A.2d 679 (1961); *Walker & Co. v. Harrison,* 347 Mich. 630, 81 N.W.2d 352 (1957); *see generally* 3A A. Corbin, *Corbin on Contracts* § 659. Here, money damages adequately would have compensated Steeles for any interference in their interests that might have been caused if the bank refused to consent.

We hold, therefore, that Steeles' obligation to make payments on the lease was not conditioned on whether Evatts obtained the bank's consent. Given our resolution of this issue, we do not address two of Steeles' remaining arguments: that the court erred in inferring from the bank's failure to object to the assignment its acquiescence in the assignment; and, therefore, that there was no substantial evidence of the bank's consent.[1]

Assignment did not operate to breach prior contract with bank. Finally, citing *Thermice Corp. v. Vistron Corp.,* 528 F.Supp. 1275 (E.D.Penn.1981), *aff'd,* 688 F.2d 825 (3d Cir.1982), Steeles argue the attempt to assign the lease was illegal and unenforceable because the parties entered into the assignment contemplating the breach of a contract with a third party, the bank. We disagree with Steeles' characterization of the provisions of the contract in this case. The agreement to take over the lease does not contemplate that

1. We note, however, that the bank made no effort to declare a default on the lease, either while Steeles were in possession of the computer or after Evatts had resumed possession. The only evidence that the bank ever interfered with Steeles' putative rights under the lease is that the bank refused to send them a copy of the lease agreement. However, there is no evidence that Steeles were damaged by this refusal, nor did they seek to recover such damages.

the lease itself be breached; rather, it contemplates the transfer of Evatts' rights under the lease. Evatts' attempts to obtain the bank's written consent as required by the lease were consistent with the lease provisions. Had Steeles been damaged by Evatts' failure to perform, Steeles would have possessed an adequate remedy at law short of a declaration that the contract provision was void for illegality.

Because of the foregoing considerations, the judgment of the district court is affirmed in its entirety.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

783 P.2d 962

DOWNTOWN NEIGHBORHOODS ASSOCIATION, Petitioner–Appellee,

v.

CITY OF ALBUQUERQUE, Respondent–Appellant.

The Whitehouse Partnership, Intervenor–Appellant.

No. 10341.

Court of Appeals of New Mexico.

Nov. 7, 1989.

Karl H. Sommer, Kurt H. Sommer, Sommer, Udall & Hardwick, P.A., Santa Fe, for petitioner-appellee.

James H. Foley, City Atty., Edward R. Pearson, Asst. City Atty., Albuquerque, for respondent-appellant.

Philip B. Davis, Chris Key, Albuquerque, for intervenor-appellant.

OPINION

MINZNER, Judge.

On appellee's motion for rehearing, the prior opinion is withdrawn, and the following is substituted.

The City of Albuquerque (City) and The Whitehouse Partnership (Whitehouse) appeal from a district court decision reversing the grant of a variance by the Albuquerque City Council (City Council). Pursuant to NMSA 1978, Section 3–21–9 (Repl.1985), the Downtown Neighborhoods Association (DNA) petitioned the district court to review the City Council's decision by writ of certiorari, and the district court found the City Council's decision was not supported by substantial evidence. This appeal requires us to consider the City Council's authority under NMSA 1978, Section 3–21–8 (Repl.1985), and Albuquerque, N.M. Rev. Ordinances Section 7–14–42 C.2 (1986), to grant a variance for unnecessary hardship to the owner of an historic building. We affirm.

FACTS AND PROCEDURAL HISTORY

In 1985, Whitehouse purchased the J.A. Garcia house, an 80–year–old, two-story home on a main arterial street near down-

town Albuquerque. Experts consider the house, which is listed on both the State Register of Cultural Properties and the National Register of Historic Places, one of the best examples of Classical Revival architecture in Albuquerque.

When Whitehouse purchased the property, the partners believed that they were entitled to use the entire first floor of the house for law offices. However, the existing zoning in fact limited incidental non-residential use to 10% of the gross floor space of the premises. After being cited by the City for non-residential use in excess of the permitted 10%, Whitehouse sought a variance from the City Zoning Hearing Examiner (Examiner).

The Examiner determined, after a hearing, that the variance should be denied because Whitehouse failed to make an adequate showing of practical difficulty and unnecessary hardship. He also found that the proposed variance was not consistent with the intent and purpose of the zoning ordinance, "in that office uses in apartment zones are intended to be incidental to the apartment use itself."

Whitehouse appealed this decision to the Environmental Planning Commission (EPC). Subsequently, the Zoning Enforcement Office issued a letter opinion that "incidental use" of a house referred to a use incidental to the urban center as a whole, rather than incidental to the use of the house itself. After a hearing, the EPC reversed the Examiner's decision and found that the parcel was exceptional and that compliance with the existing zoning would cause practical difficulty and unnecessary hardship. The EPC also found that the additional office use would not be injurious to adjacent properties, and that approval of the variance would not "set a precedent and in no way precludes the use of the existing zoning" at a later time.

Pursuant to Section 3-21-8(B), DNA appealed the EPC decision to the City Council on the grounds that no legal basis existed for granting a variance, that the variance was contrary to the intent and purpose of the plan, and that the variance would be detrimental to the neighborhood. Under the statute, the City Council is required to provide the procedure to be followed in considering appeals. *See* § 3-21-8(A). By ordinance, the City Council has provided for a preliminary review either by the full City Council or by a committee of the City Council. Albuquerque, N.M.Rev. Ordinances § 7-14-45 C. 1 (1987).

In this case, the Land Use Planning and Zoning Committee (LUPZ) of the City Council conducted a hearing, at which additional evidence was taken, and recommended that the appeal be heard by the full Council. However, after a hearing, at which more evidence was received, the City Council denied the appeal, thereby affirming the EPC decision to grant the variance. Those who voted to deny the appeal also voted to adopt the following findings: (1) the house had historical significance; (2) the historical significance of the house distinguished it from other nearby property subject to the same regulations, and thus, subjecting the house to the same regulations created unnecessary hardship; (3) the variance differed from the regulation no more than was necessary to overcome the hardship, and the requested additional incidental use was the minimum needed to create a reasonable office area; and (4) the variance would not interfere with the enjoyment of other land in the vicinity and would be consistent with the spirit of the ordinance.

On writ of certiorari to the district court, the court by stipulation reviewed a record that included all of the evidence at every level. The court found that the house was historically significant but concluded that historical significance did not make the house "exceptional" as required for a variance under Section 7-14-42 C.2.b. The court also found that the remaining findings were not supported by substantial evidence. The court concluded that granting the variance was illegal, arbitrary, and capricious.

On appeal to this court, appellants contend that there was sufficient evidence to support the City Council's findings. We first address the scope of judicial review, and then we discuss the ordinance.

SCOPE OF JUDICIAL REVIEW

The decision to enact an ordinance is legislative in nature, made by an elective body under its police powers for the protection of the health, safety, and welfare of the public. An aggrieved property owner may challenge the constitutionality of a zoning ordinance in court, seek to have it changed by the local legislative body, or seek a variance from the administrative body to use property in a manner prohibited by the literal requirements of the zoning ordinance. 6 R. Powell, *The Law of Real Property* ¶ 872.2 (1988). Variances are considered to be extraordinary exceptions and are granted sparingly, only under peculiar and exceptional circumstances. *Id.;* 8 E. McQuillin, *The Law of Municipal Corporations* § 25.162 (3d ed. 1983). Their purpose, in the broadest sense, is to render justice in unique and individual cases. McQuillin, *supra,* § 25.172.

Since a variance in effect creates a new zoning regulation for an individual parcel of land, *id.,* Section 25.160, the legislative body may delegate the authority to grant a variance only if it gives adequate guidance. *Id.,* § 25.165. The authority for an administrative officer or body to grant variances is limited by the terms of the relevant statute or ordinance. *See McClurkan v. Board of Zoning Appeals for Metro. Gov't,* 565 S.W.2d 495 (Tenn.Ct. App.1977); *Stice v. Gribben-Allen Motors, Inc.,* 216 Kan. 744, 534 P.2d 1267 (1975).

In this case, the City Council is the elective body that made the initial zoning determination. It has delegated the authority to grant a variance to the EPC. The central question on appeal is whether the variance that was granted in this case was authorized. The district court decided that it was not authorized.

Judicial review of a zoning authority's decision is limited to questions of law. By statute, the district court must determine initially whether the decision is illegal, in whole or in part. *See* § 3-21-9(A). An appellate court conducts the same review as the district court. That determination depends upon whether the zoning authority acted fraudulently, arbitrarily, or capriciously; whether the decision is supported by substantial evidence; and whether the zoning authority acted within the scope of its authority. *Singleterry v. City of Albuquerque,* 96 N.M. 468, 632 P.2d 345 (1981); *Coe v. City of Albuquerque,* 76 N.M. 771, 418 P.2d 545 (1966); *Rowley v. Murray,* 106 N.M. 676, 748 P.2d 973 (Ct. App.1987).

It is clear from our statute and the cases that this court, as well as the district court, must review actions taken by a governing body such as the City Council with deference and may disturb those decisions only as provided by law. We may not disturb a decision if we are satisfied that the action was authorized and that factual issues are supported by substantial evidence.

In this case, we believe the question of whether the variance was authorized depends upon a construction of the ordinance. As we construe the ordinance, the validity of the variance depends upon factual questions that the City Council failed to resolve.

Where the decision depends upon factual questions that the governing body failed to resolve, the reviewing court must remand for further proceedings. *Cf. Michelson v. Michelson,* 89 N.M. 282, 551 P.2d 638 (1976) (case should be remanded when trial court's findings of fact are insufficient to permit reviewing court to decide case). Although this principle evolved in the context of appellate court review of district court decisions, we think it is applicable here by analogy. Neither we nor the district court may make the decision in the first instance. If we are to give proper deference to the City Council, in a case where it has failed to resolve ultimate facts, we will remand to permit the Council to reach a decision that can be reviewed.

THE ORDINANCE

The City Council has broad statutory authority to grant a variance. *See* § 3-21-8(C)(1). The City Council may authorize a variance "(a) which [is] not contrary to the public interest; (b) where, owing to special conditions, a literal enforcement of the zoning ordinance will result in unnecessary hardship; and (c) so that the

spirit of the zoning ordinance is observed and substantial justice done." § 3-21-8(C)(1)(a), (b), (c).

Pursuant to that authority, the City Council has adopted an ordinance which provides, in pertinent part:

a. A variance shall be approved if and only if compliance with the regular zoning provisions would cause practical difficulties and unnecessary hardship as defined in subsection b., and if the proposed development:

(1) Differs from development which would be permitted under the general development provisions no more than is necessary to overcome the practical difficulties and unnecessary hardship;

(2) Will not significantly interfere with the enjoyment of other land in the vicinity; and

(3) Is consistent with the spirit of this Ordinance, substantial justice, and the general public interest.

b. For purposes of this section, compliance with the regular zoning provisions would cause practical difficulties and unnecessary hardship if:

(1) The parcel is exceptional as compared with other land in the vicinity subject to the same regulations by reason of the physical characteristics of the land, which physical characteristics existed at the time of the adoption of the regulation or were created by natural forces or by governmental action for which no compensation was paid;

(2) The parcel is exceptional as compared with other land in the vicinity subject to the same regulations by reason of the *conditions or use* of the parcel or other land in the vicinity which condition or use existed at the time of adoption of the regulations; or

(3) The parcel is irregular, unusually narrow or shallow in shape, and the conditions existed at the time of the adoption of the regulation or was [sic] created by natural forces or governmental action for which no compensation was paid.

§ 7-14-42 C.2 (emphasis added).

In the construction of ordinances, like the construction of statutes, a court must ascertain and give effect to the intention of the enacting authority. *Burroughs v. Board of County Comm'rs,* 88 N.M. 303, 540 P.2d 233 (1975); *State ex rel. Battershell v. City of Albuquerque,* 108 N.M. 658, 777 P.2d 386 (Ct.App.1989). The City Council's findings suggest that those who voted to deny DNA's appeal believed that if a house has historical significance, then its owner has shown both the special conditions and the unnecessary hardship required by the statute. However, that interpretation is inconsistent with the concept of a variance and the terms of the statute.

The purpose of a variance is to prevent zoning regulation from operating to deprive a property owner of all beneficial use of his property. *Clerics of St. Viator, Inc. v. District of Columbia Bd. of Zoning Adjustment,* 320 A.2d 291 (D.C.App.1974). To impose restrictions that unduly interfere with that right is confiscatory, and may amount to a taking. *See id.* On the other hand, variances should be granted sparingly, only under exceptional circumstances. To do otherwise would encourage destruction of planned zoning. *See Clouser v. David,* 309 F.2d 233 (D.C.App.1962), *cert. denied,* 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed.2d 733 (1963). The ultimate question to be answered is whether the applicant has shown "unnecessary hardship." In answering that question, the body considering the variance must resolve several factual questions.

The first question is whether the parcel is distinguishable from other property that is subject to the same zoning restrictions. The answer depends upon whether, as a result of the differences between this parcel and others, the zoning restrictions create particular hardship for the owner. The test is whether, because of the differences, the owner will be deprived of a reasonable return on his or her property under any use permitted by the existing zoning classification. 6 R. Powell, *supra,* at 872.2[1][b]. If this question is answered affirmatively, then the body considering the variance is entitled to conclude that there are exceptional or special circumstances justifying

consideration of a variance. If not, the applicant must seek a change in the zoning restrictions themselves. If the body considering the variance determines that the applicant has shown exceptional or special circumstances, then it still must consider whether the particular variance requested is appropriate. The answer to this question depends upon a comparison of the special circumstances shown and the public interest. The test is whether the hardship identified can be avoided consistently with the public interest. *Id.* If this question is answered affirmatively, then the zoning authority must conclude that the applicant is entitled to a variance. If not, it may deny the variance.

As we read the ordinance, it establishes the same general, two-pronged inquiry. First, the applicant must show that because of exceptional or special circumstances, compliance with the existing zoning requirements would cause practical difficulties and unnecessary hardship. Second, the applicant must show that the proposed variance: (a) differs from that permitted by the existing zoning requirements no more than is necessary to overcome the identified practical difficulties and unnecessary hardship; (b) will not significantly interfere with enjoyment of other land in the vicinity; and (c) is consistent with the spirit of the ordinance, substantial justice, and general public interest. Generally speaking, under the elements of the first criterion, the zoning authority is determining whether the applicant has shown exceptional circumstances that justify consideration of a variance. Under the second criterion, the zoning authority is determining whether the particular variance requested is appropriate.

Under the ordinance, exceptional or special circumstances are shown by establishing the facts to which any one of the three subparagraphs to Section 7–14–42 C.2.b refers. Only subparagraph (2) is applicable here.

Under that subparagraph, compliance would cause practical difficulties and unnecessary hardship if the parcel is exceptional as compared to other land in the vicinity subject to the same zoning requirements "by reason of the conditions or use of the parcel or other land in the vicinity which condition or use existed at the time of adoption of the regulations." We are not certain what the City Council intended by the phrase "conditions or use." Thus, we are not certain what kinds of special or exceptional circumstances the City Council intended Section 7–14–42 C.2.b to encompass.

It seems clear that designation of a house as historically significant does not in and of itself answer the ultimate question of unnecessary hardship. *See Sorg v. North Hero Zoning Bd. of Adjustment,* 135 Vt. 423, 378 A.2d 98 (1977). Our research has not disclosed any cases holding an owner's desire to preserve the historical significance of a structure was sufficient to support a variance on the ground of unnecessary hardship. *Cf. Village Bd. v. Jarrold,* 53 N.Y.2d 254, 423 N.E.2d 385, 440 N.Y.S.2d 908 (1981) (use variance not granted to preserve historic barn absent proof of unnecessary hardship).

"Unnecessary hardship" has been given special meaning by courts considering a zoning authority's power to grant a variance. It ordinarily refers to circumstances in which no reasonable use can otherwise be made of the land. *Stice v. Gribben–Allen Motors, Inc. See generally* Powell, *supra,* ¶ 872.2[1]; McQuillin, *supra,* § 25.160; *Kelly v. Zoning Hearing Bd.,* 87 Pa.Commn. 534, 487 A.2d 1043 (1985). The exact showing necessary to prove unnecessary hardship varies from case to case. The City Council must make the initial determination by considering all of the relevant circumstances. However, it is clear that a showing that the owner might receive a greater profit if the variance is granted is not sufficient justification in itself for a variance. *See Culinary Inst. of Am. v. Board of Zoning Appeals,* 143 Conn. 257, 121 A.2d 637 (1956); *Stice v. Gribben–Allen Motors, Inc.; McMullen v. Zoning Hearing Bd.,* 90 Pa.Commw. 119, 494 A.2d 502 (1985).

We recognize that Section 7–14–42 C.2.b appears to define "unnecessary hard-

ship" as any situation in which one of the conditions listed in b.1, .2, or .3 exists. That seems in fact to be the interpretation given subsection (b) by the City Council. We do not read subsection (b) in that manner, because that reading is not consistent with the City's statutory authority to grant a variance. Under Section 3-21-8(C)(1), the City cannot define "unnecessary hardship" as any situation in which one of the conditions listed in b.1, .2, or .3 exists, because such a definition equates "special conditions" with "unnecessary hardship." Under Section 3-21-8(C)(1), these terms serve different functions.

Under the statute, the City may grant a variance where, owing to special conditions, a literal enforcement of the zoning ordinance will result in "unnecessary hardship." *See* § 3-21-8(C)(1)(b). When the ordinance is read in light of the statute, it is clear that the situations listed in subsection b are the "special conditions" referred to in the statute, which must be present to support a decision to grant a variance. However, the fact that a parcel is exceptional under Section 7-14-42 C.2.b(2) is not sufficient to support a variance without a determination that enforcement of the zoning ordinance will result in unnecessary hardship.

In the present case, the ordinance provides that special conditions may arise either from physical characteristics unique to the land, including irregular shape, *see* § 7-14-42 C.2.b(1), (3), or from the "conditions or use of the parcel." § 7-14-42 C.2.b(2). Because the language of the ordinance encompasses conditions or use, the City Council was entitled to decide that Whitehouse need not show the physical characteristics of its parcel were unique. Nevertheless, the City Council was required to determine that the "condition" or "use" of the house makes it "exceptional" in the sense that application of the zoning restrictions affects this property more harshly than other properties under the ordinance and, thus, creates a particular hardship, depriving the owner of a reasonable return. Although the effect on this property must be exceptionally harsh in comparison to the effect on other properties, the parcel need not be the *only* property so affected. *See Rygg v. Kalispell Bd. of Adjustment*, 169 Mont. 93, 544 P.2d 1228 (1976). In *Rygg*, the court recognized that the zoning agency may prefer the use of variances over rezoning to handle unique property situations in transitional neighborhoods, even though a few other properties may be similarly affected. It does not appear from the record that the City Council made this determination.

We conclude the City Council applied an erroneous interpretation of the ordinance in denying the appeal. The record indicates that the City Council and the EPC both misinterpreted the ordinance. Because of the misinterpretation, the zoning authority's inquiry was incomplete. Thus, the City Council failed to resolve the ultimate question of whether Whitehouse had shown unnecessary hardship.

The findings by the City Council fail to resolve the question of whether this parcel is distinguishable from other parcels subject to the same requirements, whether the differences create particular hardship for Whitehouse, and whether the requested variance is necessary to prevent undue hardship. The findings by the EPC are similar.

Under provisions of the Zoning Code dealing with the right of appeal to the City Council, the City may decline to hear an appeal further if it is satisfied that no error exists. § 7-14-45 C.1. In this case, the appeal should have been granted. On this basis, we affirm the district court's decision reversing and remanding the cause to the City Council.

CONCLUSION

We hold that the City Council erred in denying appellee's appeal. On this basis, we affirm the district court decision reversing and remanding the case to the City Council. No costs are awarded.

IT IS SO ORDERED.

BIVINS, C.J., and CHAVEZ, J., concur.

784 P.2d 12

Dave SANDERS, Plaintiff–Appellant and Cross–Appellee,

v.

Carmen LUTZ and Dave Garrett, Defendants–Appellees and Cross–Appellants.

No. 18102.

Supreme Court of New Mexico.

Dec. 11, 1989.

William A. L'Esperance, Albuquerque, for plaintiff-appellant and cross-appellee.

George H. Perez, Bernalillo, for defendants-appellees and cross-appellants.

OPINION

BACA, Justice.

Following trial before the district court of Sandoval County to determine the location of an easement and resolve a claim of intentional infliction of emotional distress, both parties appeal the judgment of the court. Sanders, appellant and cross-appellee, plaintiff below, appeals the judgment regarding the placement of the easement, maintaining that it was in error because the judgment rendered the easement unsafe and because he was not granted damages for intentional infliction of emotional distress. Defendants below, Lutz and Garrett, cross-appeal, arguing that the court erred in increasing the size of the easement.

FACTS

In 1976, Lutz acquired property consisting of tracts 71 and 72 located near Algodones. The land is bordered by State Road 85 to the west and a railroad right-of-way to the east. At that time, Sanders' predecessor in interest acquired property east of

the Lutz property, which included an easement running through tract 71 that provided access to the highway. The predecessor in interest and Lutz entered into an agreement defining the location of the easement. This agreement, which was recorded in December 1979 and amended in February 1980, placed the entrance of the easement on tract 71. Sanders subsequently purchased this property adjacent to the Lutz parcels, while Garrett purchased a portion of tract 71 from Lutz. Evidence, in the form of the "Hugg plat," indicated that in fact there were two easements—the easement described in the agreement that ran over tract 72, and an existing roadway easement running along tract 71. The deed described the easement as "the correct legal description of the easement which was the subject matter of the easement agreement is that certain EXISTING ROADWAY EASEMENT. The existing roadway easement on the Hugg plat is on tract 71." However, confusion apparently arose because the plat indicates that an easement also crosses tract 72. Apparently, Lutz intended the designation of an easement over tract 72 as an agreement reserving a separate easement over that tract, which she subsequently sold to a person not a party to this suit. Sanders' predecessor in interest testified that the easement on tract 72 was distinct from the one claimed by Sanders; he inadvertently placed the entrance to the Sanders' easement on tract 72.

The easement, as it existed, was unworkable for its intended purpose—it had sharp, square corners that were difficult to traverse and was thus unfit for use as a roadway. The trial court found that this problem could be resolved by rounding off the sharp and narrow corners.

The parties had disagreed over the placement and extent of the easement, and evidence was presented that the disagreement boiled over into petty squabbling, with both parties bickering and taking unneighborly actions against one another. Sanders maintained that this squabbling, with its accompanying manifestations of physical interference, exacerbated an existing psychological condition, causing him damages.

We address three issues on this appeal: (1) whether the trial court correctly determined the location of the easement over tract 71 rather than on tract 72; (2) whether the court abused its discretion by increasing the size of the easement by rounding off the corners; and (3) whether the court erred by refusing to award damages to either party for intentional infliction of emotional distress. We affirm the decision below.

I. THE EASEMENT

A. *Was It Properly Located on Tract 71?*

Sanders apparently is claiming that the trial court erred in locating the easement on tract 71; he contends that the Hugg plat clearly shows that the entrance is located on tract 72. On appeal, we examine the record to determine whether the verdict is supported by substantial evidence, i.e. if it contains evidence that a "reasonable mind might accept as adequate to support a conclusion." *Clovis Nat'l Bank v. Harmon,* 102 N.M. 166, 168, 692 P.2d 1315, 1317 (1984). We resolve disputed facts in favor of the prevailing party below, indulging all reasonable inferences in support of the verdict. *Id.*

Lutz and Garrett contend that Sanders did not raise this issue in his docketing statement, and thus waived his right to have the issue considered on appeal. However, the docketing statement is not jurisdictional, and it is within our discretion to consider error properly preserved below and presented in appellant's brief, although omitted from the docketing statement. *Gallegos v. Citizens Ins. Agency,* 108 N.M. 722, 731, 779 P.2d 99, 108 (1989). Accordingly, we will consider the merits of the issue raised by plaintiff.

An easement should be construed according to its express and specific terms as a manifestation of the intent of the parties. If the grant or reservation is ambiguous, the parties' intention must be determined from the language of the instrument as well as from the surrounding cir-

cumstances. *Kennedy v. Bond,* 80 N.M. 734, 736, 460 P.2d 809, 811 (1969).

The evidence indicates that the easement was granted by express agreement of Lutz' and Sanders' predecessor in interest, and the location was defined in the granting instrument as traversing tract 71. Further, in the amended easement agreement, the description of the easement is cross-referenced to the Hugg plat and identified as the "existing roadway easement" as marked on the plat; the plat shows this easement as running through tract 71. Evidence indicates that the circumstances surrounding the creation of the easement support this view. Lutz apparently intended, as part of a future conveyance of tract 72 to a third party, to reserve a right to an easement across tract 72 for herself; the evidence supports a conclusion that the easement across tract 72 is entirely distinct and separate from the easement relevant to this proceeding.

Plaintiff, nevertheless, maintains that the location of the easement was always on tract 72, and that it was on tract 72 when he acquired the property. Evidence submitted at the trial indicates that the entrance of the easement was erroneously located on tract 72 by the original grantee, and its placement there was not the intent of the parties. In any case, although the parties' conduct may be indicative of their intent and may assist the court in filling in missing or ambiguous details, "it does not permit a disregard of the language in the conveyance." *Martinez v. Martinez,* 93 N.M. 673, 676, 604 P.2d 366, 369 (1979). We find that the language of the grant, in combination with the circumstances surrounding the grant of the easement as evinced during the trial, provides adequate support for the trial court's conclusions.

Thus, despite Sanders' contentions to the contrary, the record supports the court's finding that the easement runs across tract 71 only, and we affirm the court's determination on this issue.

Sanders argues that the placement of the easement on tract 71 is unsafe, and that the easement should be revised. However, we find adequate support in the record for a determination that the easement as defined by the trial court is safe, and we reject this contention.

B. *Did the Court Err in Expanding the Easement and Rounding Off the Corners?*

Lutz and Garrett, in their cross-appeal, argue that the trial court erred by reforming the easement. They claim that the court exceeded its authority by increasing the size of the easement when it decided to round off its corners, and cites us to *Brooks v. Tanner,* 101 N.M. 203, 207, 680 P.2d 343, 347 (1984), and *Posey v. Dove,* 57 N.M. 200, 212, 257 P.2d 541, 548 (1953), for the proposition that an easement cannot be altered and a servient estate further burdened except by the consent of the owner. Lutz and Garrett maintain that the easement agreement clearly and unambiguously recites the dimensions of the easement. Although the agreement, which reads: "The use of the easement shall be as a roadway for normal residential building construction purposes, and shall include the right to make such installations and improvements as may be reasonably necessary to such use[,]" may be read as creating an ambiguity, it refers only to a use restriction on the easement. It is not to be read as a mandate to enlarge its scope. According to Lutz and Garrett, the agreement unambiguously indicates that the easement's corners are square, and therefore, by the rule articulated in *Northrip v. Conner,* 107 N.M. 139, 142–43, 754 P.2d 516, 519–20 (1988), a court is restricted to the four corners of the deed and may not go beyond it to determine the parties' intentions. They contend that Sanders had notice of the dimensions of the easement as specified in the agreement, and therefore is bound by those limitations. *See Germany v. Murdock,* 99 N.M. 679, 681, 662 P.2d 1346, 1348 (1983). Sanders contends that, by rounding off the corners of the easement, the court only effectuated a *de minimis* encroachment on the servient estate, and that the trial court possessed the authority to revise the easement, citing *Dyer*

v. Compere, 41 N.M. 716, 73 P.2d 1356 (1937).[1]

In construing an agreement creating an easement, a court must determine and give effect to the intent of the parties. 28 C.J.S. *Easements* § 26 (1941). In determining the intent of the parties, the court may examine the surrounding circumstances that shed light on the parties' intent. *Dyer,* 41 N.M. at 720, 73 P.2d at 1358. However, "[b]arring any ambiguity [in the granting instrument], ... the trial court may not go outside the deed itself to interpret the parties' intentions." *Northrip v. Conner,* 107 N.M. at 143, 754 P.2d at 520.

We find that the agreement granting the easement is ambiguous, and the trial court properly resorted to an examination of the circumstances surrounding the creation of the easement to determine the parties' intention. The easement agreement states the dimensions of the grant, and it is expressly laid out with square corners. However, the same instrument states that the easement is to be used as a roadway. The trial court determined that, as laid out with square corners, the easement could not be used for this purpose. This created an ambiguity—although the sentence in the instrument was intended as a use limitation, it also evinced the parties' intent that the area should be fit for use as a road. A court has equitable power to interpret an easement, and, under the circumstances, we hold that it properly exercised this authority by rounding off the corners. *See Sedillo Title Guaranty, Inc. v. Wagner,* 80 N.M. 429, 432, 457 P.2d 361, 364 (1969).

A comparison of the facts presented for this appeal with those in *Northrip* and *Germany* demonstrate the propriety of this holding. In *Northrip,* the deed was silent as to *any* easements; the court refused to go beyond the instrument to find that the parties intended an easement, despite the experience of the parties. In *Germany,* a case presenting an issue similar to that first addressed by this opinion, the court determined that the *location* of the easement was unambiguously referred to in the instrument, and refused to modify the agreement to conform to the practice of the parties. In the present case, however, the instrument is ambiguous—if we were to accept Lutz' argument, Sanders would be left with a right of access unfit for its intended purpose. We, therefore, hold that the trial court properly acted within the scope of its authority by determining the intent of the parties and revising the written instrument accordingly.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Sanders appeals the trial court's denial of his claim for damages for the intentional infliction of emotional distress. As we understand Sanders' argument, he is contending that Lutz and Garrett unjustifiably provoked Sanders, despite knowledge that Sanders suffered from a stress disorder, and that subsequently Sanders was treated for stress. Sanders maintains that unjustified provocation should give grounds for liability, citing us to several cases concerning assault and battery.

To recover for the intentional infliction of emotional distress, it must be shown that the party's conduct was extreme and outrageous and was done with the intent to cause severe emotional distress. *Mantz v. Follingstad,* 84 N.M. 473, 480, 505 P.2d 68, 75 (Ct.App.1972). Extreme and outrageous conduct is defined as conduct "beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable as a civilized community." *Id.* (citing *Restatement (Second) of Torts* § 46 (1965)). Mere provocation, without more, is inadequate, no matter how unjustified. The trial court found that Sanders did not carry his burden of showing that the conduct was extreme and outrageous and did not prove damages, a de-

1. We find Sanders' reliance on *Dyer* puzzling. Our interpretation of that case is that it stands for the proposition that the express boundaries of an easement set forth in a granting agreement should be strictly adhered to, absent ambiguity. The court upheld an order allowing the grantee to remove a row of hedges because they interfered with his use of the granted easement.

termination of fact within its discretion, and we AFFIRM.

IT IS SO ORDERED.

RANSOM and MONTGOMERY, JJ., concur.

784 P.2d 16

STATE of New Mexico, Plaintiff–Appellee,

v.

Casimiro "Casey" L. ARAGON, Defendant–Appellant.

No. 17916.

Supreme Court of New Mexico.

Dec. 14, 1989.

Jacquelyn Robins, Chief Public Defender, Linda Yen, Asst. Appellate Defender, Santa Fe, for appellant.

Jim Foy, Silver City, Trial Counsel.

Hal Stratton, Atty. Gen., Charles H. Rennick, Asst. Atty. Gen., Sante Fe, for appellee.

OPINION

SOSA, Chief Justice.

Appellant was convicted by a jury in Luna County of first degree murder contrary to NMSA 1978, Section 30–2–1(A)(1) (Repl.Pamp.1984), and of aggravated burglary contrary to NMSA 1978, Section 30–16–4(A)(C). He was sentenced to life for the murder count with a mandatory one-year firearm enhancement, and nine years plus two year's probation for the aggravated burglary count. The sentences were ordered to be served consecutively.

There is no dispute that Appellant killed Rufina Mendoza. Appellant and the victim had lived together off and on for nine years. Appellant had fathered the victim's child. He suffered from a nervous disorder, and for a while the victim served as his custodian to receive social security payments for him. When the parties' relationship grew unstable, the victim forced Appellant to leave her home. Appellant began drinking heavily and had to acquire a

new custodian. During this time the victim made it difficult for Appellant to visit his son and to come to the victim's house.

On the evening of July 25, 1986, after drinking heavily, Appellant entered the victim's home through a closed, unlocked screen door, displayed a gun, and stated he was going to kill the victim. The victim's adult daughter stood between Appellant and her mother but was told by Appellant to get out of the way or he would kill her, too. Appellant then fired a shot into the floor. The victim's daughter threw a pillow at Appellant, knocking him into a chair. Appellant fired a shot into the victim's shoulder, causing her to fall to the floor. Appellant then walked to where the victim had fallen, looked down at her, and shot her again. Appellant then shot himself. The victim died from the gunshot wounds.

Appellant raises several points on appeal. However, because we reverse the judgment and remand the case to the trial court for a new trial, we consider only the principal issue raised on appeal. We phrase that issue as follows:

DID THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO STRIKE THE ONLY TWO BLACKS WHO HAD A CHANCE TO SERVE ON THE JURY UNCONSTITUTIONALLY DEPRIVE APPELLANT OF A JURY REFLECTING A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY?

We answer this question in the affirmative, and thus settle an issue that heretofore has not been squarely decided by the courts of our state. At trial, three Blacks were members of the venire. Appellant is not Black, but Hispanic. His victim, too, was Hispanic. One Black member of the venire was excused for cause. The two other Black members were peremptorily excused by the prosecutor. Appellant contends that the prosecutors' peremptory strikes unconstitutionally deprived him of a jury reflecting a cross section of the community, in violation of both the federal and state constitutions (U.S. Const. amend. VI and N.M. Const. art. II, § 14). The sixth amendment provides in pertinent part, that an accused shall be tried by "an impartial jury." Similarly, Article II, Section 14 of our state constitution provides in pertinent part: "[T]he accused shall have the right to * * * a speedy public trial by an impartial jury * * *."

When the prosecutor's strikes were challenged at trial, he offered as an explanation that the individuals in question might be related to a Black defendant then being prosecuted by the State in the same court and raised the possibility that the two potential jurors would be prejudiced against the State in its prosecution of Appellant. After hearing the prosecutor's explanation, the court overruled Appellant's objection to the prosecutor's peremptory challenges, and the potential jurors were stricken.

The prosecutor had asked no questions during voir dire to elicit from the two prospective jurors responses showing that they in fact were related to the other defendant. Nothing in the record shows that the prosecutor had anything on which to base his opinion that these individuals might be untrustworthy jurors other than his own statement to the court about their possible blood relationship to the other defendant. Nor did the court conduct an inquiry as to how the prosecutor arrived at this conclusion. The court in effect simply accepted the prosecutor's rationale for excluding the Black prospective jurors and then overruled Appellant's objection.

I. *The Batson and Taylor Holdings As They Affect Jury Selection*

Constitutional jurisprudence in this area is clear on two points: (1) Under the Equal Protection Clause of the fourteenth amendment, a defendant may challenge the constitutionality of the state's selection of members of the petit jury when the defendant shows that he is a member of a cognizable racial group and establishes a prima facie case that potential jurors from his group were excluded from the jury for reasons of race. *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); (2) Under the sixth amendment, a defendant is entitled to select a petit jury from a venire that constitutes a representative cross section of the

community in which he is tried. *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

Appellant contends that the prosecutor's alleged racially-discriminatory striking of two Black members from the venire deprived him of a jury comprised of a fair cross section of the community. Appellant thus asks us in effect to adopt the *Wheeler* Doctrine, discussed below, and to grant the holding in *Taylor* onto the holding in *Batson,* arguing that under the state constitution we may afford greater protection to a criminal defendant than has been given criminal defendants by rulings of the United States Supreme Court.

The State argues against this. To the State, the sixth amendment requirement that the venire be selected from a cross section of the community is not applicable to the prosecutor's peremptory strikes of prospective jurors. The State argues that *Taylor* and the sixth amendment apply to selection *of* the venire, and that *Batson* and the Equal Protection Clause apply to selection *from* the venire. In the State's words, "the Sixth Amendment requirement that the jury be selected from a fair cross section of the community is not applicable to the petit jury itself, but only to the venire, or jury pool."

Because we decide this case on the independent and adequate state ground of the New Mexico Constitution, Article II, Section 14, we do not decide whether the State is correct in asserting that the sixth amendment proscription against exclusion of a section of the community from jury service extends to the prosecutor's use of preemptory challenges.[1]

II. *How Our Court of Appeals Has Addressed This Issue*

Our court of appeals has come close to agreeing with Appellant's position. In *State v. Crespin,* 94 N.M. 486, 488, 612 P.2d 716, 718 (Ct.App.1980), decided before *Batson,* the court in dictum linked "systematic acts by the prosecutor" in striking members of a minority racial group from the petit jury with a violation of Article II, Section 14 of our constitution. In *Crespin,* the sole Black member of the venire was stricken by the prosecutor, but the court felt unable from that fact alone to conclude that the State systematically had excluded Blacks from the jury.

In *State v. Sandoval,* 105 N.M. 696, 736 P.2d 501 (Ct.App.1987), the court applied *Batson* to a factual situation in which the defendant was Hispanic and the prosecutor peremptorily struck the only two Hispanics who could have sat on the jury. Noting that "*Crespin* has been modified by *Batson,*" *id.* at 699, 736 P.2d at 504, the court decided the issue strictly on an equal protection basis. Yet, the dictum in *Crespin,* to the effect that a challenge to racially biased peremptory strikes based on the state constitution might succeed if brought in a proper case, was not laid to rest.

In *State v. Hall,* 107 N.M. 17, 751 P.2d 701 (Ct.App.), *cert denied,* 107 N.M. 16, 751 P.2d 700 (1988), the court of appeals was asked to decide the issue that is now before us. In *Hall,* the defendant was Black and the peremptorily stricken potential jurors were Hispanic. Defendant challenged the strikes on sixth amendment grounds, relying on *Fields v. People,* 732 P.2d 1145 (Colo.1987). The court held that *Fields* was inapplicable because defendant did not show that the potential jurors with Hispanic surnames "were excused *solely* because of their membership in that group as required by *Fields.*" *Hall,* 107 N.M. at 22, 751 P.2d at 705 (emphasis in original). In another recent case raising the issue of challenged peremptory strikes, *State v. Goode,* 107 N.M. 298, 756 P.2d 578 (1988), the court of appeals was not called upon to decide the issue raised in *Hall,* but resolved the case solely on *Batson–Sandoval* equal protection grounds.

1. Pursuant to the "plain scrutiny" standard announced in *Michigan v. Long,* 463 U.S. 1032, 1040–41, 103 S.Ct. 3469, 3476–77, 77 L.Ed.2d 1201 (1983), we note that we consider none of the federal precedents discussed in the body of this opinion to compel the result reached today. Rather, we consider these federal cases for the guidance they may offer, just as we consider the precendents of other jurisdictions.

III. *Origins and Elaboration of the Wheeler Doctrine*

In *People v. Wheeler,* 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978), the California Supreme Court held that both the federal sixth amendment and equivalent section of the California constitution guaranteed a criminal defendant the right to trial by jury drawn from a representative cross section of the community, and that a prosecutor's systematic use of peremptory strikes to exclude members of a cognizable racial group violated that section of the California constitution. Other state courts have followed California's lead: *State v. Superior Court In & for Maricopa County,* 157 Ariz. 541, 760 P.2d 541 (1988); *Riley v. State,* 496 A.2d 997 (Del.1985), *cert. denied,* 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986); *State v. Neil,* 457 So.2d 481 (Fla.1984); *Commonwealth v. Soares,* 377 Mass. 461, 387 N.E.2d 499, *cert. denied,* 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979); *State v. Gilmore,* 103 N.J. 508, 511 A.2d 1150 (1986). *See also, Kibler v. State,* 546 So.2d 710 (Fla.1989).

The case that was cited but not applied by our court of appeals in *Hall, Fields v. People,* in turn adhered to the *Wheeler Doctrine.* In *Fields,* a Black defendant challenged peremptory strikes of Hispanics. The court held:

> [A] prosecutor's purposeful, discriminatory and systematic exercise of peremptory challenges in a given case to exclude from the jury panel Spanish-surnamed persons solely on the basis of presumed group characteristics violates the sixth amendment to the United States Constitution and article II, section 16 of the Colorado Constitution.

732 P.2d at 1155.

In assessing whether such a violation had taken place, the court followed the criteria discussed in *Wheeler:*

> [T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole. Next the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage the same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly * * * the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.

Id. at 1156 (citation omitted).

The Colorado Supreme Court then applied a *Batson* test to determine how the trial court should have resolved any effective challenge by the defendant of the prosecutor's peremptories. This test has been thoroughly set forth by our own court of appeals in *State v. Goode,* 107 N.M. at 301–303, 756 P.2d at 581–583, and need not be summarized here. It is noteworthy that in both *Fields* and *Goode,* after applying the relevant tests, the courts did not find the asserted violation of the defendant's rights. In *Fields,* the court held: "[O]ur review of the voir dire convinces us that the circumstances do not support the defendant's argument that there is a strong likelihood that the jurors were excused *solely* because of their membership in the group." 732 P.2d at 1157. (emphasis added). In *Goode,* the court found that the prosecutor did not know that in striking a woman who had previously sat on a hung jury, she had stricken a Black person from the jury, and thus the court found that the state "rebutted the prima facie case by providing a racially-neutral explanation for its challenge." 107 N.M. at 304, 756 P.2d at 584.

We emphasize that courts which have approved the *Wheeler* Doctrine or a rationale similar to it have made it clear that the racial identities of the defendant and of the challenged stricken jurors need not be the same. *See, e.g., Kibler,* 546 So.2d 710 (1989) (defendant was White and the strick-

en prospective jurors were Black). Indeed, under a *Wheeler* rationale, challenges may be made even when the stricken jurors are not members of a cognizable racial minority. *Roman v. Abrams,* 822 F.2d 214 (2nd Cir.1987) (challenged stricken jurors were white), *cert. denied,* — U.S. —, 109 S.Ct. 1311, 103 L.Ed.2d 580 (1989).

The Supreme Court has not yet resolved the issue before us, although in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), it was presented with this issue but declined to address it. Soon, however, the Court will address the issue. *See People v. Holland,* 121 Ill.2d 136, 117 Ill.Dec. 109, 520 N.E.2d 270 (1988), *cert. granted,* — U.S. —, 109 S.Ct. 1309, 103 L.Ed.2d 579 (1989). Appellant finds support for his argument in *Gray v. Mississippi,* 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987). There the Court applied the rationale of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), to a factual setting in which a prospective juror was held improperly excluded for cause in a capital murder case when she gave ambiguous answers to her views on the death penalty. *Witherspoon* and, in part, *Gray,* were based on the defendant's right to an impartial jury under both the sixth and fourteenth and sixth amendments. While the issue under *Gray* was different from the issue here, Appellant argues that the Supreme Court looks favorably on a coalescence of sixth and fourteenth amendment challenges to juries that are erroneously chosen, and thus urges us to apply the *Wheeler Doctrine* in his favor because of *Gray's* proximity to that doctrine.

We are thus left with two tasks: (1) To decide whether to adopt the *Wheeler Doctrine,* thereby agreeing with Appellant, as he puts it, to "affirm the dictum in *Hall;*" and (2) To decide, by whatever standard of review we adopt, whether the trial court erred in overruling Appellant's objection to the prosecutor's striking of the two prospective black jurors and in accepting the prosecutor's explanation for why the two persons were struck from the jury.

IV. *Our Holding on Appeal*

We hold that this issue is to be decided on state constitutional grounds. We accept the rationale in *Wheeler* and its progeny, and in the cited cases that have not explicitly relied on *Wheeler* but which have nonetheless relied on the sixth amendment to prohibit the prosecution from using racially discriminatory peremptory challenges that would prevent the defendant from being tried by a jury that represents a fair cross section of the community in which the defendant is being tried. We agree with the court in *Taylor* that it is unnecessary for the petit jury to "mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." 419 U.S. at 538, 95 S.Ct. at 702.

At the same time, however, we feel that the state should not be able to accomplish indirectly at the selection of the petit jury what it has not been able to accomplish directly at the selection of the venire. In the case before us, while the venire may have reflected a fair cross section of the number of Blacks in the county in which defendant was to be tried, if those Blacks are then excluded as soon as the prosecution sees them in the venire, of what practical effect is the constitutional protection of Article II, Section 14 of our constitution?

Using the criteria chosen by the court in *Fields,* we find the prosecutor's conduct in the case before us lacking. First, Appellant showed that the prosecutor struck the only two Blacks who had a chance to serve on the jury. Second, Appellant showed that the two prospective jurors ostensibly shared only this one characteristic: membership in the same cognizable racial minority. Third, other than their race, the two prospective jurors were ostensibly as heterogenous as the community as a whole. Fourth, the prosecutor failed to engage these individuals in more than a random voir dire, and specifically, he failed to engage them in questions about their relationship to the other defendant whom the State was allegedly prosecuting in the same court. In other words, the prosecutor established no predicate for his subse-

quent explanation for his peremptory challenges, in that he elicited no testimony on voir dire to establish that the two individuals were indeed related to the other defendant.

Having found that Appellant established at trial a prima facie showing that the prosecution violated his rights under Article II, Section 14, entitling him to a jury representing a fair cross section of the community, we now determine whether the trial court properly resolved the challenge to the prosecutor's use of his peremptory strikes. In other words, did the trial court properly assess the prosecutor's explanation for his peremptory striking of the Black jurors and did it correctly decide that this explanation passed constitutional muster? As the court stated in *Goode:*

> Did the state meet its burden of showing its peremptory challenge was racially neutral? [T]he state must justify its peremptory challenge by explaining what racially-neutral considerations led to the challenge. The state's explanations need not rise to the level justifying removal of the juror for cause. *State v. Sandoval.* They must, however, be clear and reasonably specific reasons that are related to the case to be tried * * * [T]he prosecutor may not rebut by denying a discriminatory motive * * *. Instead, the prosecutor must articulate a neutral explanation related to the particular case, giving a clear, concise, reasonably specific legitimate explanation for excusing those jurors * * *. Further, the trial court may not merely accept the state's proffered explanations, but has the duty to examine them and decide whether they are genuine and reasonable.

107 N.M. at 301–02, 756 P.2d at 581–82.

By the above criteria, the trial court's resolution of Appellant's challenge to the prosecutor's peremptory strikes of the two Blacks was constitutionally inadequate. The prosecutor's assertion that he feared the two Blacks were related to another defendant was based on nothing more than the prosecutor's own words. The prosecutor's explanation was hardly "a clear, concise, reasonably specific legitimate explanation for excusing those jurors" as required by *Goode.* Instead it amounted to simply a bare denial of a discriminatory motive. Further, the trial court did nothing more than listen to the prosecutor's explanation and rubber stamp it, without inquiry or scrutiny, and without demanding of the prosecutor articulate and explicit substantiation. Such a procedure prevented Appellant from gaining access to the prosecutor's motives for striking the two Blacks and effectively violated his right to a jury drawn from a representative cross section of the community in which he was to be tried. Accordingly, his rights under Article II, Section 14 of our state constitution were abrogated, and he should be given a new trial.

We reverse the judgment of the trial court and remand the case for a new trial to be conducted in a manner that is not inconsistent with our decision herein.

IT IS SO ORDERED.

RANSOM, J., and STEVE HERRERA, District Judge, concur.

784 P.2d 21

Newell R. HAYS, and Ruby C. Hays, his wife, Plaintiffs–Appellants,

v.

Joe KING, a single man, and Elizabeth F. Silva, a single woman, Defendants–Appellees.

No. 18085.

Supreme Court of New Mexico.

Dec. 14, 1989.

Burrough & Rhodes, F. Randolph Burroughs, Alamogordo, for plaintiffs-appellants.

Gary C. Mitchell, Ruidoso, for defendants-appellees.

OPINION

SOSA, Chief Justice.

This foreclosure action by vendors Newell R. Hays and Ruby C. Hays (Hays) resulted in a judgment in favor of purchasers Joe King and Elizabeth F. Silva (King [1]). Hays attempted to enforce a promissory note and mortgage upon property he allegedly owned and tried to sell to King. King, having been informed by the title company prior to closing that he already owned the property, counterclaimed to quiet title. After a bench trial, the court dismissed the complaint, rendered void a recorded mortgage from King to Hays, quieted title to 10.688 acres in Joe King subject to an undisputed mortgage to a third party, and awarded King costs and the return of $1,100.00 paid to Hays. We affirm.

The following is a summary of the district court's findings of fact pertinent to the issues on appeal. The 10.688 acres, which are part of a 756-acre tract sold by the original grantors, the Gabaldons, to Lanis L. Bosworth, include a 7.0333-acre tract that is the subject of the mortgage Hays sought to foreclose. The Gabaldon-Bosworth real estate contract was entered into in 1968 and recorded in March 1973. In 1977, a warranty deed was recorded that conveyed the 10.688 acres from Bosworth to Petroleum Leasing Services, Inc. In 1981, a quitclaim deed for the 10.688 acres from Petroleum Leasing to Ivy Heymann was recorded. Heymann conveyed the land to Joe King, who recorded the quitclaim deed in May 1985. Finally, in June 1985, a warranty deed from Gabaldon to Bosworth was recorded in an attempt to clear any clouds upon the title.

When the property was conveyed to King "the only title defect of which the grantor knew (and told to King) was the inability to obtain a partial release of the Gabaldon/Bosworth contract from the Gabaldons' heir * * *. The defect known to defendant King was cured with the completion of the Gabaldon/Bosworth contract." Accordingly, the court concluded: "There were no defects in Joe King's chain of title other than the Gabaldon contract. Under the doctrine of after-acquired title, title passed back through Bosworth to King upon completion of the Gabaldon Contract."

The court also found that there had been several agreements to assign contract rights by Bosworth to Hays, but concluded they were not conveyances of interests in real property. Nevertheless, in June 1978,

1. The district court found that Joe King was the sole grantee of the subject property in 1985 through a quitclaim deed from Ivy Heymann. However, because Silva was residing with King on the property, she was included in the negotiations with Hays, and, thus became a named party to the suit.

Hays quitclaimed any interest he might have had in the property back to Bosworth in an attempt to clear any clouds on the title. In June of 1982, for reasons unknown, Bosworth conveyed the entire 756-acre parcel to a Mr. Franzen who then deeded it to Hays; however, the court concluded these conveyances were outside King's chain of title. The court further concluded that "Bosworth had no interest in the 10.668 (sic) acre tract to convey at that time because of the prior conveyance of Bosworth to Petroleum." This conclusion of law is challenged by Hays, who claims superior title over King through the warranty deed from Franzen that was recorded in 1983.

Hays' main contention is that the district court erred by applying the doctrine of after-acquired title in order to quiet title in King. Hays asserts King should not benefit from this equitable doctrine because he was a remote grantee in the Bosworth–Petroleum chain of title, he possessed knowledge of alleged title defects at the time of the conveyance by Heymann, and he received title by quitclaim deed. Cited as authority are cases supporting the propositions that a quitclaim deed vests only the title held by the grantor at the time of the conveyance, and that the after-acquired title doctrine does not apply to one claiming title under a quitclaim deed. While we have no quarrel with the substance of these cited authorities, we find them inapplicable to the case at bar for the reasons set forth below.

Other issues raised by Hays are whether delivery of a deed, note and mortgage from King to Hays was completed, and whether King is estopped from objecting, or waived objection, to the enforcement of the terms of the mortgage, note and deed. The viability of these issues rests upon the success of Hays' main argument.

The dispositive issue, then, is whether the district court erred by applying the after-acquired title doctrine, which effectively operated to clear any cloud on King's chain of title. It appears that Hays may have misconstrued the court's use of the doctrine as applying exclusively and directly to the Heymann–King conveyance rather than to the entire Gabaldon–Bosworth chain of title.

The common law doctrine of after-acquired title is one under which title to land subsequently acquired by a grantor who previously attempted to convey title to the same land, which he then did not own, completely and automatically inures to the benefit of his prior grantee. *See Jenkins v. Huntsinger*, 46 N.M. 168, 181–83, 125 P.2d 327, 335–37 (1942) (Bickley, J., dissenting); *Black's Law Dictionary* 57 (5th ed. 1979); *see generally* 23 Am.Jur.2d *Deeds* § 341 (1983); 31 C.J.S. *Estoppel* § 54 (1964). The doctrine is "nothing more than an enforcement of the grantor's obligation to deliver a good title." *Waterman v. Tidewater Associated Oil Co.*, 213 La. 588, 611, 35 So.2d 225, 233 (1947); *cf. Cox v. Ney*, 580 P.2d 1085 (Utah 1978) (statute provides that earlier conveyance is enforceable in equity when subsequent acquisition of title is obtained by grantor).

In general, a grantor is estopped from asserting an after-acquired title against a grantee or those claiming under him. 23 Am.Jur.2d *Deeds* § 342 (1983). An attempt to do so would be tantamount to a denial that the original conveyance passed the interest it purported to pass. *Id. See generally* 31 C.J.S. *Estoppel* §§ 10–54 (1964) (doctrine of after-acquired title is sub-category of general doctrine of estoppel by deed, which precludes party from denying truth of his deed). The grantee or his successors in interest possess the right to assert an estoppel as to the after-acquired property. 31 C.J.S. *Estoppel* at § 54.

> It is well established that a deed may have the effect of passing to the grantee a title subsequently acquired by the grantor. A grantor who executes a deed purporting to convey land to which he has no title or to which he has a defective title at the time of the conveyance will not be permitted, when he afterward acquires a good title to the land, to claim in opposition to his deed as against the grantee or any person claiming title under him. This rule is applicable even though the deed was by way of gift. One of the chief theories upon which this

> doctrine rests is that the deed operates on the after-acquired title by way of an estoppel, usually deemed to arise from some express or implied covenant or recital, a principle which has long been applied by practically all courts irrespective of equity jurisdiction * * *. [T]o permit a grantor who sells land which he does not own to assert a subsequently acquired title against the grantee or those claiming under him would be to permit the grantor to perpetrate a fraud upon the grantee.

23 Am.Jur.2d *Deeds* § 341 (1983) (footnotes omitted). To accept Hays' argument would be a misapplication of the doctrine.

The warranty deed given by Bosworth to Petroleum Leasing evinced Bosworth's intent to convey the 10.688 acres. Under a conveyance with warranty, Bosworth was seised of the fee and the after-acquired title inured to King as a party claiming under the original grantee. *Cf. Munson v. Goodro,* 124 Vt. 282, 284, 204 A.2d 126, 128 (1964) (in absence of covenants of title, after-acquired interests will not inure to benefit of prior grantee). The district court properly concluded: (1) upon completion of the Gabaldon contract, title passed back through Bosworth, Petroleum Leasing, and Heymann to King; and (2) the attempted conveyance by Bosworth to Franzen in 1982 was outside King's chain of title in light of Bosworth's 1977 original conveyance. Thus, Franzen owned no interest in the property to convey to Hays, and the district court properly dismissed the complaint. Having held that the district court was correct, the collateral issues raised by Hays are found to be without merit.

Therefore, based upon the above, the judgment of the district court is affirmed in its entirety.

IT IS SO ORDERED.

BACA, J., and STEVE HERRERA, District Judge, concur.

784 P.2d 24

Jose Damian ETURRIAGA and Jacobo "Jake" Salazar, Contestants–Appellants,

v.

Cecilia R. VALDEZ and Joe B. Romero, Contestees–Appellees.

No. 18081.

Supreme Court of New Mexico.

Dec. 19, 1989.

Ida M. Lujan, Santa Fe, for contestants-appellants.

George M. Scarborough, Santa Fe, for contestees-appellees.

OPINION

RANSOM, Justice.

This is an appeal from the dismissal of an election contest brought by Jose Damian Eturriaga and Jacobo "Jake" Salazar (contestants) against Cecilia R. Valdez and Joe B. Romero (contestees) following a primary election in Rio Arriba County on June 8, 1988. We primarily address a conflict between the Election Code, NMSA 1978, Sections 1-1-1 to 1-22-19 (Repl.Pamp.1985), and the Rules of Civil Procedure promulgated by this Court concerning proceedings to contest the validity of a primary election. *See* SCRA 1986, 1-087.

Additionally, we must decide what relief is available to the contestants in this case when, although we conclude the district court erred in dismissing the action, the general election long since has passed and the challenged candidates have been elected to public office. We conclude that the contest action is now moot and we affirm the dismissal of the action by the district court. However, we will address the merits of the points raised in this appeal as they involve important questions of New Mexico law.

Eturriaga opposed Valdez, and Salazar opposed Romero in the democratic primary for the office of county commissioner. Following the tabulation of ballots, the contestants obtained an order of the district court impounding the ballots pursuant to Section 1-14-9. After certificates of nomination were issued to Valdez and Romero on July 8, 1988, *see* Section 1-13-13(B), the contestants filed a verified complaint of contest with the district court on Monday, August 8, 1988, within the thirty days provided by Section 1-14-3.

The complaint filed with the district court alleged that numerous unlawful irregularities and fraudulent acts had been permitted or committed by election officials and county employees in connection with absentee voting. The contestants asserted that the court should reject the votes of the entire absentee precinct, and then declare that the contestants had won the primary and were entitled to the certificates of nomination.

On August 17, 1988, contestees filed a motion to dismiss the complaint for (1) failure to state a claim upon which relief could be granted because the complaint did not allege that each contestant received more legal votes than the contestee, and (2) failure to timely file notices of contest within fifteen days of the issuance of the certificates of nomination as required by Rule 1–087(B). The contestants filed an amended complaint on August 24, 1988, which was answered the following day. Although not important to our decision, the amended complaint set out the number of votes each candidate received, and showed that the contestants would have the greater number of votes if all of the absentee ballots were to be excluded.

On September 23, the district court granted contestees' motion to dismiss the case. On October 3, contestants filed a motion to reconsider, which was denied on October 17. Thereafter, the contestants filed a notice of appeal with the district court on October 21, and later filed a docketing statement with this Court on November 21. The case was assigned to the Court's general calendar and was submitted for decision after oral argument on May 9, 1989. The general election was held on November 8, 1988, as scheduled, and Valdez and Romero were elected to office. Romero ran unopposed while Valdez faced competition from a write-in candidate only.

The district court based its dismissal, in part, upon the lack of any specific allegation in the original complaint that the contestants had received the majority of the legal votes cast. Contestees argue that under *Heth v. Armijo*, 83 N.M. 498, 494 P.2d 160 (1972), a complaint which fails to allege that the contestant received more legal votes than the contestee is not a claim showing that the contestant is entitled to relief. *Heth* should not be read so narrowly. As *Heth* recognized, in 1971 the legislature made the Rules of Civil Procedure applicable to election contests. *Id.* at 499, 494 P.2d at 161. Under these rules, technical forms of pleading are not required. SCRA 1986, 1–008(E)(1). In *Heth* we stated that "the gist of a successful election contest [is] that the contestant 'is legally entitled to the office.'" *Id.* at 499, 494 P.2d at 161 (quoting *Rogers v. Scott*, 35 N.M. 446, 300 P. 441 (1931)). Assertion of that factor was completely lacking in the notice of contest in that case.[1] We stated:

> Viewing the notice of contest as a whole, it contains neither allegation nor inference that contestants were lawfully elected to the offices they seek, or that by reason of the asserted illegality of certain votes, the results of the election would be changed, or even that the contestants are entitled to the offices for which they were candidates.

Heth, 83 N.M. at 499, 494 P.2d at 161.

Heth concluded that in order to state a valid claim the notice of contest should allege that the contestant "received more legal votes than the contestee." *Id.* at 500, 494 P.2d at 162. However, that language should not be construed to be the exclusive manner of stating a contest claim. An allegation that the results of the election were changed by the alleged irregularities, or that the contestant was entitled to the certificate of nomination, is sufficient to state a claim for contest. Either of these assertions can be true only if the contestant received the greater number of the legal votes cast. In the instant case the original complaint contained allegations of numerous specific irregularities in con-

1. Under statutes since repealed, *see* NMSA 1953, Repl.Vol. 1 (1970), § 3–14–4 to § 3–14–6, repealed by 1971 N.M. Laws, ch. 210, § 2, the notice of contest in election cases took the place of a conventional civil complaint. *Ferran v. Trujillo*, 50 N.M. 266, 175 P.2d 998 (1946).

nection with the absentee voting. The complaint then alleged the following:

16. Contestants Eturriaga and Salazar, at all times mentioned herein were, and now are, registered voters of Rio Arriba County, Districts Three and Two, respectively, and were candidates duly nominated for the offices of County Commissioner, District Three and District Two, respectively, were duly nominated for those offices at the June 7, 1988 primary election, and are entitled to the nominations thereto. But for the fraudulent acts and misconduct in regard to the absentee voting set forth above, Contestants' nominations to the offices and entitlement would be manifest, and certificates of nomination would properly have been issued to Contestants.

17. By reason of the above, the Court should reject the votes of the entire absentee precinct of Rio Arriba County, New Mexico, or in the alternative, the Court should determine those votes which were cast legally, that Contestants had more legal votes than Contestees and that by reason thereof Contestants Eturriaga and Salazar are entitled to certificates of nomination to the office of County Commissioner of Rio Arriba County, Districts Three and Two, respectively, rather than Contestees.

We are of the opinion that the above statements sufficiently put the ultimate outcome of the election at issue, and did not just contest the legality of certain votes whose exclusion would have no effect on the final result. The contestants are alleged to have been "duly elected," "entitled to the nomination," and "entitled to the certificate of nomination." Further, paragraph seventeen of the complaint does allege "that Contestants had more legal votes than Contestees." A motion to dismiss pursuant to SCRA 1986, 1–012(B)(6) merely tests the legal sufficiency of the claim and not the facts that support it. *Environmental Imp. Div. v. Aguayo,* 99 N.M. 497, 660 P.2d 587 (1983); *McCasland v. Prather,* 92 N.M. 192, 585 P.2d 336 (Ct. App.1978). The original complaint as filed was sufficient to state a claim for contest.

The district court also found the filing of the original complaint to be untimely. At issue is a conflict between the Election Code and this Court's rules concerning initiation of election contest proceedings. Under Section 1–14–3, a party is directed to commence an action to contest an election by filing a verified complaint of contest in the district court no later than thirty days from the issuance of a certificate of nomination or certificate of election to the successful candidate. Under Rule 1–087(B), in order to contest the results of any primary election, notice of contest must be filed and served on the adverse party within fifteen days of the issuance of the certificate of nomination to the successful candidate.

The right of an unsuccessful candidate to contest the results of a primary election of political candidates was created by the legislature in 1943. *See* 1943 N.M.Laws, ch. 86, § 10. Like the right to contest a general election, such a right was unknown at common law and existed only under statutory provisions. *See Dinwiddie v. Board of County Comm'rs,* 103 N.M. 442, 445, 708 P.2d 1043, 1046 (1985), *cert. denied,* 476 U.S. 1117, 106 S.Ct. 1974, 90 L.Ed.2d 658 (1986). However, the 1943 legislation only provided the substantive right of contest in the district court and the right of appeal to this Court. The legislation directed this Court to establish under our rulemaking power the necessary procedural framework for the full implementation of the statute. *See* N.M. Const. art. VI, § 3; *Ammerman v. Hubbard Broadcasting, Inc.,* 89 N.M. 307, 551 P.2d 1354 (1976). This Court then promulgated Rule of Civil Procedure 1–087.[2]

When the legislature passed the 1943 primary election contest statute, other statutes extensively regulated the practice and procedure involved in the contest of a general election. *See* NMSA 1941, §§ 56–601

2. In general, Rule 1–087 establishes certain expedited procedures for the filing of notice of contest, answer, reply, decision and disposition of any appeal to the Supreme Court. *See* SCRA 1986, 1–087.

to 56–608 (in general, providing specific time periods for the filing of a notice of contest, answer, reply, and the taking of testimony). Contest actions under these and earlier versions of the general election contest statutes were considered to be special statutory proceedings that required strict compliance. *See Bull v. Southwick,* 2 N.M. 321, 365 (1882); *Montoya v. McManus,* 68 N.M. 381, 385, 362 P.2d 771, 774 (1961).

In 1969 the legislature extensively revised the Election Code and passed legislation covering both primary and general elections. *See* 1969 N.M.Laws, ch. 240. Certain provisions purported to govern the practice and procedure of all contest actions, primary and general, and provided for expedited judicial process. *See Id.* at §§ 328–36. In general, these provisions were similar to earlier ones governing general election contests. *Compare* 1969 N.M. Laws, ch. 240, §§ 328–36 *with* NMSA 1941, §§ 56–602 to 56–610. These legislative changes conflicted in numerous ways with our Rule 1–087 on primary election contests.

In 1971 the Election Code was again amended. Numerous provisions purporting to regulate the practice and procedure of contest actions were repealed. *See* 1971 N.M.Laws, ch. 210, § 2. The Code was amended to provide that the Rules of Civil Procedure would apply to all election contests. *Id.* at § 1. However, the Code retained one provision providing for the initiation of contest proceedings within thirty days of the issuance of a certificate of nomination or election, and substituted the filing of a "verified complaint of contest" for the "notice of contest" required earlier.[3] *Id.* Thus, the conflict with our own rule addressing primary election contests was reduced to a difference between the initial filing period and the form of the notice and filing involved.

At the outset we observe that there is no practical difference between the filing and service of a "notice of election contest" under previous statutes, and the filing and service of a "verified complaint of contest" under the present statutes. It was recognized that the former was merely a designation for our method of contesting elections that served the same function as the filing of a civil complaint. *See Ferran v. Trujillo,* 50 N.M. 266, 175 P.2d 998 (1946). Thus, Rule 1–087 may be read to substitute the words "verified complaint of contest" where "notice of contest" now appears. The only question is whether the action must be commenced in the district court within fifteen or thirty days of the issuance of the certificate of nomination.

The contestants state that Rule 1–087 is an anachronism and should be disregarded in its entirety because the statutory basis for the promulgation of Rule 1–087 was repealed in 1969. We cannot agree that Rule 1–087 has any less force and validity now than earlier. It provides important procedural mechanisms for the timely resolution of primary election contests. Where not in conflict with legislative provisions it remains effective.

When, however, there comes before this Court a conflict between the functions of the legislative and judicial branches of government, "the Court must resolve that conflict in a manner reasonably assuring that powers exercised by one branch do not conflict with the essence of power exercised by the other branch of government." *Southwest Community Health Servs. v. Smith,* 107 N.M. 196, 199, 755 P.2d 40, 43 (1988). It is not the province of this Court to invalidate substantive policy choices made by the legislature. *Id.* Here, the same statute that creates the substantive right to contest a primary election provides

3. Section 1–14–3 of the Election Code provides:

> Any action to contest an election shall be commenced by filing of a verified complaint of contest in the district court of the county where either of the parties resides. Such complaint shall be filed no later than thirty days from the issuance of the certificate of nomination or election to the successful candidate. The party instituting such action shall be known as the contestant, and the party against whom the action is instituted shall be known as the contestee. The Rules of Civil Procedure apply to all actions commenced under the provisions of this section.

NMSA 1978, § 1–14–3 (Repl.Pamp.1985).

a definite time period for commencement of the action. This is a limitation on the substantive right the legislature has created as well as on the remedy afforded any particular aggrieved party. *See Swallows v. City of Albuquerque,* 61 N.M. 265, 266, 298 P.2d 945, 946–47 (1956). We have traditionally viewed legislative rules of election contest as "special proceedings" whose provisions were binding on the district court as well as the parties. *E.g., Vigil v. Pradt,* 5 N.M. 161, 168, 20 P. 795, 798 (1889); *Wood v. Beals,* 29 N.M. 88, 91, 218 P. 354, 355 (1923); *Ratliff v. Wingfield,* 55 N.M. 494, 236 P.2d 725 (1951).

We hold that the thirty-day filing period granted by the legislature represents a substantive right which this Court has no power to reduce. Therefore, the verified complaint of contest was timely filed and its dismissal was error. However, as we have explained earlier, other than paragraph (B), Rule 1–087 remains valid and must be followed.

Having decided that the dismissal of the contest action was error, both because the complaint stated a legally sufficient claim for contest and because it was timely filed, we must consider what relief is now available to the contestants. We know of no New Mexico cases where the results of a general election have been declared void or of no effect after the successful contest of the primary election that preceded it. The contestants assert that, if successful in their suit on remand, they are entitled to the public office now held by Valdez and Romero under Section 1–14–4. We cannot agree.

Section 1–14–4 of the Election Code, relied on by contestants, provides that:

> Judgment shall be rendered in favor of the party for whom a majority of the legal votes shall be proven to have been cast, and shall be to the effect that he is entitled to the office in controversy with all the privileges, powers and emoluments thereto and for his costs. If the contestant prevails he shall have judgment placing him in possession of the contested office and for the emoluments thereto from the beginning of the term for which he was elected and for his costs.

NMSA 1978, § 1–14–4 (Repl.Pamp.1985). We believe, however, that this statute was intended to place the successful contestant of a *general* election into the office to which he is entitled. In the words of the statute, there is no "office in controversy" when the results of a primary is contested. It is the legal entitlement to the *certificate of nomination* which is in controversy. The Election Code has no remedy in a situation such as this, where a primary election contest has not been resolved before the voting in the general election.

The provisions of Rule 1–087 are intended to resolve any controversy over primary election results prior to the general election. We have recognized that this Court's power of superintending control is an appropriate means to timely resolve primary election contests when the right of appeal is inadequate. *See Montoya v. McManus,* 68 N.M. 381, 362 P.2d 771 (1961). The contestants in this case have ignored all provisions of Rule 1–087 and have instead followed the general rules of civil and appellate procedure. In practical terms, this means we have heard this appeal six to seven months after the general election rather than before it. As a general rule, courts have held that a primary election contest becomes moot if not finally determined prior to the balloting in the general election. *See Smith v. Crawford,* 747 S.W.2d 938 (Tex.Ct.App.1988) (notwithstanding good cause or grounds for contest); *Rapier v. Superior Court of Greenlee County,* 97 Ariz. 153, 398 P.2d 112 (1964) (en banc) (recognizing an exception only in cases of voter fraud); *Sasser v. South Carolina Democratic Party,* 277 S.C. 67, 282 S.E.2d 602 (1981); *Harter v. Kehm,* 733 S.W.2d 775 (Mo.Ct.App.1987); *Palmer v. Bond,* 247 Ga. 35, 273 S.E.2d 612 (1981). *But cf. Barber v. Moody,* 229 So.2d 284 (Fla.Ct.App.1969) (contest not moot where candidate ran unopposed in general election and defendants utilized every dilatory tactic available to delay the contest action). We have decided to follow such a course in this case where the general elec-

tion not only has been held, but the contestants also have not availed themselves of the expedited procedures of Rule 1–087, or sought extraordinary relief from this Court. We recognize that when the contested candidate ran unopposed in the general election not all courts have been willing to hold that the primary election contest is moot. *See id.* However, unlike the *Barber* case, the primary responsibility for the untimely consideration of this appeal lies with the contestants and not with those opposing the contest action.

We believe that it is incumbent upon the contestant of a primary election to utilize every available means to resolve the dispute in time to place his name on the ballot in the general election. Consequently, based upon the circumstances of this case, we will not remand the case to the district court for contest proceedings and we find that the action is now moot. The order of the district court is affirmed.

IT IS SO ORDERED.

SOSA, C.J., and BACA, J., concur.

784 P.2d 30

STATE of New Mexico, Petitioner,

v.

Esequiel CORDOVA, Respondent.

No. 18645.

Supreme Court of New Mexico.

Dec. 20, 1989.

Hal Stratton, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for petitioner.

Jacquelyn Robins, Chief Public Defender, Jerry Todd Wertheim, Asst. Appellant Defender, Santa Fe, for respondent.

OPINION

RANSOM, Justice.

Respondent Cordova was convicted of possession of heroin. He appealed the denial of his motion to suppress evidence seized under an allegedly invalid search warrant. The court of appeals reversed his conviction, holding that the affidavit used to secure the warrant did not provide an adequate basis from which the issuing magistrate could conclude probable cause existed to search the house where Cordova resided at the time of his arrest.

The affidavit submitted to secure the search warrant in this case stated:

1. That within the last 24 hours, Affiant has been contacted by a Confidential Informant, who advised that a subject driving a red Chrysler Cordova with Texas Plates, was currently selling heroin at a residence at 1106 South Cahoon. That Subject John Doe was from out of town and had brought the heroin in.
2. That Said Informant stated that subject was a [S]panish male, approximately 6–0 tall, weighing a little over 200 pounds, having black hair and did have some tattoos on his person.
3. That Said Informant did state that through personal knowledge, several heroin users had been to this residence.
4. That Said Informant has furnished information to Affiant in the past which Affiant did find to be true and correct through personal knowledge and investigation.
5. That based on the information provided by Said Informant, Affiant did drive by the residence and did observe the red Cordova which did have a partial white vinyl roof. Description and the trailer house next to the house are the same as stated by Informant. Also, on checking utilities, it was learned that a Carol Cordova resided at this address.

The court of appeals based its determination that this affidavit was lacking on our rule of criminal procedure governing the issuance of warrants based on affidavits containing hearsay information. *See* SCRA 1986, 5–211(E). The court noted that our interpretations of Rule 5–211(E) have been based on the two-prong test formulated by the Supreme Court in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). However, as also noted by the court of appeals, the United States Supreme Court has since abandoned the *Aguilar–Spinelli* test in favor of a determination based on "the totality of circumstances." *Illinois v. Gates,* 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983). We granted certiorari to determine the impact, if any, of the *Gates* decision on Rule 5–211(E). We conclude that our previous reading of this rule comports both with its plain meaning and with the requirement of the New Mexico Constitution that "no warrant * * * shall issue * * * without a written showing of probable cause, supported by oath or affirmation." N.M. Const. art. II, § 10.[1] Moreover, although our analysis of the facts of this case differs from that of the court of appeals, we affirm the result reached by that court.

Federal law before Gates—The reasons behind the two-prong test of Aguilar and Spinelli. The fourth amendment of the federal constitution, like Article II, Section 10 of our state constitution, strongly favors the warrant process. This process requires law enforcement officials to make a showing of probable cause before a "neutral and detached magistrate" in order to obtain a search warrant. *Johnson v. United States,* 333 U.S. 10, 13, 68 S.Ct. 367, 368, 92 L.Ed. 436 (1948); *see also State v. Baca,* 97

1. Because our holding today is based on our interpretation of the New Mexico Constitution, we do not consider as controlling the principles announced in *Gates* or the other federal precedent cited in the body of this decision, albeit the reasoning of those opinions informs our result.

N.M. 379, 640 P.2d 485 (1982). The intent of this requirement, and of the protection it affords,

> is not [to deny] law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson, 333 U.S. at 13–14, 68 S.Ct. at 368–69.

The constitutionally mandated role of magistrates and judges in the warrant process requires them to make "an informed and deliberate" determination whether probable cause exists. *Aguilar v. Texas,* 378 U.S. at 110, 84 S.Ct. at 1511 (quoting *United States v. Lefkowitz,* 285 U.S. 452, 464, 52 S.Ct. 420, 423, 76 L.Ed. 877 (1932)). Accordingly, when an application for a search warrant is based on an affidavit, the affidavit must contain sufficient facts to enable the issuing magistrate independently to pass judgment on the existence of probable cause. "Mere affirmance of belief or suspicion [by the affiant] is not enough." *Nathanson v. United States,* 290 U.S. 41, 47, 54 S.Ct. 11, 13, 78 L.Ed. 159 (1933) (warrant improperly issued upon sworn affidavit stating simply that affiant "has cause and does believe" certain liquors were to be found in specified location); *see also Baca,* 97 N.M. at 382, 640 P.2d at 488 (bald and unilluminating assertion that defendant was known by informant to be involved in narcotics transactions is entitled to no weight in appraising judge's decision to issue warrant).

Frequently, applications for search warrants depend on unnamed, confidential, police informants to show the existence of probable cause. To analyze such cases, the *Aguilar* and *Spinelli* Courts refined the basic requirement that applications for search warrants must contain sufficient detail to enable an issuing magistrate to make an independent determination of the existence of probable cause. Although an affidavit may be based wholly or in part on hearsay provided by an unnamed informant, "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that [the facts were as] he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant * * * was 'credible' or his information 'reliable.' " *Aguilar,* 378 U.S. at 114, 84 S.Ct. at 1514 (citations omitted); *see also State v. Snedeker,* 99 N.M. 286, 657 P.2d 613 (1982); *State v. Perea,* 85 N.M. 505, 513 P.2d 1287 (Ct.App.1973) (applying test to "double hearsay" problem). These requirements are often called the "basis of knowledge" and "veracity" (or "credibility") tests. *See, e.g., Gates,* 462 U.S. at 267, 103 S.Ct. at 2347 (White, J., concurring); Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond,* 69 Iowa Law Review 551, 556 (1984).

In *Aguilar,* the Court held an affidavit to be insufficient to support a search warrant when it stated simply that "Affiants have received reliable information from a credible person and do believe" that illegal drugs and paraphernalia were being kept at a particular residence. The Court found this affidavit lacking because it expounded neither the basis for the officers' conclusion that the information was gathered in a reliable way nor the basis for the conclusion that the informant was credible.[2]

In *Spinelli,* the Court explored two particular means by which a magistrate reasonably could conclude that an affidavit contained sufficient information to satisfy *Aguilar's* two prongs. First, the Court noted, an affidavit that otherwise would be inadequate nevertheless may support a determination of the existence of probable cause if "it fairly [can] be said that the tip

2. In many cases, the affidavit will attempt to satisfy the basis of knowledge and veracity tests by stating that the informant has a reliable "track record" with the police, and that the informant gathered the information from first-hand observation. In other cases, the credibility of an informant may be assumed when the tip constitutes an admission that the informant was involved in the illegal activity. *See Perea,* 85 N.M. at 508, 513 P.2d at 1292; *United States v. Harris,* 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971).

* * * when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration." 393 U.S. at 415, 89 S.Ct. at 588. Under the facts of *Spinelli,* however, Justice Harlan, writing for the Court, concluded that independent police investigation had verified only innocent facts that were not sufficiently suggestive of the illegal bookmaking activity alleged. *Cf. Perea,* 85 N.M. at 508–509, 513 P.2d at 1292–93 (affidavit established probable cause when it alleged that police officer had defendant's premises under surveillance for months, had seen several known narcotics users come and go, had observed fresh needle marks on some whom he stopped, and some whom he stopped admitted purchasing narcotics from defendant).

The *Spinelli* Court also opined that, even when an affidavit does not affirmatively state an informant's basis of knowledge, it may be inferred that an informant who otherwise is known to be credible obtained the information set forth in the affidavit in a reliable fashion *if* the tip contains enough detail to be self-verifying. *Id.* at 417, 89 S.Ct. at 589; *see also Baca,* 97 N.M. at 382, 640 P.2d at 488. The *Spinelli* Court concluded, however, that there was insufficient detail set forth in the affidavit in question to compensate for its failure to specify the factual basis for the informant's tip.[3]

New Mexico's rules of criminal procedure. In New Mexico, this Court has promulgated rules to govern the determination of probable cause for the issuance of a search warrant. Under SCRA 1986, 5–211(E),[4]

> "[P]robable cause" shall be based upon substantial evidence, which may be hearsay in whole or in part, *provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.* Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such additional evidence shall be reduced to writing, supported by oath or affirmation and served with the warrant.

(Emphasis added.) As first recognized by the court of appeals in *Perea,* and by this Court in *State v. Turkal,* 93 N.M. 248, 599 P.2d 1045 (1979), our rules of criminal procedure codify the standard set out in *Aguilar* and related Supreme Court cases.

The use of the conjunctive "and" in Rule 5–211(E) clearly contemplates that an affidavit must set forth both: (1) a substantial basis for believing the informant; and (2) a substantial basis for concluding the informant gathered the information of illegal activity in a reliable fashion. It is equally clear that these requirements are formulations of the "veracity" and "basis of knowledge" tests of *Aguilar–Spinelli.* Moreover, we are convinced that these requirements structure the issuing magistrate's inquiry in a manner made necessary by the affidavit's reliance on second or third hand reports from an unnamed informant. As Justice Harlan noted, "It is not possible to argue that since certain information, if

3. The *Spinelli* Court compared the extent of detail in the case before it to that in *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). In *Draper,* the informant's tip described in minute detail the time of arrival, dress, and movements of an alleged drug courier. This detail provided police, upon observing the suspect as predicted, with probable cause to make a warrantless arrest. Although the detailed facts in the tip did not themselves give rise to an inference of illegal activity, they were of a kind that generally would have been known only by someone intimately connected with making careful arrangements for meeting the suspect. By analogy, the *Spinelli* Court posited that a magistrate confronted with the tip considered in *Draper* could have concluded that the tip was based on personal knowledge without an affirmative statement to that effect. *Cf. Spinelli,* 393 U.S. at 426, 89 S.Ct. at 594 (White, J., concurring).

4. Rule 5–211 governs procedures in district court; however, identical provisions govern the determination of probable cause in applications for search warrants made in magistrate courts, *see* SCRA 1986, 6–208(F); in metropolitan courts, *see* SCRA 1986, 7–208(E); and in municipal courts, *see* SCRA 1986, 8–208(F).

true, would be trustworthy, therefore, it must be true. The possibility remains that the information may have been fabricated." *See United States v. Harris,* 403 U.S. 573, 592, 91 S.Ct. 2075, 2086, 29 L.Ed.2d 723 (1971) (Harlan, J., dissenting, joined by Douglas, Brennan, and Marshall, JJ.).

Conversely, if "the conclusory allegations of a police officer, presumably [truthful] * * * are insufficient to establish probable cause [cf. *Nathanson*], the conclusory allegations of a generally [truthful] informant must be insufficient as well." Kamisar, *supra* at 556. "Truthful persons can be the bearers of hearsay, rumor, gossip, or bare conclusions as surely as can be liars." *State v. Jones,* 706 P.2d 317, 322–23 (Alaska 1985) (quoting *State v. Jackson,* 102 Wash.2d 432, 441, 688 P.2d 136, 142 (1984)). It is for these reasons that the two prongs of *Aguilar–Spinelli* and of our rule have been characterized as independent and "analytically severable" requirements. *United States v. Harris,* 403 U.S. at 592, 91 S.Ct. at 2086; *State v. Jackson,* 102 Wash.2d at 437, 688 P.2d at 139; *see also Baca,* 97 N.M. at 381, 640 P.2d at 487 ("[T]he test we apply is two pronged, from which we cannot deviate.").

The Supreme Court's rejection of the two-prong test in favor of the "totality of the circumstances" test. In *Illinois v. Gates,* a four-justice plurality of the Supreme Court abandoned the *Aguilar–Spinelli* approach in favor of a "totality of the circumstances" test.[5] The Justices seem in large part to have been motivated by a conviction that some lower courts tended to apply the two-prong test in a rigid and technical fashion. They were convinced that such applications did not comport with the fourth amendment principle of probable cause, which was described as a "fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Gates,* 462 U.S. at 232, 103 S.Ct. at 2329.[6]

Gates did recognize the continued utility of the basis of knowledge and veracity tests as factors to be considered. *Id.* at 230, 103 S.Ct. at 2328. These factors, however, no longer were to be considered as exclusive or analytically severable requirements under the federal constitution.[7]

5. In *Massachusetts v. Upton,* 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984), *on remand, Commonwealth v. Upton,* 394 Mass. 363, 476 N.E.2d 548 (1985), the Court applied the *Gates* totality-of-circumstances test in a per curiam opinion, reversing the decision below of the Massachusetts Supreme Court.

6. Other concerns of the *Gates* plurality, not discussed in the body of this opinion, include the concern that, if courts subject affidavits to great scrutiny, police may resort to warrantless searches, and the concern that rigid application of *Aguilar–Spinelli* unduely diminishes the value of anonymous tips in police work. 462 U.S. at 236–37, 103 S.Ct. at 2331. We note, however, that each of these concerns is itself derived from the plurality's concern that the test sometimes was applied too rigidly. As noted in the body of this opinion, these concerns do not accord with our experience of our courts application of the principles set forth in Rule 5–211(E). Under *Spinelli,* moreover, police corroboration may compensate for an inability to demonstrate that an anonymous tip was from a credible source, and a detailed description may compensate for an inability to show the anonymous informant's basis of knowledge. *See Gates,* 462 U.S. at 284, 103 S.Ct. at 2356 (Brennan, J., dissenting).

7. For example, the *Gates* plurality asserted that if an informant has a particularly good track record in predicting certain types of criminal behavior, it should not stand as an absolute bar to a determination of probable cause that the affiant has failed thoroughly to set forth the basis of this informant's prediction in a particular case. 462 U.S. at 233. This principle has some intuitive appeal as an empirical proposition in close cases, i.e., those in which the informant's veracity is particularly well established and the informant's basis of knowledge has not been omitted entirely. *See* Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond,* 69 Iowa Law Review 551, 580 (1984). Nevertheless, this empirically acceptable rule-of-thumb implies some abdication of the issuing judge's role in making an *independent* assessment of the affidavit's sufficiency. "By requiring police to provide certain crucial information to magistrates and by structuring magistrates' probable cause inquiries, *Aguilar* and *Spinelli* assure the magistrate's role as an independent arbiter of probable cause." *Gates,* 462 U.S. at 283, 103 S.Ct. at 2356 (Brennan, J., dissenting). Similarly, as a strictly empirical proposition, one can argue that, as a magistrate may know a particular police officer to be an honest and reliable observer of human events, the magistrate reasonably could conclude the officer's summary conclusion in a particular case was truthfully

The New Mexico experience. We believe that what we have identified as the primary reason of the *Gates* plurality for abandoning the two-prong test—its application in too rigid and technical a fashion by some courts—has not proved to be a problem in our state courts' application of the standard set forth in Rule 5–211(E). In *Perea,* for example, the court of appeals was careful to note that affidavits normally are "drafted by non-lawyers ... in the midst and haste of a criminal investigation, therefore, technical requirements of elaborate specificity have no proper place in a court's evaluation." 85 N.M. at 507, 513 P.2d 1287. The *Perea* Court also noted that affidavits should be tested under less rigorous standards than those governing admissibility at trial. *Id.* Similarly, in *State v. Snedeker,* 99 N.M. 286, 290, 657 P.2d 613, 617 (1982) (quoting *State v. Gutierrez,* 91 N.M. 542, 545, 577 P.2d 440, 443 (Ct.App.1974)), we noted that on issues of probable cause to support a warrant:

> "(1) only a probability of criminal conduct need be shown; (2) there need be less vigorous proof than the rules of evidence require to determine guilt of an offense; (3) common sense should control; [and] (4) great deference should be shown by courts to a magistrate's determination of probable cause."

See also Baca, 97 N.M. at 380, 640 P.2d at 486 (showing of probable cause that a person has committed a crime will permit reasonable inference that evidence of the crime is to be found at his residence); *Turkal,* 93 N.M. at 250, 599 P.2d at 1047 (probable cause established when, reading affidavit as a whole and considering corroboration supplied by second confidential informant, there was substantial evidence that juvenile informant was veracious and her information, based on personal knowledge, was reliable); *Gutierrez,* 91 N.M. at 545, 577 P.2d at 443 (there is no requirement that issuing magistrate conduct independent investigation to determine whether informant is reliable, nor is it necessary for affidavit to state that informant's past tips resulted in conviction when, from verified facts presented, magistrate reasonably could believe source was credible and a factual basis existed for information furnished).

We simply do not believe this tradition to be one of unthinking rigidity or overly technical application of the principles codified in Rule 5–211(E). Moreover, we believe these principles to be firmly and deeply rooted in the fundamental precepts of the constitutional requirement that no warrant issue without a written showing of probable cause before a detached and neutral magistrate. We are convinced that our rules, while providing a flexible, common sense framework, also provide structure for the inquiry into whether probable cause has been demonstrated. The fact that "non-lawyers" are involved in drafting applications for search warrants underscores rather than obviates the need for such structure.[8]

reported and well founded. However, as pointed out in the body of this opinion, the Supreme Court held in *Nathanson* that such an affidavit was constitutionally defective. Surely the second-hand, conclusory report from an unnamed source does not improve the magistrate's ability to make an independent determination. *Cf. Gates,* 462 U.S. at 272, 103 S.Ct. at 2350 (White, J., concurring in judgment, but not in abandonment of *Aguilar–Spinelli*).

8. *Cf. Gates,* 462 U.S. at 288, 103 S.Ct. at 2358 (Brennan, J., dissenting). Our rules do not require us to endorse the somewhat questionable premise, suggested by *Gates,* that a highly credible informant is likely to have gathered his information in a reliable fashion even though there has been an insufficient showing of the informant's basis of knowledge on the face of the affidavit. Rather, our rule encourages a magistrate in close cases to inquire further of the officer or to call the informant as a witness. Not only does such a procedure comport better with the constitutional duty of the issuing magistrate to make an independent evaluation, it eliminates the need to make that determination on the basis of assumptions which, in any given case, well may be incorrect. We are mindful of Justice Harlan's observation that "in order to leave some room for the States to cope with their own diverse problems, there has been a tendency to relax federal requirements under the Fourth Amendment, which now govern state procedures as well." *Coolidge v. New Hampshire,* 403 U.S. 443, 491, 91 S.Ct. 2022, 2050, 29 L.Ed.2d 564 (1971) (Harlan, J., concurring). In this respect, our rejection of *Gates* as a guide in interpreting the New Mexico Constitution is not entirely a rejection of the concerns of the *Gates* majority. Our holding today also reflects our

We conclude that our present court rules better effectuate the principles behind Article II, Section 10 of our Constitution than does the "totality of the circumstances" test set out in *Gates*. *Accord, State v. Jones,* 706 P.2d 317 (Alaska 1985); *State v. Kimbro,* 197 Conn. 219, 496 A.2d 498 (1985); *Commonwealth v. Upton,* 394 Mass. 363, 476 N.E.2d 548 (1985), *on remand from Massachusetts v. Upton,* 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984); *People v. Griminger,* 71 N.Y.2d 635, 529 N.Y.S.2d 55, 524 N.E.2d 409 (1988); *State v. Jacumin,* 778 S.W.2d 430 (Tenn.1989); *State v. Jackson,* 102 Wash.2d 432, 688 P.2d 136 (1984). *See also,* 1 W. LaFave, *Search and Seizure,* § 3.3 (Supp.1984); Kamisar, *supra. But see People v. Pannebaker,* 714 P.2d 904 (Colo.1986); *State v. Lang,* 105 Idaho 683, 672 P.2d 561 (1983); *Potts v. State,* 300 Md. 567, 479 A.2d 1335 (1984); *State v. Novembrino,* 105 N.J. 95, 519 A.2d 820 (1984); *State v. Arrington,* 311 N.C. 633, 319 S.E.2d 254 (1984); *State v. Ringquist,* 433 N.W.2d 207 (N.D.1988); *Commonwealth v. Gray,* 509 Pa. 476, 503 A.2d 921 (1986); *State v. Adkins,* 346 S.E.2d 762 (W.Va. 1986); *Bonsness v. State,* 672 P.2d 1291 (Wyo.1983). *Cf. State v. Swaim,* 412 N.W.2d 568 (Iowa 1987) (statute set forth express considerations for magistrates and required explication of reasons for issuing warrant under *Gates* totality-of-circumstances test). Therefore, pursuant to our constitutional role in interpreting the provisions of our state constitution and in promulgating rules of procedure to govern criminal proceedings in this state, we hold that the court of appeals was correct in utilizing the *Aguilar–Spinelli* two-prong test.

Affidavit failed to state adequately the basis of informant's knowledge—deficiency not cured by independent corroboration. Turning to the affidavit at issue in this case, we agree with the court of appeals that it fails to establish probable cause. We disagree, however, that the affidavit fails because it does not set forth adequately the affiant's basis for believing the informant to be credible. Rather, it fails because it did not provide the issuing court with a substantial basis for believing that the information provided was reliable. Since this affidavit contained both hearsay information from an informant and corroborating facts from independent police investigation, we follow the lead of *Spinelli* and analyze, first, the sufficiency of the hearsay report standing alone and, second, whether the facts corroborated by the police cured any deficiencies in the report.

The court of appeals noted that the affiant, while stating that his informant had provided reliable information in the past, did not say "when the informant had provided such information, how frequently, or whether the information provided related to a matter under criminal investigation * * *. [F]or all we know, the statement could refer to nothing more than the fact the informant had correctly provided * * * the time of day * * *." Slip op. at 4. The state argues in its petition for certiorari that it was not necessary for the affiant to detail the information given in the past by the informant. We agree with the state that "technical requirements of elaborate specificity have no proper place in a court's evaluation" of probable cause, *Perea,* 85 N.M. at 507, 513 P.2d at 1289. In reviewing the issuance of the warrant here, we balance this concession to common sense against the basic constitutional premise that the magistrate, and not the police officer, is to determine whether probable cause exists.

Here, the affidavit stated that the informant had provided information in the past which the affiant "did find to be true and correct from personal knowledge and investigation." It is true that this unadorned statement did not provide a particularly strong basis on which to judge the informant's credibility. *Cf. Turkal,* 93 N.M. at 250, 599 P.2d at 1042 (honest citizen was credible informant); *State v. Cervantes,* 92 N.M. 643, 593 P.2d 478 (Ct.App. 1979) (affiant's statement that informant

close acquaintance with the problems and traditions of our state. By necessity, we are better acquainted with these factors than is the United States Supreme Court.

had provided correct information once before sufficient when statement revealed that information was received the week prior to the affidavit and resulted in recovery of stolen property and indictment); *Perea* 85 N.M. at 510, 513 P.2d at 1294 (statement against interest was credible). Nonetheless, given the great deference that we accord to an issuing court's determination of probable cause, *see Snedeker*, 99 N.M. at 290, 657 P.2d at 617, we conclude the court here reasonably could infer that the reference to information supplied by the informant in the past involved information that was relevant to a police investigation.

Unaddressed by the court of appeals, however, was whether the affidavit, standing alone, adequately stated the informant's basis of knowledge for the allegation that Cordova was selling heroin. The informant reportedly stated that Cordova had brought heroin into town and was selling it at the house in question. However, the affidavit is devoid of any indication of how the informant gathered this information. Similarly, although the affidavit states the informant has personal knowledge that "heroin users" have been at the residence, there is nothing in the affidavit to indicate the source of his knowledge, or even how the informant knows the persons in question to be "heroin users."

In *Spinelli*, the Court held the assertion that Spinelli was a known "gambler and associate of gamblers" was "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." 393 U.S. at 414, 89 S.Ct. at 588; *accord Baca*, 97 N.M. at 382, 640 P.2d at 488. By implication, the allegation that a person said to be a "heroin user" has been to a particular residence, unsupported by any detail as to how the informant knows the person to be a heroin user or how he knows the person has been to the residence, is entitled to little or no weight in determining whether probable cause exists to believe that heroin is to be found at that residence.

We also do not believe the affidavit contained sufficient detail concerning the alleged illegal activity to be self-verifying. Aside from a simple assertion that the heroin was brought to town by respondent, the only details in the affidavit concern a description of a man, a house, and a car parked outside that house. As with the details provided by the informant in *Spinelli*, which stated no more than that Spinelli spent a large amount of his time in an apartment that contained two phones with separate, identified numbers, the details provided in this affidavit relate to innocent facts that do not, either separately or taken as a whole, suggest illegal activity. 393 U.S. at 416, 89 S.Ct. at 589; *see also State v. Herrera*, 102 N.M. 254, 694 P.2d 510 (mere fact that residence was described in minute detail did not give rise to probable cause to believe that suspect made such residence his home), *cert. denied*, 471 U.S. 1103, 105 S.Ct. 2332, 85 L.Ed.2d 848 (1985).

The affiant's independent corroboration did not serve to establish the reliability of the informant's report. *See State v. Jones*, 96 N.M. 14, 627 P.2d 409 (1981) (unique information concerning modus operandi of crime supplied by informant and corroborated by police sufficient to establish informant's reliability); *State v. Donaldson*, 100 N.M. 111, 666 P.2d 1258 (Ct.App.), *cert. denied*, 100 N.M. 53, 665 P.2d 809 (1983) (deficiency in affidavit cured when police investigation substantially corroborated detailed information provided by informant); *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984) (under *Gates*, informant's tip and surrounding facts possessed an internal coherence that sustained magistrate's finding of probable cause when informant described goods stolen in recent burglaries, knew of a police raid on a motel room that day, was recognized by police as defendant's girlfriend, and gave detailed description of alleged location of stolen goods that was corroborated by police investigation), *on remand*, *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985).

Here, the affiant verified only the infor-

mant's description of the house and car.[9] We agree with the court of appeals that the affidavit in essence "asked the magistrate to believe the informant was reliable merely because the house and car existed, and further asked the magistrate to believe that because the house and car existed, the man and the heroin probably did as well." Slip op. at 6. We hold that the affidavit in this case did not establish a substantial basis for believing the informant's report was based on reliable information as required by Rule 5–211(E) and the New Mexico Constitution. Accordingly, the decision of the court of appeals is affirmed. IT IS SO ORDERED.

SOSA, C.J., and BACA and MONTGOMERY, JJ., *concur.*

784 P.2d 38

Wallace RADER, Plaintiff–Appellee,

v.

DON J. CUMMINGS COMPANY, INC., a New Mexico Corporation, and Fireman's Fund Insurance Company, Defendants–Appellants,

v.

Fabian CHAVEZ, State Superintendent of Insurance, and the New Mexico Subsequent Injury Fund, Third–Party Defendants–Appellants.

No. 10920.

Court of Appeals of New Mexico.

Sept. 19, 1989.

Certiorari Denied Nov. 1, 1989.

9. We do not address the state's contention that the police also verified the description of Cordova himself, as this did not take place until after the warrant issued. It is well settled that probable cause cannot be established by the results of the search. *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (Ct.App.), *cert. denied,* 87 N.M. 5, 528 P.2d 649 (1984). A contrary rule would render the warrant requirement an empty formality, as a warrant could always be justified at trial if the search resulted in the seizure of the evidence, fruits, or instrumentalities of a crime.

Eric S. Jeffries, C. Kristine Osnes, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, for plaintiff-appellee.

James P. Lyle, Butt, Thornton & Baehr, P.C., Albuquerque, for defendants-appellants.

Byron Caton, Briones & Caton, P.A., Farmington, for third-party defendants-appellants.

OPINION

BIVINS, Chief Judge.

This court's opinion filed August 31, 1989, is withdrawn and the following substituted therefor.

Plaintiff Wallace Rader sued his employer, Don J. Cummings Company, Inc., and its insurance carrier, Fireman's Fund Insurance Company (hereinafter collectively referred to as "employer"), under the Workmen's Compensation Act, NMSA 1978, Sections 52-1-1 to -69 (Orig. Pamp.), and the Occupational Disease Disablement

Law, NMSA 1978, Sections 52-3-1 to -59 (Orig. Pamp.), for benefits allegedly resulting when Rader became totally and permanently disabled February 7, 1986. Employer later impleaded the New Mexico Subsequent Injury Fund (SIF), seeking apportionment of any award in favor of Rader. From a judgment awarding Rader total permanent disability and apportioning liability for benefits, attorney fees, and costs, 22% to employer and 78% to SIF, employer and SIF appeal.

Employer's appeal challenges the award of Rader's attorney fees. SIF's appeal seeks to avoid apportionment of any liability to it, based on: (1) a claimed deficiency in the certificate of preexisting disability; (2) a lack of proof of any preexisting impairment which disabled Rader from work or constituted an obstacle to continued employment; (3) a claimed failure of proof to establish apportionment; (4) a claim that benefits, if any, are exclusively payable under the Occupational Disease Disablement Law; and (5) a claim that employer is not entitled to reimbursement for Rader's attorney fees, absent proof that SIF benefited from such fees. We affirm on all issues except apportionment as between employer and SIF.

The trial court found that Rader worked for employer from 1963 until February 7, 1986, when he became totally and permanently disabled. All parties agree that Rader was totally and permanently disabled from and after that date. The trial court further found that, while working for employer, Rader was exposed on a daily basis to asbestos dust, dust from insulation, dust created by welding, and other pollutants, which, over time, caused accidental injuries to his lungs, resulting in an accidental injury in February 1986, for which employer was liable under the Workmen's Compensation Act.

On the second day of trial, Rader and employer entered into a stipulation essentially resolving all issues between them, except the defense of the statute of limitations. The trial court found against employer on that issue; employer does not appeal that issue. Thus, the issues between Rader and employer have been resolved, except for the issue of attorney fees.

SIF'S APPEAL

1. *Certificate of Preexisting Physical Impairment*

SIF claims that the certificate of preexisting physical impairment filed with the superintendent of insurance fails to meet the requirements of Section 52-2-6 of the Subsequent Injury Act, NMSA 1978, §§ 52-2-1 to -13 (Orig. Pamp. & Cum. Supp.1986) (Interim Act), in several respects. First, SIF says that the certificate, while describing the nature of the preexisting impairment, fails to express it as a percentage as required by Section 52-2-6(B). Second, Rader refused to sign the certificate; moreover, he was no longer employed when the certificate was prepared and filed, and therefore could not be made to sign. § 52-2-6(A). Third, SIF claims that the certificate was not timely filed.

(a) Requirement that Certificate State Percentage of Impairment

In making its argument under this subpoint, SIF relies on two provisions of the Interim Act: 1986 N.M. Laws, ch. 57, Section 3 (codified as Section 52-2-6), and 1986 N.M. Laws, ch. 22, Section 46 (codified as Section 52-2-3). Section 52-2-6(B) requires that the certificate shall set forth the nature of the impairment "both as a description of the impairment and as a percentage of the permanent physical impairment of the body as a whole." Under Section 52-2-3(A) of the Interim Act, "permanent physical impairment" means

> any permanent physical defect, due to a previous accident or disease or due to any congenital condition, which is capable of being expressed in percentage terms as determined by medically or scientifically demonstrable findings as presented in the American medical association's guides to the evaluation of permanent impairment, copyright 1984, 1977 or 1971, or comparable publications by the American medical association.

Because Dr. Gorman, who signed the certificate, could not express Rader's impairment in terms required by those provisions, SIF claims the certificate was defective, and therefore, under Section 52–2–6(D) of the Interim Act, that act does not apply and SIF is not liable. Dr. Gorman expressed Rader's "percentage of disability" as "[p]atient's useful working life will end at age 67."

We need not decide whether the certificate substantially satisfies the requirements of the Interim Act provisions relied upon by SIF. The Interim Act does not apply to this claim. 1986 N.M. Laws, chapter 22, section 101 states, "The provisions of Sections ... 46 [52–2–3] ... of this act shall apply to injuries ... occurring ... on or after the effective date of those sections." This section of the act contained no effective date, but pursuant to N.M. Const. article IV, section 23, the section was effective on May 21, 1986. The 1986 amendment to Section 52–2–6 also contained no effective date, *see* 1986 N.M. Laws, ch. 57, and therefore the amendment was effective on May 21, 1986.

In this case, Rader became totally and permanently disabled on February 7, 1986, almost three months before the effective dates of the Interim Act provisions relied on by SIF. In *Strickland v. Coca–Cola Bottling Co.*, 107 N.M. 500, 760 P.2d 793 (Ct.App.1988), we held that the date the injury becomes compensable, rather than the date of accident, controls as to which statute governs the claim. In the case before us, the date that the injury manifested itself, February 7, 1986, and the date that Rader became disabled, are the same. Thus, the original Subsequent Injury Act applies. §§ 52–2–1 through –13 (Orig. Pamp.).

Since SIF makes no argument under the provisions of the original Subsequent Injury Act, we need not address the question further.

(b) and (c) Failure to Sign and Late Filing

The claimed defects based on Rader's failure or refusal to sign the certificate and the late filing can also be summarily answered. Employer, in its brief, states that Rader refused to sign the certificate unless employer would agree it was 100% liable for the compensation benefits as a result of the subsequent injury, and that this was explained in a letter to the superintendent of insurance that accompanied the certificate. On those facts, we believe that the certificate substantially complies with the purposes of the statute. The purposes of the Subsequent Injury Act, as discussed in *Vaughn v. United Nuclear Corp.*, 98 N.M. 481, 650 P.2d 3 (Ct.App. 1982), are to encourage employers to hire or to retain injured or impaired workers, and to document the nature and extent of their impairment. The purpose of encouraging employers to retain handicapped workers is satisfied where, as here, the employer had actual notice of the disability and retained the worker.

We recognize, however, that the purpose of documenting the impairment is minimally served, if at all, where the employer and the worker wait until long after the subsequent injury to document the preexisting impairment. Nevertheless, the supreme court in *Fierro v. Stanley's Hardware*, 104 N.M. 50, 716 P.2d 241 (1986), held that the certificate of preexisting physical impairment can validly be filed after the subsequent injury where the employer, before the subsequent injury, had actual knowledge of the employee's preexisting impairment. Subsequent to the supreme court decision in *Fierro*, the legislature in 1988 amended the requirements for filing a certificate of preexisting permanent physical impairment and now provide that the Subsequent Injury Act is only applicable to a disability "arising out of an accident or occurrence taking place after the date a certificate ... is executed and filed with the superintendent of insurance." *See* NMSA 1978, § 52–2–6 (Supp.1988). Since we decide this issue under the law in effect when the injury manifested itself, we determine that in this case, there was evidence that employer did have knowledge of Rader's preexisting physical impairment. It was aware of Rader's breathing problems in the early 1970's. Employer purchased a

breathing machine for Rader to help him breathe and stay productive.

Moreover, where an employer does have actual knowledge, we do not believe that it should be denied the opportunity of impleading SIF by the actions of the worker in refusing to sign the certificate, particularly where such refusal was apparently premised on an improper basis. *Cf. City of Roswell v. Chavez,* 108 N.M. 608, 775 P.2d 1325 (Ct.App.1989) (employer's action against SIF barred by statute of limitations where employee refused to sign certificate, and employer did not attempt to substantially comply with statute by filing unsigned certificate).

We reject SIF's arguments under this point.

2. *Does the Worker's Preexisting Impairment Have to Be Disabling?*

As we understand SIF's argument, it contends that, before the Subsequent Injury Act can become applicable, the worker's preexisting physical impairment must have been disabling. It relies on *Sentry Insurance Co. v. Gallegos,* 87 N.M. 249, 531 P.2d 1222 (Ct.App.1975), and *Ballard v. Southwest Potash Corp.,* 80 N.M. 10, 450 P.2d 448 (Ct.App.1969). From this point, SIF argues that, while Rader did have a preexisting lung disease, it did not disable him from working. We disagree that the Subsequent Injury Act requires that the preexisting physical impairment be disabling, and do not read the cases on which SIF relies as so holding.

Ballard states that, assuming a certificate of preexisting impairment and other procedural requirements are met, applicability of the Subsequent Injury Act depends on four things: (1) a preexisting permanent physical impairment; (2) a subsequent disability compensable under the Workmen's Compensation Act; (3) the subsequent disability must be permanent; and (4) the subsequent disability must be materially and substantially greater than that which would have resulted from the subsequent injury alone. We do not read *Ballard* or *Sentry* as holding that a worker must be disabled by the preexisting impairment in order for the Subsequent Injury Act to apply. Neither case stands for that proposition.

Nor do we read the Subsequent Injury Act as requiring that the worker's preexisting physical impairment be disabling. Section 52–2–9(A) provides in pertinent part:

> When an employee ... who has a permanent physical impairment and who incurs a subsequent disability ..., which results in a permanent disability, that is materially and substantially greater than that which would have resulted from the subsequent injury alone, then the employer or his insurance carrier shall pay awards of compensation for the combined condition of disability....

The term "permanent physical impairment" is defined under Section 52–2–3 as meaning "a permanent physical condition which is, or which is likely to be, an obstacle to employment." That same section provides that the words "disability," "partial disability," and "total disability" shall have the same meaning as defined in and construed under the Workmen's Compensation Act. Thus, it is clear under the plain meaning of these provisions that there is no requirement that the preexisting physical impairment be disabling. Certainly, had the legislature intended such, it would not have been necessary under Section 52–2–3 to set forth a specific definition for "permanent physical impairment" separate and apart from the definition of "disability."

We reject this claim also.

3. *Sufficiency of Evidence for Apportionment*

In its conclusion of law No. 4, the trial court apportioned liability, 22% to employer and 78% to SIF. Although denominated a conclusion of law, we treat conclusion No. 4 as a mixed finding of fact and conclusion of law. *See Sheraden v. Black,* 107 N.M. 76, 752 P.2d 791 (Ct.App.1988) (conclusion of law may be treated as finding of fact).

SIF's position is that "evidence of work life expectancy and the shortening of such expectancies attributed to the aggravation

are irrelevant to the case, and are an improper method of determining [apportionment]." The question, then, is whether a showing of decrease in work life expectancy may be used to determine apportionment of liability between employer and SIF where, as here, the medical testimony indicates that a percentage apportionment is not possible.

"A contention that a ... finding of fact is not supported by substantial evidence shall be deemed waived unless the party so contending shall have included in his summary of proceedings the substance of the evidence bearing upon the proposition...." SCRA 1986, 12–213(A)(3). SIF did not comply with this rule. While it provided evidence regarding the testimony of Dr. Gorman, it did not provide the substance of the testimony of employer's expert, Bill Patterson. Nevertheless, we believe that this issue should be answered on its merits, since employer does provide sufficient evidence in its answer brief, and we have not heretofore addressed this question. We hold that there was sufficient evidence in the trial court to apportion liability. We disagree, however, with the manner in which it was done. In short, we hold the evidence does permit apportionment, but does not support the result reached. Our discussion explains why.

In cases where the employer seeks reimbursement from the fund, the employer has the burden of proving apportionment. *Smith v. Trailways, Inc.,* 103 N.M. 741, 713 P.2d 557 (Ct.App.1986). It has the burden of establishing the difference between the compensation payable for the worker's combined injury and the compensation that would have been payable as a result of the second injury alone. *See id.*

In this case, employer provided sufficient evidence for the trial court to apportion liability. Dr. Gorman testified that Rader suffered from chronic obstructive lung disease, not caused by his work conditions, which over time would have disabled him. He said that aggravating factors related to work accelerated the rate of disability. Dr. Gorman testified that the acceleration leading to disablement caused by work was materially and substantially greater than the progression of the disease caused by Rader's preexisting condition. Although he could not assign a percentage to each cause, Dr. Gorman did say to a reasonable degree of medical probability that the preexisting condition alone would have disabled plaintiff at age sixty-seven. The fact that Rader was totally disabled at age fifty-four, instead of age sixty-seven, would then have been attributable to the additional acceleration caused by the aggravating work conditions.

Bill Patterson, an economist, testified that, using federal statistical data, a white male, age fifty-five with no health problems, would have a life expectancy of 21.6 years. Thus, of all white males age fifty-five with no health problems, one-half can expect to live to age 76.6; the other half will die. Of those who live, according to Mr. Patterson, some are capable of earning a living and working in the labor force.

The trial court apparently accepted employer's calculation in apportioning liability 22% to employer and 78% to SIF. Employer calculated as follows: Rader began working at age sixteen. Expert testimony at trial established that healthy white males of Rader's age would live until age 76.6, and that some of them could continue to work. Therefore, Rader's work life expectancy, without any preexisting impairment or work-related condition, was 60.6 years. Rader's subsequent injury shortened his work life expectancy by thirteen years (difference between age sixty-seven, when he could be expected to become disabled because of the preexisting impairment, and age fifty-four, when he did become disabled due to the work-related condition). Employer correctly divided 13 years by 60.6 years to determine that the work-related condition shortened Rader's work life by 21.45%, thus establishing its liability as 21.45%.

Although employer's arithmetic was correct, we believe its calculation is flawed because employer incorrectly determined which figures to use in its calculations. The appropriate calculation is not based on what percentage of Rader's *overall* work

life was shortened by the work-related condition and the preexisting condition, but, rather, what percentage of Rader's *shortened* work life is due to each.

As established by testimony, Rader's work life expectancy was 60.6 years. (76.6 minus 16 (the age Rader began working) equals 60.6.) However, since he became disabled at 54, his work life was shortened overall by 22.6 years. (54 minus 16 equals 38; 60.6 minus 38 equals 22.6.) Since he would have become disabled at 67 due to the preexisting lung condition, that condition alone would have shortened his work life expectancy by 9.6 years. (76.6 minus 67 equals 9.6.) However, the work-related condition further shortened his work life expectancy by 13 years. (67 minus 54 equals 13.) Therefore, employer is responsible for 13 years of the 22.6–year shortening, and SIF for 9.6 years.

Thus,

13 divided by 22.6 equals 57.52% due to work, and

9.6 divided by 22.6 equals 42.48% due to preexisting condition.

Because the trial court accepted employer's erroneous calculations, we remand for recalculation of the apportionment. In doing so, the trial court may use the 76.6 life expectancy figure Mr. Patterson provided, any other figures in evidence, or any other figures of which the court may take judicial notice. On this point we make two observations. First, it seems highly unlikely that a person would continue to work full-time throughout his or her full life expectancy. Indeed, we do not perceive that to be Mr. Patterson's testimony. He testified that some healthy males Rader's age could live to age 76.6, and that some of them could continue at some form of work until that time. He did not testify that it would be full-time. Second, we note that federal law at the time Rader became totally disabled provided that employers may not mandate retirement earlier than age seventy. *See* § 631 of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634 (1982). The court on remand may take judicial notice that a person's work life expectancy is to that age, rather than to age 76.6. If the court determines Rader's work life expectancy would have been to age seventy, then Rader's work life was shortened by sixteen years instead of 22.6, and employer is responsible for 81.25% (13 divided by 16), and SIF for 18.75% (3 divided by 16).

4. *Should the Claim Have Been Determined Under the Occupational Disease Disablement Law?*

SIF argues that, because the trial court found that Rader was exposed on a daily basis to asbestos dust and that such exposure, peculiar to the work site, caused and aggravated his pulmonary fibrosis, bronchitis, chronic pulmonary obstruction, and asbestosis, jurisdiction of Rader's claim should have been under the Occupational Disease Disablement Law rather than the Workmen's Compensation Act. Because the Occupational Disease Disablement Law is not mentioned in the Subsequent Injury Act, SIF claims that it cannot be held liable for any part of Rader's disability. Employer takes no position on SIF's argument under this point. This is difficult to understand. If SIF is not liable for apportionment under the Occupational Disease Disablement Law, then employer must pay the entire benefits.

In addressing this issue, we assume, but do not decide, that SIF is correct in saying the Subsequent Injury Act does not apply to disability or disablement arising under the Occupational Disease Disablement Law. *See* 1B A. Larson, *Larson's Workmen's Compensation Law* § 41.86 (1987). The question, then, is whether the trial court should have concluded that Rader's claim was compensable under the Occupational Disease Disablement Law. Based upon the findings made, which are not challenged, we hold that it did not err.

The trial court found that from 1963, when Rader began working for employer, until February 1986, he was exposed, on a daily basis, "to asbestos dust, dust from insulation, dust created by welding, and other pollutants, which, over time, caused *accidental injuries* to his lungs" and that "employer is liable under the New Mexico

Workmen's Compensation Act." (Emphasis added.) The court also found that "[e]xposure to dusts and asbestos *peculiar to the work site* caused and aggravated, overtime [sic], the pulmonary fibrosis, bronchitis, chronic pulmonary obstruction and asbestosis within both of Mr. Rader's lungs." (Emphasis added.) It concluded that Rader's accident or accidents fell within the meaning of the Workmen's Compensation Act as a compensable accident that rendered Rader totally and permanently disabled.

In order for the Occupational Disease Disablement Law to apply, it must be established that the disease is peculiar to the worker's occupation and not merely to his workplace. *Chadwick v. Public Serv. Co.*, 105 N.M. 272, 731 P.2d 968 (Ct.App. 1986). Here, the trial court found that exposure to dusts and asbestos "peculiar to the work site" aggravated Rader's preexisting lung problems. It did not, however, find that exposure peculiar to Rader's occupation. Quoting from a New York court, we approved the following statement in *Chadwick:*

> "[W]e 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).

105 N.M. at 274, 731 P.2d at 970.

Further, we note that in order for there to be an occupational disease, in addition to the requirement that it be peculiar to claimant's occupation, the conditions must attach to that occupation a hazard that distinguishes it from the usual run of occupations and is in excess of the hazards attending employment in general. *Chadwick v. Public Serv. Co.*

In this case, the trial court made no finding that Rader's disease was peculiar to his occupation; nor was it requested to so find. Nor was any finding made or requested on the requirement that the conditions attach distinctive hazards to the occupation that are in excess of those attending employment in general. *See* SCRA 1986, 1–052(B)(1)(f) (party waives specific finding of fact if he fails to make a general request or fails to tender specific finding).

We recognize it would have been incumbent upon Rader to establish these requirements had he pursued his count under the Occupational Disease Disablement Law. He did not pursue it, so the burden rested with SIF to prove the requirements if it wanted to rely on that law to defend against employer's claim. It failed to meet that burden. We reject this claim.

5. *Apportionment of Attorney Fees*

SIF argues that it should not be liable for part of the attorney fees awarded Rader, absent evidence that SIF benefited from those fees. SIF's complaint is that counsel for Rader and employer "were literally at each other's throat" throughout this litigation, and that it should not be compelled to pay for this. Moreover, it says that *Duran v. Xerox Corp.*, 105 N.M. 277, 731 P.2d 973 (Ct.App.1986), is unfair because it allows "an employer to call the shots ... and still be able to share the cost of his bad judgment if the result is not good." In *Duran,* SIF contended that a settlement between the employer and the worker barred further proceedings by either against SIF. We held in that case that, following settlement between the employer and the worker, each could proceed separately against SIF.

The question presented here is whether, in apportioning liability between employer and SIF, the trial court was required to apportion attorney fees in the same manner that it apportioned liability for compensation benefits. While the Subsequent Injury Act makes no distinction between liability for compensation benefits and liability for attorney fees or other costs, we see no reason why apportionment must be the same. To hold otherwise would encourage extensive and unnecessary litigation of workers' compensation cases, a result inimical to the purposes of this legislation.

In *Gonzales v. Stanke-Brown & Associates, Inc.*, 98 N.M. 379, 648 P.2d 1192 (Ct.App.1982), we said that if specific guidance is lacking in a statute, then fundamental fairness to the parties should be the guideline. Here there is a lack of specific guidance as to how, or whether, to apportion liability for attorney fees and costs differently from liability for compensation benefits; therefore, we hold that fundamental fairness should be the guideline. In some cases, the same apportionment may apply across the board for all liability. In other cases, across-the-board apportionment may be inappropriate. Matters which the trial court may take into consideration in determining apportionment for attorney fees and costs may include the stage of proceedings when SIF was impleaded; whether worker and employer settled among themselves either before or after SIF was impleaded; the extent to which issues were appropriately litigated; and whether, as claimed here, counsel for the worker and the employer engaged in unnecessary tactics or strategies which resulted in excessive attorney fees. This list of considerations is not intended to be exhaustive.

Since we are setting aside the apportionment as made by the trial court regarding compensation benefits, the trial court, on remand, may make whatever apportionment it deems appropriate for attorney fees and costs in accordance with this opinion.

EMPLOYER'S APPEAL

One day after filing its third-party complaint against SIF seeking apportionment, employer offered to pay Rader 22.2% of all compensation benefits and medicals then being claimed, including all future benefits and payments. The total amount of compensation and other benefits offered was $47,054.97 plus $9,410.99 in attorney fees. That offer was made more than thirty days before trial. In fact, it remained open from January 30, 1987 and, according to employer, was verbally reaffirmed several times, the last of which occurred two or three weeks before the trial. The trial court awarded Rader $41,000 in attorney fees, ordering employer to pay that amount, with SIF to reimburse employer for 78% of that amount.

Employer contends that the trial court erred in calculating the present value of Rader's award, and because of such miscalculation, it erred in awarding Rader *any* attorney fees against employer. Employer argues that, since it made an offer more than thirty days before trial in an amount that exceeded its apportioned liability, Section 52-1-54(D) precludes recovery. It contends that it makes no difference that employer was required to pay 100% of the benefits due Rader and then seek reimbursement for the apportioned liability from SIF.

In view of our holding that the trial court incorrectly apportioned liability, and it appearing that, under any factor used on remand, employer's apportioned liability would exceed its offer, we need not address this issue.

CONCLUSION

We affirm the trial court on all issues except apportionment, and remand for new findings on that issue consistent with this opinion. Costs of appeal shall be paid by employer.

IT IS SO ORDERED.

DONNELLY and CHAVEZ, JJ., concur.

784 P.2d 415

PIONEER SAVINGS & TRUST, F.A., Plaintiff-Appellee,

v.

Barney RUE, Defendant-Appellant,

v.

STERLING HOMES-CARRIZO LODGE, JOINT VENTURE, et al., Defendants.

No. 17904.

Supreme Court of New Mexico.

Dec. 18, 1989.

O'Reilly & Wardlaw, P.C., Mel P. O'Reilly, Ruidoso, for appellant.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., Joseph E. Roehl, Albuquerque, Sanders, Bruin, Coll & Worley, P.A., James L. Bruin, Roswell, Ronald G. Harris, Albuquerque, for appellee.

OPINION

RANSOM, Justice.

Barney Rue appeals from the judgment of the district court awarding to Pioneer Savings & Trust, F.A., the proceeds of a mortgage foreclosure sale, and assessing costs against Rue. Rue and other contractors claiming preferential mechanic's liens on a Ruidoso condominium development were defendants in the foreclosure proceedings. Only Rue appeals. We affirm.

Rue is a dirt and paving contractor who obtained a paving contract for roads and parking lots in the Carrizo Lodge Condominiums project, which consisted of Phases I, II, and III. Pioneer loaned $3.891 million to the project developers with promissory notes being secured by two mortgages on the Carrizo Lodge Condominiums property. The first loan for $1.5 million was secured by a mortgage on Phases I, II, and III, which was executed on December 7, 1982, and recorded on December 9, 1982. The second loan for $2.191 million was made on May 31, 1983, and also was secured by the mortgage recorded on December 9, 1982,

pursuant to an advancements clause in that mortgage. A third loan for $200,000 was made on June 26, 1984, and was secured by a mortgage on the furniture, appliances, and other personal property in the Phase II condominiums. This second mortgage was recorded on June 28, 1984. The developers fell behind in their payments, and Pioneer brought an action to foreclose both mortgages against Phase II only.

In November of 1982, prior to the recording of either of Pioneer's mortgages, a sewer line was built along a utility easement that passed through part of Phase II as well as other areas of the Carrizo Lodge Condominiums property. Also present at that time on Phase II was a mobile home that extended partly into Phase I. The mobile home had been remodeled (for purposes unclear from the record) prior to the recording of either of Pioneer's mortgages. These improvements have significance in relation to the law that a mechanic's lien is preferred to a mortgage of which the lienholder had no notice, and which was unrecorded at the time work commenced. *See* NMSA 1978, § 48–2–5 (Repl.Pamp.1987). A subcontractor's lien relates back to the date when any construction actually commenced, even though that subcontractor's work commenced after the mortgage was recorded. *Id.; Valley Fed. Sav. & Loan Ass'n v. T-Bird Home Centers, Inc.*, 106 N.M. 223, 226, 741 P.2d 826, 829 (1987).

Rue asserted that he had a mechanic's lien on Phase II that enjoyed priority over Pioneer's mortgage because his mechanic's lien related back to the date of the sewer construction, or to the date of the mobile home remodeling. The district court found that no work was done on any of the Carrizo Lodge Condominiums prior to the recording of the mortgage on December 9, 1982, and, therefore, neither the sewer construction nor the mobile home remodeling was a starting point for the relation back of subsequent work. The district court also found Rue's mechanic's lien and those of other subcontractors invalid and not timely filed, and assessed Pioneer's costs against Rue and those other subcontractors.

We first address Rue's argument that the district court improperly allowed Pioneer to foreclose on the $2.191 million loan of May 31, 1983, a date clearly after the subcontractors' work began. That loan was secured by an advancements clause contained in the mortgage recorded on December 9, 1982. Rue asserts that, under NMSA 1978, Section 48–7–9 (Repl.Pamp. 1987), the mortgage cannot be allowed to secure an advance greater than the face amount of the mortgage. The statute reads:

> Every mortgage or other instrument securing a loan upon real estate and constituting a lien, or the full equivalent thereof, upon the real estate securing such loan, may secure future advances and the lien of such mortgage shall attach upon its execution and have priority from the time of recording as to all advances, whether obligatory or discretionary, made thereunder until such mortgage is released of record; provided, that the lien of such mortgage shall not exceed at any one time the maximum amount stated in the mortgage.

We read this statute to mean that the amount secured by the mortgage shall not exceed the maximum amount stated in the mortgage. Any excess would be unsecured. This is the interpretation given to the statute in *In re Bass*, 44 B.R. 113 (D.N.M.1984), and we agree. In that case, the amount of the advance in excess of the face amount of the mortgage was unsecured by that mortgage. Our interpretation of the statute also comports with *New Mexico Bank & Trust Co. v. Lucas Bros.*, 92 N.M. 2, 582 P.2d 379 (1978). In *Lucas*, Section 48–7–9 had been enacted but did not apply to the parties. This Court, however, found the rationale behind the statute persuasive and allowed the first secured lender to have priority over a subsequent secured lender only to the extent of the face amount of the first lender's mortgage (plus costs, interest and attorney fees). The first lender's prior interest did not include advances made under the advancements clause of the first lender's mortgage, since the clause in question did not

state a dollar amount of advances to be secured by the mortgage. *Id.* at 4–5, 582 P.2d at 381–82.

In this case, Pioneer's mortgage recorded on December 9, 1982, has a stated amount of $1.5 million. Under Section 48–7–9, therefore, that mortgage cannot secure more than $1.5 million, plus costs, interest, and attorney fees for collecting on the note. The district court found that Pioneer "purchased the property at the foreclosure sale at a price within the maximum amount stated in the mortgage of December 7, 1982, as filed of record on December 9, 1982, plus property [sic] allowable interest and costs." The appellate court will not substitute its 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 Soc'y of the United States,* 90 N.M. 195, 561 P.2d 468 (1977), *cert. denied,* 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95 (1977).

The court's finding is supported by substantial evidence. The amount of the advance secured by the mortgage recorded on December 9, 1982, was $1.5 million. Not including any interest due up to the day the complaint was filed, the $1.5 million sum represented sixty-three percent of the $2,361,293.72 sought in the complaint. Adding in further interest and attorney fees, the total amount owed to Pioneer as of the date of the foreclosure sale had risen to $2,898,216.60. The portion of that amount attributable to the $1.5 million, or sixty-three percent of the total, was $1,825,876. The foreclosure sale brought $1.8 million, not even enough to satisfy the indebtedness attributable to the $1.5 million secured by the mortgage recorded on December 9, 1982.[1] We affirm the application of the mortgage to the sums recovered.

Furthermore, we affirm the district court's findings that Rue's purported mechanic's lien did not enjoy priority over Pioneer's mortgage. We consequently do not reach any decision relative to the validity or timeliness of Rue's lien.

There was evidence introduced at trial to support the court's finding that no work actually was performed on any of the Carrizo Lodge Condominiums before Pioneer's mortgage was recorded. Ms. Fuller and Ms. Sluder, employees of Guaranty Abstract and Title, testified that, on December 9, 1982, they walked the boundaries of Phase II and that no construction had been done. In order for work to constitute a "commencement" such work must have been done on the "building, improvement or structure" upon which the lien is claimed. § 48–2–5; *Huntington Nat. Bank of Columbus v. Treasurer of Franklin County,* 13 Ohio App.3d 408, 469 N.E.2d 535 (1983); *Fryman v. McGhee,* 108 Ohio App. 501, 163 N.E.2d 63 (1958). Accordingly, work done that is not a part of the "building, improvement or structure" is irrelevant in assessing lien priorities. Mr. Collins, of Burke/Collins Surveyors, testified that the remodeling of the mobile home on Phase II was done in preparation for the sale of the land, prior to the construction of the Carrizo Lodge Condominiums. Michael Booth, a general contractor, testified that preliminary dirt work did not begin on Phase II until 1983.

There also was evidence that, not only had no work commenced on Phase II of the Carrizo Lodge Condominiums prior to the mortgage being recorded, none had been done on Phases I or III either. The previous owners of the Carrizo Lodge Condominiums property contracted for the sewer work as a condition of the sale of the property to the developers, not as a part of some construction project they were pursuing. Furthermore, Barry Burke, a consulting engineer, testified that the sewer work predated the construction on Phase II, and there was other testimony that the sewer work predated construction on Phases I and III also. From this evidence, the court could have concluded either that no work

1. Additionally, furniture, drapes, carpets and other personal property, which was the subject of the mortgage recorded on June 28, 1984, to secure a loan of $200,000, was sold at the foreclosure sale as part of the Phase II property. This would further reduce the amount of the proceeds of that sale attributable to the $1.5 million mortgage.

was done on Phase I, II or III prior to recording the mortgage, or that the work which was done was not part of the Carrizo Lodge Condominiums project.

Lastly, Rue appeals the district court's assessment of Pioneer's costs against him and two other defendants. SCRA 1986, 1-054 allows costs to be awarded to the prevailing party as a matter of course. The trial court has discretion in assessing costs, and its ruling will not be disturbed on appeal unless it was an abuse of discretion. *South v. Lucero,* 92 N.M. 798, 595 P.2d 768 (Ct.App.), *cert. denied,* 92 N.M. 675, 593 P.2d 1078 (1979). Costs which have been held to be within the discretion of the court to award include those for depositions, *Mantz v. Follingstad,* 84 N.M. 473, 505 P.2d 68 (Ct.App. 1972); witness fees, *Prudential Insurance Co. of America v. Anaya,* 78 N.M. 101, 428 P.2d 640 (1967); transcript fees, *Dunne v. Dunne,* 83 N.M. 377, 492 P.2d 994 (1972); and special master's fees, *Pena v. Westland Development Co.,* 107 N.M. 560, 761 P.2d 438 (Ct.App.), *cert. denied,* 107 N.M. 413, 759 P.2d 200 (1988). In addition, filing fees, lis pendens, service of process and a receiver's fee are costs which are reasonably necessary and so within the discretion of the court. *Cf. Mantz v. Follingstad,* 84 N.M. at 481, 505 P.2d at 76. We find no abuse of discretion in the trial court allowing these costs to be assessed against Rue and the two other defendants.

Because we affirm the district court's ruling, we do not address appellee's cross-appeal for attorney fees, which appellee requested only in the event of a reversal.

IT IS SO ORDERED.

SOSA, C.J., and BACA, J., concur.

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[redacted]

784 P.2d 420

Sondra Ann HOPKINS,
Petitioner–Appellee,

v.

Johnny Eldon HOPKINS,
Respondent–Appellant.

No. 10537.

Court of Appeals of New Mexico.

Nov. 21, 1989.

Morris Stagner, Clovis, Winston Roberts–Hohl, Santa Fe, for petitioner-appellee.

David F. Richards, Garrett & Richards, Clovis, for respondent-appellant.

OPINION

MINZNER, Judge.

Father appeals from an order holding him in contempt for non-payment of child support and for failing to pay certain community debts he was ordered to pay at the time of his divorce from mother. Father has briefed four issues: the district court erred (1) in calculating the amount of past due child support; (2) in refusing to reduce

his monthly payments; (3) in holding him in contempt for failure to pay certain debts, because those debts had been discharged in bankruptcy; and (4) in entering judgment for mother in the amount of $62,902. The first two issues briefed ultimately depend on whether there was sufficient evidence to support the trial court's findings. The third issue briefed presents issues of first impression in New Mexico. They are: (a) what test a state district court should apply in determining that a divorce decree provision that one spouse must pay a debt due a third party creates a non-dischargeable support obligation under 11 U.S.C.S. Section 523(a)(5) (1986 and Cum.Supp.1989); and (b) whether a court may modify its prior divorce decree under SCRA 1986, Rule 1-060(B)(6) to identify a non-dischargeable support obligation. We affirm as to father's first two issues, except that we reverse and remand for entry of an amended judgment giving father additional credit for past payments made directly to mother. We affirm in part, reverse in part, and remand for further proceedings as to father's third issue. In view of our disposition of father's third issue, we do not reach the fourth issue.

BACKGROUND.

Father and mother were married in 1968 and filed for divorce in 1982. The divorce became final in 1984 when the parties entered into a stipulated final decree. The agreement provided for the division of property and debts and awarded the parties joint legal custody of their two minor children, with primary physical custody given to mother. Father agreed to pay $500 per month in child support and provide medical insurance for the children. The decree specifically stated that no alimony was awarded.

Mother was to keep the 3000 square foot family residence on three acres and to assume responsibility for the first mortgage on the property. Father also agreed to assume $300,000 in personal and business community debts associated with the feed lot which he operated during the marriage. The debts included notes to the First National Bank in Clovis (First National) and the Small Business Administration (SBA), secured by second and third mortgages on the family residence.

In 1985, father filed for bankruptcy in Kansas. He named both First National and the SBA as creditors, but did not name mother. Although mother had actual knowledge of the bankruptcy action, she was not given formal notification and had no knowledge of the injunction prohibiting creditors from bringing actions against the debtor while the bankruptcy was pending. An order of discharge of all debts was filed December 10, 1985.

While the bankruptcy action was pending, the younger child decided to live with her father in Kansas. In December 1985, father informed mother and the Curry County Child Support Unit (CSU) that he was reducing his child support payments to $250 per month, beginning with the October 1985 payment.

In 1986, the SBA instituted foreclosure proceedings against mother on the family home. SBA did not name father as a party. A default judgment was entered against mother. The home was sold to her neighbors for $39,650. First National was paid in full from the proceeds of the sale; the SBA did not seek a deficiency judgment. The neighbors verbally agreed to allow mother to purchase the second mortgage from them for the price they paid at the foreclosure sale. Mother has remained in the home continuously since the divorce.

In 1987, mother filed a motion for contempt in state court seeking a judgment against father for failure to pay the sums due First National and the SBA and for delinquent child support payments. At the same time, father filed a motion seeking custody of the daughter and reduction of child support from $500 to $250 per month.

The district court denied his motion for reduction in child support, awarded mother a judgment for $6,000 in child support arrearages, and continued joint custody as to both children, but awarded father primary care and custody of the daughter. The court characterized father's obligation to pay the second and third mortgages as in

the nature of support and ordered him to execute a note for $62,902, secured by a mortgage on any real property he then owned.

On February 3, 1988, father filed a motion to reopen the Kansas bankruptcy proceedings and sought an injunction to prevent mother from enforcing the district court's judgment. The bankruptcy court filed an order reopening the bankruptcy case on February 25, 1988. A few days later, father appealed to this court from the judgment of the district court, but his appeal was stayed pending the decision of the bankruptcy court.

The bankruptcy court found that mother had actual knowledge of husband's bankruptcy proceedings, but that she was not given actual written notice of either the filing or of the injunction prohibiting creditor's actions. The bankruptcy court refused to enjoin mother from proceeding to enforce the district court's judgment. The court reasoned that mother was not in contempt of any order of the bankruptcy court and that it would be inappropriate for the bankruptcy court to bar her from bringing proceedings in state district court or otherwise to interfere with state court jurisdiction in domestic relations matters.

COMPUTATION OF PAST DUE CHILD SUPPORT.

There are several issues on appeal regarding past due child support. The first is whether the lower court improperly refused to credit father for child support payments made directly to mother. There is also an issue as to whether father should have been credited for the proceeds of the sale of livestock he bought for the children. The final issue regarding past due child support is whether the trial court erred in refusing to find that mother was barred by laches, acquiescence, or waiver. All of these issues ultimately depend on whether there was sufficient evidence to support the trial court's findings.

According to the records of the CSU, father was $5,000 to $7,000 in arrears as of September 1987. However, evidence at trial showed that he had not been credited for $1,400 directly paid to mother. She contends that some of the checks for which he claims credit were actually sent to replace earlier bad checks.

The evidence at the hearing indicated that a wire transfer of $500 was the only money used to replace earlier bad checks. Mother contends in her reply brief that some of the other checks she received were sent to replace prior bad checks. However, there is no evidence in the record that any other checks should not have been credited. Thus, this response does not present an appellate issue. *See State v. Smith,* 92 N.M. 533, 591 P.2d 664 (1979). We conclude that father should have been given an additional $900 credit for child support payments, but that the balance of the award for past due child support should be affirmed.

Father also contends that he did not receive credit for livestock he purchased for the children. He testified that he borrowed the money from a bank to buy the livestock and that the sale proceeds were to be applied toward that indebtedness. The livestock was sold for $1,000, but mother never gave the proceeds of the sale to father. Instead, he says she used the money for the benefit of the children but failed to credit him with $1,000 in child support. Based on this belief, he withheld two months of child support and was charged with an arrearage in the records of the CSU.

Mother contests father's view. She says the money for the livestock came from the children's own accounts; therefore, the proceeds did not belong to husband. Father denied this at trial.

It is not clear why the proceeds from the sale of the livestock should have been credited as child support, and thus the factual discrepancy is not important. If the money to buy the livestock belonged to the children, it certainly could not be credited as child support. If father borrowed the money but purchased livestock for the children, the court was entitled to have considered the livestock a gift. In that situation, the proceeds belonged to the chil-

dren, and father also was not entitled to credit. As a general rule, a non-custodial parent will not be permitted credit against court-ordered child support obligations for gifts given to the children. *See generally* Annotation, *Right to Credit on Accrued Support Payments for Time Child is in Father's Custody or for Other Voluntary Expenditures,* 47 A.L.R.3d 1031 (1973). There is no evidence that mother and father ever agreed that the proceeds would replace certain child support payments. Consequently, we believe the trial court did not err in refusing to grant credit against the arrearages for the amount realized for the sale of the livestock. *See McBride v. McBride,* 708 S.W.2d 738 (Mo.Ct.App.1986) (general rule is that no credit is allowed for support paid other than as ordered, except under equitable considerations, such as when such support is provided with consent that it is in lieu of decreed support or when provided under compulsion of circumstances).

Father contends that the trial court erred in failing to modify the sum he owed mother for past due child support. His contention arises out of the fact that the younger child has resided with him since 1985. He claims the trial court should have reduced the arrearages by $250 a month from the time the younger child began living with him. We disagree.

The general rule in New Mexico is that a court should not retroactively modify child support or alimony awards. *See Chrane v. Chrane,* 98 N.M. 471, 649 P.2d 1384 (1982). However, in the context of contempt proceedings, the court has the power to consider any valid defense, including substantial change in circumstances, payment from another source, or equitable defenses such as laches and waiver. *Mask v. Mask,* 95 N.M. 229, 620 P.2d 883 (1980); *see Brannock v. Brannock,* 104 N.M. 416, 722 P.2d 667 (Ct.App.1985). The trial court has broad discretion in accepting or rejecting such defenses. We understand father's defense to be laches or waiver.

One of the essential elements of laches or waiver is a delay in assertion of rights. *Cave v. Cave,* 81 N.M. 797, 474 P.2d 480 (1970). Father cites this court's decision in *Brannock* for the proposition that mother waived her right to seek collection of past due child support by not objecting to the reduction in child support for a period of almost two years. However, in *Brannock,* the court found an express agreement to accept support payments in an amount less than that ordered by the decree. Here, on the other hand, the evidence regarding mother's acquiescence in agreement to the lower payments is conflicting. Mother testified that she contacted father on at least six occasions and that she also notified the CSU of her objection to a reduction in child support. Thus, this case is distinguishable from *Brannock.*

Father's reliance on *Daniel v. Daniel,* 239 Ga. 466, 238 S.E.2d 108 (1977) is misplaced. In *Daniel,* the judicial decree specifically stated that the father was to pay no child support during certain months he had custody, pursuant to the divorce decree. Subsequently, the mother and the father agreed that he would take custody for other months while she returned to school. The father believed that their oral agreement to support the children during the additional months excused him from paying the mother child support. On appeal from a decision awarding the mother unpaid child support for this period, the appellate court reversed and noted that although a parent is not entitled as a matter of law to credit for voluntary expenditures, he or she may be given credit if equity dictates under particular circumstances. The court held that on the facts of the case, the father was entitled to credit.

Here, however, father has not argued any equitable circumstances to justify a reduction other than his support of the younger child while she was in his custody and mother's alleged acquiescence. The record reveals none. On this record, we do not believe the trial court abused its discretion in rejecting father's defense. *Id.*

FAILURE TO MODIFY FUTURE CHILD SUPPORT.

Father's argument that the trial court should have reduced his future child

support obligations is similar to his argument that his past child support obligation should have been reduced. The well-established general rule is that an undivided support award directed at more than one child is presumed to continue in force for the full amount until the youngest child reaches majority. *Britton v. Britton,* 100 N.M. 424, 671 P.2d 1135 (1983). Here, the divorce decree did not specify that $250 of the $500 was for each child. Father presently makes almost twice as much as mother, and her basic expenses remain the same, regardless of the number of children in her custody. We conclude the trial court did not abuse its discretion in refusing to modify the award. *See Spingola v. Spingola,* 91 N.M. 737, 580 P.2d 958 (1978).

WHETHER THE NEW MEXICO DISTRICT COURT ERRED IN HOLDING HUSBAND IN CONTEMPT FOR FAILURE TO PAY THE SECOND AND THIRD MORTGAGES ON THE HOME.

Father contends that the trial court erred in holding him in contempt because the debt he was ordered to pay had been discharged in bankruptcy. He reasons that the trial court erred in characterizing the divorce decree provisions ordering him to pay the second and third mortgage payments as "*actually in the nature of* alimony, maintenance or support" under Section 523(a)(5)(B) (emphasis added) and in concluding that the obligation imposed had not been discharged. He argues that his assumption of the obligation to pay the mortgages was in the nature of a property division. In addition, he finds fault with what he characterizes as an improper modification of the original divorce decree to include alimony where previously no obligation existed. *See generally Benavidez v. Benavidez,* 99 N.M. 535, 660 P.2d 1017 (1983) (no alimony having been awarded initially, court cannot award it later pursuant to Rule 60 in order to afford relief for a free and conscious choice). We discuss father's arguments under two sub-headings.

(A) The Determination that a Debt Due a Third Party Creates a Non-Dischargeable Support Obligation Under Section 523(a)(5).

Two different kinds of obligations are involved in this case. The first is the obligation owed the second and third mortgage holders. The second is the obligation to the former spouse and child to keep those payments current. We are not concerned here with the first obligation, which was discharged. Rather, we are concerned with the issue of whether father owed a separate non-dischargeable obligation of support to mother or the children to keep the payments current. If the state district court correctly found that father's obligation to pay was non-dischargeable, he is subject to the court's contempt power if he failed to pay. *See Sosaya v. Sosaya,* 89 N.M. 769, 558 P.2d 38 (1977).

The bankruptcy court and the state district court have concurrent jurisdiction to determine whether a debt arising out of the divorce agreement is dischargeable under Section 523(a)(5). 3 L. King, *Collier on Bankruptcy* § 523.15 at 523–114–15 (15th ed. 1989).[1] However, characterization of a debt as being "in the nature of alimony, maintenance, or support" must be made under federal bankruptcy law, not state law. *Benavidez v. Benavidez; In re Yeates,* 807 F.2d 874 (10th Cir.1986); *In re Calhoun,* 715 F.2d 1103 (6th Cir.1983). *See also* 3 L. King, *supra,* § 523.15 at 523–105. The relevant statute is 11 U.S.C.S. Section 523(a)(5) (Cum.Supp.1989), which provides:

> (a) A discharge under section 727, 1141, * * * or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> * * * * * *
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or

1. When such a debt is in question, either the debtor or the creditor *may* file a complaint with the bankruptcy court for determination of dischargeability of the debt; however, neither is required to file there. If the debtor files, he must do so before any action is commenced in any other forum. 3 L. King, *supra,* § 523.15 at 523–115, *citing* Bankruptcy Rule 4007.

child, in connection with a separation agreement, divorce decree or other order of a court of record * * * or property settlement agreement, but not to the extent that—

* * * * * *

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually *in the nature of alimony, maintenance, or support*[.] [Emphasis added; citations omitted.]

Here, the bankruptcy court never determined whether there was an obligation to mother and, if so, whether it was discharged. Father argues that because mother had actual knowledge of the bankruptcy proceeding, his obligation to her should be discharged pursuant to Section 523(a)(3)(A). Father correctly cites this subsection as an exception to the non-dischargeability of unlisted debts. However, this subsection does not preclude this court from considering the nature of the debt in the first instance. If the debt is in the nature of support, it is not governed by Section 523(a)(3)(A). *See* 3 L. King, *supra,* § 523.15 at 523–114–15; *see also* § 523(c). There need not be a timely determination in bankruptcy court that such a debt is non-dischargeable. *Id.*

We agree with father that mother had the burden of proving his obligation to her was "in the nature of alimony, maintenance, or support," and therefore non-dischargeable. *See In re Calhoun.* The district court in this case determined that wife met her burden of proof.

Father also argues that dischargeability and the policy of a fresh start are favored under the Bankruptcy Code. However, Section 523(a)(5) "departs from the general policy of absolution * * * that is embodied in the federal Bankruptcy Act. It enforces an overriding public policy favoring the enforcement of familial obligations." *Shaver v. Shaver,* 736 F.2d 1314, 1315–16 (9th Cir.1984) (footnote omitted).

The trial court made a finding that father's obligation to pay the second and third mortgages was made in lieu of alimony and to provide a home for the children. This finding of fact was essential to its conclusion that the obligation was a specific agreement by father for support to his children and former spouse. *See Nelson v. Nelson,* 82 N.M. 324, 481 P.2d 403 (1971). Father argues that no evidence on the record exists to support this finding and conclusion. We disagree.

Federal courts look to the intent of the parties at the time they entered into the agreement. *E.g., In re Yeates; In re Calhoun; Boyle v. Donovan,* 724 F.2d 681 (8th Cir.1984); *see generally* S. Scheible, *Defining "Support" Under Bankruptcy Law: Revitalization of the "Necessaries" Doctrine,* 41 Vand.L.Rev. 1 (1988). One expression of intent is the language of the divorce decree or the separation agreement. A number of courts have held that such language does not necessarily control. 3 *Bankruptcy Service Lawyers Edition,* § 22:75 (rev. 1983) (hereinafter "*Bankr. Serv.*"); 3 L. King, *supra,* § 523.15 at 523–113; *In re Calhoun; but see In re Yeates* (when written agreement is clear it normally controls).

In the case before this court, the final decree stated that no alimony would be paid. Immediately following that statement is the provision by which mother received the residence and agreed to pay the first mortgage on the home while father assumed the remaining community debts, including the second and third mortgages. Because the decree did not designate this provision as either support or property division, we need not here decide whether the language of a decree controls. In this case, the placement of the provisions in the decree lends support to the trial court's finding that the provision as to the mortgage payments was in lieu of alimony and in the nature of child support.

Where the decree is silent, or its language ambiguous, federal courts looking beyond the face of the decree search for extrinsic evidence to discover intent. 3 *Bankr.Serv.,* § 22:75 at 223. One factor is the dependent spouse's need for support. "[E]vidence that payment of the debt is necessary in order for the plaintiff to main-

tain daily necessities such as food, housing and transportation indicates that the parties intended the debt to be in the nature of support." *In re Yeates,* 807 F.2d at 879. In this case, payment of the second and third mortgages was necessary for mother and the children to continue living in the family home. In addition, payment of the mortgages had "the *effect* of providing the support *necessary* to ensure that the daily needs of the former spouse and * * * children of the marriage [were] satisfied." *In re Calhoun,* 715 F.2d at 1109 (emphasis in original). *See also In re Williams,* 703 F.2d 1055 (8th Cir.1983). Thus, because father's obligation functioned as support, a court could reasonably find that the parties intended the obligation as support, despite the absence of such wording in the agreement.

However, an inquiry into the intent of the parties should not end the analysis. Parties to a divorce decree do not necessarily neatly categorize provisions as support or property division on paper or in their own minds; neither are they aware of the possible future ramifications of such a categorization. In addition, property division has often been a substitue for traditional alimony payments. *See* S. Scheible, *supra,* at 9–14, 53. Thus, it is appropriate to look further.

The Sixth Circuit in *Calhoun* has extended the analysis to include an inquiry into the reasonableness of the award under "traditional concepts of support." *Id.,* 715 F.2d at 1110. This court recognizes that the reasonableness analysis has not been accepted by the other circuit courts. Those courts reason that an inquiry into the needs of the recipient spouse and the ability of the debtor spouse to pay is not for federal bankruptcy courts to conduct, but is better left for state district courts, which traditionally deal with domestic relations problems. *E.g., Sylvester v. Sylvester,* 865 F.2d 1164 (10th Cir.1989); *In re Harrell,* 754 F.2d 902 (11th Cir.1985). However, such an approach is not inappropriate here, because the issue arises in state district court. In addition, we believe that utilizing this test corresponds with congressional intent that courts determine the essence of a debt which "is" in the nature of support. *See* S. Scheible, *supra,* at 55. This reading of the statute is appropriate, even in the absence of express wording concerning "undue hardship," which is included in Section 523(a)(8)(B). We do not equate the concept of "undue hardship" with the concept of reasonableness, and, in any event, we view the concept of reasonableness as inherent in the congressional focus on the present nature of a debt.

When a court considers reasonableness, it must resolve the question of whether, at the time the debts were assumed, the obligation exceeded the debtor's ability to pay. *In re Calhoun.* If the obligation assumed by the debtor is "manifestly unreasonable under traditional concepts of support," the court must set a reasonable limit to the nondischargeability of the debt. *Id.* at 1110. Determination of reasonableness must be made both at the time the obligation was assumed and at the time of the bankruptcy. *Id.* In making that determination, the court must consider the relative earning ability of each of the parties, their financial status including other means of support, and prior work experience or abilities of the parties to determine how much of the debt assumed can be fairly construed as being in the nature of support. *Id.*

In this case, the trial court did not determine the reasonableness of the obligation as support. Under the Sixth Circuit's analysis in *Calhoun,* this is an ultimate fact upon which the conclusion reached by the trial court depends. *See generally Galvan v. Miller,* 79 N.M. 540, 445 P.2d 961 (1968) (ultimate facts are the essential and determinative facts upon which a conclusion is reached). Thus, we conclude the case must be remanded so that the trial court may make findings concerning the reasonableness of the obligation both at the time of the decree and at the time of the bankruptcy. The court, if it wishes, may take additional evidence.

For the foregoing reasons, we hold that there was sufficient evidence to support the trial court's finding that father's obli-

gation to pay the second and third mortgages was in lieu of alimony and to provide a home for the children. We view this finding as an implicit determination that the parties intended to create a support obligation and that this obligation functioned as support. However, we remand the case to permit the trial court to consider the reasonableness of father's obligation to mother both at the time of the decree and at the time of the bankruptcy, according to the third step of the test set forth in *Calhoun.*[2]

(B) Modification of a Prior Divorce Decree Under Rule 1–060(B)(6) to Identify a Non–Dischargeable Support Obligation.

Father next argues that the trial court's finding that father's obligation to mother and the children was a non-dischargeable support obligation improperly modifies the original divorce decree to include alimony where previously none existed. *Benavidez* held that alimony cannot be awarded after the entry of a final decree, unless appropriate under Rule 1–060. In that case, the court did not allow modification of a final decree by adding alimony that did not exist in the original decree. *Id.* Wife claimed she was entitled to the alimony because husband was discharged in bankruptcy from a mortgage debt on the couple's residence to Citicorp. In that case, however, the original decree did not mention the debt owed to Citicorp. *Id.* In the case before this court, the original decree did include father's obligation to pay all outstanding debts, except the first mortgage, which was to be assumed by mother. Therefore, in this case the obligation is not one which is to be added to the decree, and the supreme court's holding in *Benavidez* did not preclude the trial court from finding that a support obligation existed in the original decree.

In addition, the supreme court noted that a modification of the original decree adding alimony could be made if appropriate under Rule 1–060. "Rule 60(b) has been recognized as providing a reservoir of equitable power in order to accomplish justice." *Koppenhaver v. Koppenhaver,* 101 N.M. 105, 108, 678 P.2d 1180, 1183 (Ct.App. 1984). Rule 1–060(B)(6) allows relief for any reason not delineated if such relief is justified. Thus, the trial court could allow modification of the decree to include a support obligation if it believed that such modification was justified.

Father argues that mother failed to show the exceptional circumstances justifying relief required by this court in a Rule 1–060(B) motion. *See Mendoza v. Mendoza,* 103 N.M. 327, 706 P.2d 869 (Ct.App.1985). In her motion for relief under Rule 1–060(B), mother contends that the foreclosure of the family home justifies relief under the rule. We believe that such circumstances are sufficiently exceptional to allow the court to utilize the rule to identify any support obligation within the original decree.

This court recognizes that although father's obligation to pay the second and third mortgages was present in the decree, it was not identified as an obligation to mother and children. If the trial court ultimately determines that any part of this obligation is in the nature of spousal or child support, this determination may be reflected in a modification of the decree in the interests of substantial justice pursuant to Rule 1–060(B)(6).

DID THE TRIAL COURT ERR IN AWARDING MOTHER THE ENTIRE AMOUNT OF LOST EQUITY RESULTING FROM NON–PAYMENT OF THE MORTGAGES.

The district court determined that at the time of the divorce, the family home had a value of $100,000, and that the first mortgage, which mother assumed, was for $37,-098. It also determined that father's failure to pay the second and third mortgages

2. "In an attempt to clarify the appropriate standard, the *Calhoun* court proposed a three-step test based on separate inquiries into the following: the intent of the court or the parties creating the obligation; the actual effect of the liability in providing for the necessary support of the debtor's dependents; and the reasonableness of the debt, both at the time of its creation and at the time of the bankruptcy action." S. Scheible, *supra,* at 51.

on the property caused mother to lose $62,-907 in equity because of the foreclosure sale.

Father believes that if the court finds him liable on this debt at all, he should be obligated to pay only the $39,650 which mother would have to pay to obtain total equity in the home. He argues that $39,-650 is all that is required to put mother in the position she would have been in if father paid the mortgage debts.

The ultimate validity of the award depends on a determination that mother was awarded a non-dischargeable support obligation. We have concluded that the trial court must inquire into whether the obligation was reasonable at the time of the divorce and at the time of the bankruptcy and, to the extent it is not reasonable in its entirety, the court must set a reasonable limit to the non-dischargeability of the debt. On the record before us, we cannot determine what the extent of the obligation was. Thus, we do not decide father's fourth issue.

CONCLUSION.

We affirm the district court's decision awarding mother past due child support, but reverse and remand for entry of an amended judgment giving father credit for an additional $900 in payments made directly to mother. We also affirm the district court's decision to deny father's request that his future child support obligation be reduced. Finally, we reverse the trial court's decision that the debts father was ordered to pay in the divorce decree were in the nature of a support obligation and nondischargeable, but we remand for further proceedings not inconsistent with this opinion. No costs are awarded. Mother's request for attorney fees on appeal is denied. On remand, if mother is awarded additional attorney fees, the trial court should take the efforts of mother's counsel on appeal into account.

ALARID and APODACA, JJ., concur.

784 P.2d 986

STATE FARM MUTUAL INSURANCE COMPANY, Plaintiff-Appellee,

v.

Dewey CONYERS and Kay Conyers, his wife, Defendants-Appellants.

No. 17600.

Supreme Court of New Mexico.

Nov. 29, 1989.

Duhigg, Cronin & Spring, Frank L. Spring and David M. Berlin, and Bruce P. Moore, Albuquerque, for defendants-appellants.

Foy, Foy & Jollensten, Celia Foy Castillo, Silver City, for plaintiff-appellee.

OPINION

BACA, Justice.

Dewey and Kay Conyers appeal from a district court order granting State Farm Mutual Insurance Company (State Farm) summary judgment, holding that the substantive law of New Mexico should apply in determining the amount of policy proceeds State Farm owed the Conyers and that State Farm did not owe the Conyers any further payments under its policy. The main issue of whether the court erred in granting State Farm summary judgment can be divided into three sub-issues: (1) whether the Conyers had sufficient minimum contacts with New Mexico for the court to properly exercise personal jurisdic-

tion over them under NMSA 1978, Section 38-1-16(A)(1) (Repl.Pamp.1987) of the New Mexico long-arm statute; (2) whether minimum contacts existed to satisfy due process; and (3) whether New Mexico should change its approach to contractual choice of law rules. We affirm.

In August 1982, Kay Conyers purchased automobile insurance in Silver City, New Mexico, from State Farm agent, Roy Lewis, covering the Conyers' Ford truck with $25,000 in underinsured motorist coverage. In June 1984, Kay Conyers purchased additional automobile insurance from Roy Lewis in Silver City covering the Conyers' Jeep with $25,000 in underinsured motorist coverage. On each insurance application, Kay Conyers gave a Silver City mailing address and listed her husband's and her New Mexico driver's license numbers. The Ford truck had a New Mexico license plate until February 1987.

Dewey Conyers was a union ironworker who was assigned jobs with different companies at various job sites in and out of New Mexico. The Conyers, by affidavit, state that they resided in Silver City from May 1981 to April 1982, and from August 1982 to January 1983. The Conyers lived in Silver City between jobs. From January 1983 until December 26, 1984, the Conyers lived in California. After December 26, 1984, the Conyers moved to Tonopah, Nevada. On March 28, 1985, Dewey Conyers, a passenger in an automobile driven by Jerry Jordan (Jordan), was injured in an automobile accident in Nevada. Allstate Insurance Company (Allstate), the liability insurance carrier for Jordan, paid Dewey Conyers $25,000, the policy liability limits. State Farm paid Dewey Conyers underinsured motorist benefits of $25,000 under the policy covering the Jeep but failed to tender an additional $25,000 under the other policy. Conyers claimed his medical expenses exceeded $25,000 and demanded the entire $50,000 in underinsured motorist benefits available under both policies from State Farm.

Subsequently, State Farm brought a declaratory judgment action in the New Mexico district court, seeking a determination that it owed no further payments to Dewey Conyers because it could offset against its underinsured motorist coverage limits the amount of $25,000 liability coverage Allstate previously paid. The Conyers entered a special appearance before the court contesting the court's jurisdiction over them and filed a motion to dismiss the declaratory judgment for lack of personal jurisdiction, improper venue, forum non conveniens, and failure to state a claim upon which relief can be granted. On July 29, 1987, the court denied the motion. On May 8, 1987, the Conyers moved for partial summary judgment contending that Nevada law should apply to determine the distribution of the underinsured motorist proceeds. On May 29, 1987, State Farm moved for summary judgment, which the court granted.

PERSONAL JURISDICTION

We first consider whether the court had personal jurisdiction over the Conyers in New Mexico under Section 38-1-16, our long-arm statute. The long-arm statute sets out five different types of acts, which if conducted in the State of New Mexico, submit the actor to the jurisdiction of the courts of this state if any cause of action should arise from such acts. These include the transaction of any business, the operation of a motor vehicle, the commission of a tort, the contracting to insure, and residence within the state for divorce actions if one spouse continues to live in New Mexico.

We use a three-step test to decide whether personal jurisdiction exists over nonresident, out-of-state defendants: (1) the defendant's act must be one of the five enumerated in the long-arm statute; (2) the plaintiff's cause of action must arise from the act; and (3) minimum contacts sufficient to satisfy due process must be established by the defendant's act. *Salas v. Homestake Enterprises, Inc.*, 106 N.M. 344, 345, 742 P.2d 1049, 1050 (1987). State Farm did not specify which of the five acts enumerated in the long-arm statute it relied on to assert personal jurisdiction over the Conyers. State Farm did allege in its complaint that it issued an insurance policy to the Conyers

in Silver City, New Mexico. By purchasing insurance in New Mexico, the Conyers transacted business in this state. On appeal, the Conyers do not assert that another section of the long-arm statute is applicable.

The Conyers argue that State Farm failed to meet one element of the *Salas* in personam jurisdiction test set out above, by failing to show that its cause of action directly arose from the defendant's transaction of business in the State of New Mexico. In *Winward v. Holly Creek Mills, Inc.*, 83 N.M. 469, 472, 493 P.2d 954, 957 (1972), we stated that a close relationship must exist between the act committed by the defendant and the plaintiff's claim. " '[T]he statutory phrase "arising from" requires only that the plaintiff's claim be one which lies in the wake of the commercial activities by which the defendant submitted to the jurisdiction of the [forum's] courts.' " (Quoting *Koplin v. Thomas Haab Botts*, 73 Ill.App.2d 242, 253, 219 N.E.2d 646, 651 (1966).) The Conyers maintain State Farm's cause of action is not related to the purchase and sale of insurance; rather they claim the accident in Nevada forms the prerequisite of State Farm's liability. The Conyers misconstrue the "arising from" element of the personal jurisdiction test by an inappropriate contrast between the accident and State Farm's claim. The correct determination should be whether State Farm's cause of action arose from business activities performed in New Mexico by the defendants. The Conyers submitted themselves to the jurisdiction of New Mexico courts by conducting business in New Mexico. They cannot now escape jurisdiction by claiming that the accident itself occurred outside the state boundaries. State Farm's cause of action for declaratory judgment to determine the extent of insurance coverage is closely related to the transaction of business between State Farm and the Conyers—the negotiation and purchase of insurance in New Mexico. Indeed, if the Conyers had not purchased insurance in New Mexico, no cause of action would exist. This transaction of business in New Mexico between State Farm and the Conyers creates sufficient minimum contacts with New Mexico for the court to exercise personal jurisdiction over the Conyers.

MINIMUM CONTACTS—DUE PROCESS

The Conyers also assert that the court erred in finding that they had sufficient minimum contacts with New Mexico to satisfy due process constraints. Precedent exists in New Mexico which establishes that the "transaction of any business" element of the long-arm statute is sufficient to fulfill the due process standard of minimum contacts. This is true only if the cause of action arises from the particular transaction of business, and the minimum contacts were purposefully initiated by the defendant. *Customwood Mfg., Inc. v. Downey Constr. Co.*, 102 N.M. 56, 691 P.2d 57 (1984). For a forum to assert personal jurisdiction over defendants, due process requires that defendants "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940)). To judge minimum contacts, "a court properly focuses on the relationship among 'the defendant, the forum, and the litigation.' " *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977)).

■ The key focus in analyzing minimum contacts is that the defendant by some act "purposefully avails [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits ... of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958). "[W]here the defendant 'deliberately' has engaged in significant activities within a state, *Keeton v. Hustler Magazine, Inc.*, [465 U.S.] at 781 [104 S.Ct. at 1481], or has created 'continuing obligations' between himself and residents of the forum, *Traveler's Health Ass'n v. Virginia*, 339 U.S. [643, 648, 70 S.Ct. 927, 930,

94 L.Ed. 1154 (1950)], he manifestly has availed himself of the privilege of conducting business there." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475–76, 105 S.Ct. 2174, 2183–84, 85 L.Ed.2d 528 (1985). We also review the nature of the transaction, the applicability of New Mexico law, the contemplation of the parties and the location of potential witnesses to determine if minimum contacts exist. *Kathrein v. Parkview Meadows, Inc.,* 102 N.M. 75, 76–77, 691 P.2d 462, 463–64 (1984). Finally, we observe that a single transaction of business within this state can subject a nonresident defendant to the jurisdiction of our courts, if the cause of action being sued upon arises from that particular transaction of business. *Customwood Mfg., Inc. v. Downey Constr. Co.,* 102 N.M. at 56, 691 P.2d at 57.

We note that the Conyers voluntarily initiated contacts with State Farm by purchasing automobile insurance in 1982 and 1984 in Silver City, New Mexico, before the Nevada accident. In 1985, Kay Conyers obtained insurance coverage again in the Silver City State Farm office on a Ford Bronco. In *McGee v. International Life Insurance Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), the issuance of a single reinsurance agreement in California was deemed a sufficient contact to permit California to exercise jurisdiction over a Texas defendant. The Conyers' activities in New Mexico manifest a purposeful intent to transact business in this state. By transacting business in New Mexico *several* times, the Conyers created continuing obligations between State Farm and themselves. The Conyers did not choose another state to purchase their insurance. When the Conyers chose New Mexico in which to transact business, they reasonably could contemplate that New Mexico law would apply. State Farm's agent and employees, potential witnesses, are located in Silver City. We hold that the Conyers' conduct and connection with New Mexico was "such that [they could] reasonably anticipate being haled into court [in New Mexico]." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). This court is satisfied that the exercise of personal jurisdiction over the Conyers comports with notions of substantial justice and fair play. Thus, the Conyers had sufficient minimum contacts with New Mexico to satisfy due process.

CHOICE OF LAW

The Conyers urge us to adopt the contractual choice of law rules found in Restatement (Second) of Conflict of Laws and hold Nevada, not New Mexico law applicable.[1] Section 193 provides:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws, § 193 (1971). Under New Mexico law underinsured motorist protection can be stacked, *Konnick v. Farmers Insurance Co. of Arizona,* 103 N.M. 112, 703 P.2d 889 (1985), and underinsured motorist benefits can be offset by the tortfeasor's liability coverage. *Schmick v. State Farm Auto. Ins. Co.,* 103 N.M. 216, 223, 704 P.2d 1092, 1099 (1985). Here, Allstate has paid $25,000 to the Conyers in liability coverage. Under New Mexico law, State Farm is liable for $50,000 under the underinsured poli-

1. Alternatively, the Conyers urge adoption of the often-called "lex loci solutionis" rule from the first Restatement to the effect that the law of the place of performance of the contract governs issues regarding performances and/or breach of the contract. Even if this rule applied, it is far from clear where performance of the contract in this case would take place. The record is unclear where demand for payment was made and, even if made in Nevada, there is no showing that payment would be made there. For the reasons stated in the text, we are satisfied that New Mexico law should control in this case, even if there were any indication that performance of the promises in the State Farm policies was to occur in Nevada.

cies by stacking but is entitled to a $25,000 offset. Thus, State Farm, having paid $25,000 to the Conyers, owes them no further payments. In contrast, under Nevada law, a liability insurance carrier cannot offset the benefits it owes by the amount received from the tortfeasor's carrier so the Conyers could recover an additional $25,000 in benefits from State Farm. *Mid-Century Ins. Co. v. Daniel,* 101 Nev. 433, 705 P.2d 156 (1985). Conyers asserts that we should reconsider or modify the *Schmick* decision; we decline to do so.

The Conyers maintain the lex loci contractus rule is mechanically applied and does not provide predictability or uniformity. The Restatement's significant relationship test is neither less confusing nor more certain that the lex loci contractus approach. *See General Tel. Co. of the Southwest v. Trimm,* 252 Ga. 95, 311 S.E.2d 460 (1984), *see also Smith, Choice of Law in the United States,* 38 Hastings L.J. 1041 (1987) (jurisdictions use various choice of law approaches rather than applying the Restatement (Second) approach exclusively). New Mexico courts have not necessarily mechanically applied the lex loci contractus rule. *See Miller v. Mut. Benefit Health & Accident Ass'n,* 76 N.M. 455, 415 P.2d 841 (1966); *Ratzlaff v. Seven Bar Flying Serv., Inc.,* 98 N.M. 159, 646 P.2d 586 (Ct.App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982); *Eichel v. Goode, Inc.,* 101 N.M. 246, 680 P.2d 627 (Ct.App. 1984). In any event, in this case it is not necessary for us either to reaffirm a lex loci contractus rule categorically or to adopt or reject for all cases the Restatement (Second) "significant relationship" tests. Even were we to apply a Restatement (Second) analysis, New Mexico law would still govern the outcome of this particular dispute.

Under Section 193 of Restatement (Second), the rights created by a contract of casualty insurance are determined by the law of the state which the parties understood was to be the principal location of the insured risk, unless some other state has a more significant relationship to the transaction and the parties under Section 6. As pointed out more fully below, there was no material fact presented to the district court on summary judgment as to any state other than New Mexico being the principal location of either vehicle during the term of the policies in question. As for the principles set out in Section 6,[2] we do not believe that any of the factors listed in subsection (2) militates particularly strongly in favor of applying Nevada law. Although we may presume that Nevada's policy is to apply its rule in cases like the present, we doubt that its interest in determining the particular issue in this case is very strong. On the other hand, New Mexico has a statutorily enunciated policy of applying an offset to the underinsured motorist coverage proceeds, as we held in *Schmick.* Uniformity of result points strongly in the direction of applying New Mexico law; different results for two insureds, one of whom lived in New Mexico and bought the policy here but who happened to be injured in Nevada, and another for the Conyers—both insureds having their rights adjudicated in the courts of New Mexico—would seem to be an anomolous outcome. The policy of New Mexico's law governing a contract of insurance applied for and issued in this state (and presumably conforming to this state's laws and insurance regulations), on a vehicle at least assumed to be located here and owned by an individual

2. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws, § 6 (1971) (emphasis theirs).

who declared his residence as being here, seems to us to weigh more heavily than any possibly countervailing policy that would underlie applicability of Nevada law.

Here, Kay Conyers applied for insurance coverage for herself and her husband in Silver City, New Mexico, in 1982, and in 1984 on a Ford truck carrying a New Mexico license plate. Sufficient facts indicate that Kay Conyers signed the insurance contracts in Silver City, New Mexico. Thus, New Mexico was the principal location of the insured risk, at least as disclosed in the application to State Farm. The Conyers concede that Dewey Conyers purchased insurance while he was a New Mexico resident. The record does not reveal that the Conyers ever informed Roy Lewis of their move to Nevada. State Farm issued insurance believing the Conyers resided in New Mexico and had no reason to change this belief. An affidavit by a State Farm employee stated that Kay Conyers never told them that her permanent address had changed to a Nevada address even when she applied for insurance coverage personally in 1985 in the Silver City office. We hold the court properly applied New Mexico law to determine whether State Farm could offset the liability coverage Allstate previously paid. The court properly concluded State Farm did not owe any further payments to the Conyers under the *Schmick* analysis.

The Conyers also contend that, even if the lex loci contractus rule applies, the court could not properly determine that New Mexico law controls without the two insurance policies before it for review. The Conyers argue the trial court could not determine that the last act necessary to make the policy effective occurred in New Mexico. When interpreting a contract under the lex loci contractus rule, courts look to the law of the place where the contract was consummated, *Pound v. Insurance Co. of North America,* 439 F.2d 1059 (10th Cir.1971), unless this construction conflicts with the settled public policy of New Mexico. *Sandoval v. Valdez,* 91 N.M. 705, 580 P.2d 131 (Ct.App.1978). A contract is consummated where the last act necessary for its formation was performed. *Pound,* 439 F.2d at 1062. In *Brashar v. Mobil Oil Corp.,* 626 F.Supp. 434, 436 (D.N.M.1984), the court held that the last act necessary for an agreement's formation is accomplished when a party to a contract places the last signature on the contract. A contract is made at the place where the last signature is affixed. *Id.*

We have already observed that the Conyers conceded that Dewey Conyers purchased automobile insurance from State Farm when he was a New Mexico resident, that the Conyers purchased insurance in Silver City, New Mexico, and that sufficient facts indicate that Kay Conyers signed the applications in Silver City. Thus, the last act necessary to make insurance effective occurred in New Mexico. The applications in pertinent part also provided: "It is understood and agreed that no insurance is effective hereunder (a) *unless* the binder is completed designating the company accepting this application and signed by an authorized agent of such company, *or* (b) until the date of the policy or binder issued by the company accepting this application." Coverage on the Ford truck began on August 16, 1982, and coverage on the Jeep began on June 25, 1984, under part (a) of the applications; the contracts became fully effective on those dates. Moreover, the binders were completed designating State Farm as the accepting company and were signed by Roy Lewis, State Farm's authorized agent in New Mexico. The court could apply New Mexico law without the insurance policies because it could decide where the contract was made.

Finally, the Conyers assert that even if this court correctly found the existence of personal jurisdiction over the Conyers and applied New Mexico law, an issue of material fact remains regarding the residency of Dewey Conyers, thereby precluding the grant of summary judgment for State Farm. However, as noted above, the residency of Dewey Conyers is not a material fact in this case; even if he is or was a resident of Nevada, New Mexico law should still control for the reasons stated earlier in this opinion. The Conyers' con-

tention is meritless. We conclude that the court properly granted State Farm summary judgment. For the foregoing reasons, the decision of the trial court is affirmed.

IT IS SO ORDERED.

SOSA, C.J., and MONTGOMERY, J., concur.

784 P.2d 992

Lucy ROMERO, Plaintiff–Appellee and Cross–Appellant,

v.

MERVYN'S and Dennis Wolf, Defendants–Appellants and Cross–Appellees.

No. 18142.

Supreme Court of New Mexico.

Dec. 19, 1989.

OPINION

RANSOM, Justice.

This is an appeal by defendant Mervyn's from a verdict in favor of plaintiff Lucy Romero for $2,041 in compensatory and $25,000 in punitive damages on a breach of contract claim. Romero cross-appeals the failure of the court to award certain witness fees as costs. We affirm.

On November 23, 1984, Romero and two of her adult daughters were shopping in Mervyn's Department Store in Albuquerque. It was the day after Thanksgiving and the store was crowded with Christmas shoppers. As Romero and her daughters were descending on an escalator, another customer either intentionally or accidentally pushed her. She fell to her hands and knees, hitting her jaw as she fell. One of her daughters testified that a commotion ensued. When Romero reached the bottom of the escalator, a salesperson at a temporary station helped her to her feet and out of the path of other shoppers. Either this employee or a security guard watching from a two-way mirror summoned the store manager to the scene.

Dennis Wolf, the acting store manager, came in response to this call. His usual job as operations manager of the store entailed responsibility for directing and training employees. It was also his duty to investigate and gather information on incidents involving customer injuries on the premises. Wolf testified that he could tell Romero was in pain and asked her whether she needed a wheelchair or ambulance. Romero replied that she did not. Wolf also testified that Romero's daughters were "very upset, a little bit hysterical," and kept asking who would pay for their mother's medical expenses. Wolf himself, according to Romero's testimony, "seemed to be kind of nervous and in a hurry since the store was busy." According to testimony by Romero and her daughters, Wolf told them that Mervyn's would pay any medical expenses. Wolf testified that, pursuant to company policy, he only told Romero that Mervyn's would submit the claim to its insurer, who would make the decision

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Gallagher & Casados, Michael T. Watkins, Albuquerque, for defendants-appellants and cross-appellees.

Janet Santillanes, Albuquerque, for plaintiff-appellee and cross-appellant.

whether to pay any claims arising from the incident.

Immediately following this conversation, Romero's daughters helped their mother out of the store, brought the car around, and returned to their home in Santa Fe. The following Monday, Romero still was in pain and decided she should seek medical attention. She had another of her daughters, who lived in Albuquerque, call Mervyn's and confirm with Wolf his promise that Mervyn's would pay the expenses. She also asked him if any forms needed to be completed when her mother went to the doctor. He told her to come down to the store and pick up the necessary forms. When she did so, however, Wolf told her that he was out of the forms and then, according to her testimony, told her to go ahead and have her mother go to the doctor, and Mervyn's would pay the expenses. Wolf testified the "forms" in question were insurance claim forms. Romero's daughter confirmed that Wolf told her the forms were for the insurance company but insisted that Wolf reiterated the promise that Mervyn's would pay the bill.

Thereafter, Romero consulted a physician and underwent physical therapy. The cost of her treatment came to $2,041. Mervyn's, however, refused to pay the bills. Romero filed suit in Santa Fe District Court, alleging liability under theories of negligence and contract. She did not rely on a theory of promissory estoppel.[1] At the first trial, the court granted summary judgment to Mervyn's on the contract claim and the jury returned a verdict in favor of Mervyn's on the negligence claim. The court based summary judgment on the lack of actual or apparent authority on the part of Wolf to bind Mervyn's to a contract. On appeal, this Court affirmed the jury verdict but reversed the summary judgment, holding that the question of Wolf's authority posed a genuine issue of material fact for the jury to decide. Romero v. Mervyn's, 106 N.M. 389, 390, 744 P.2d 164, 165 (1987).

1. Where there is no consideration for a promise, it may still be enforceable if the promisor reasonably could foresee that the promisee would rely on the promise and the promisee in fact suffers economic loss as a result of reasonable reliance. *See Eavenson v. Lewis Means, Inc.*, 105 N.M. 161, 730 P.2d 464 (1986); *Capo v. Century Ins. Co.*, 94 N.M. 373, 610 P.2d 1202 (1980).

On remand, the jury found in favor of Romero on her contract claim, and awarded punitive damages. Mervyn's appeals, arguing the court erred: (1) in submitting the contract claim to the jury because there was no evidence of consideration for Wolf's alleged promise to pay Romero's medical expenses; (2) in failing to set aside the award of punitive damages absent evidence of ratification of Wolf's acts by Mervyn's; (3) in submitting the question of Wolf's actual or apparent authority to the jury; (4) in failing to grant Mervyn's motion for a directed verdict when the court granted a directed verdict in favor of Wolf; (5) in submitting the issue of punitive damages to the jury when there was no evidence of malice on the part of Mervyn's in refusing to pay Romero's medical bills, or in refusing to grant Mervyn's motions for judgment n.o.v. or for a new trial because the award of punitive damages was based on sympathy, passion, and prejudice; and (6) in admitting the medical bills from Romero's physician and Lovelace Clinic absent expert testimony that the bills were both reasonable and necessary for the injuries Romero suffered in the incident at Mervyn's.

Issues (1) and (2) not properly preserved for appeal. Without objection, the jury was instructed under SCRA 1986, 13-802 (Express contracts; definition) and 13-803 (Implied contracts; definition). Mervyn's asserts on appeal, however, that there was *no substantial evidence of consideration* either having been expressly stated or having been shown in the surrounding circumstances, as, for instance, by the parties' words and actions, what they wanted to accomplish, the way they dealt with each other, and how others in the same circumstances customarily deal or would deal. *See Trujillo v. Glen Falls Ins. Co.*, 88 N.M. 279, 540 P.2d 209 (1975) (mutual assent, necessary to formation of contract, may be manifested wholly or part-

ly by written or spoken words or by other acts or conduct).

Although the court improperly instructed the jury (without objection) that Mervyn's had the burden of proving its claim of no consideration for any promise, there was no further definition or reference to consideration in the instructions. Mervyn's had tendered and objected to the refusal of an instruction that "The mere fortuitous presence of circumstances that might constitute consideration for an agreement is not enough, but consideration, like every other element in a contract, must be bargained for by the parties, and their minds must meet upon the consideration which is to support a promise." *See Knoebel v. Chief Pontiac, Inc.*, 61 N.M. 53, 294 P.2d 625 (1956) (consideration, like every other element in contract, must be bargained for and agreed upon by the parties). Mervyn's did not object in the trial court that substantial evidence of consideration was lacking,[2] and does not renew on appeal its argument that it was error not to give the tendered instruction defining consideration.

Mervyn's also claims it was error to deny its motion for a directed verdict when there was no evidence of any consideration for the promise. However, the record on Mervyn's motion for a directed verdict is devoid of reference to absence of evidence of consideration. We conclude the consideration issue is not before us in this appeal. We similarly do not consider a *ratification* issue raised for the first time on appeal. *See Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 577 P.2d 1245 (1978) (liability of principal for punitive damages for the acts of an agent requires proof of ratification, participation, or authorization); SCRA 1986, 13–1826.

(3) *Trial court correctly submitted issue of actual or apparent authority to jury.* The jury received instructions on actual authority (express or implied) and on apparent authority. In its motion for directed verdict, Mervyn's raised the issue of substantial evidence of actual authority. Mervyn's also objected there was no substantial evidence to support the submission of an instruction of apparent authority. We conclude the court did not err in instructing the jury on the issue of agency.

"Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to [the agent]." *Restatement (Second) of Agency* § 7 (1958). To warrant an instruction on the issue of Wolf's actual authority to enter into a contract with Romero, substantial evidence must have been introduced that such conduct lay within the scope of Wolf's employment.

Besides being liable for acts within the actual authority of an agent, a principal also is responsible for the acts of the agent when the principal has clothed the agent with the appearance of authority. *Chevron Oil Co. v. Sutton*, 85 N.M. 679, 682, 515 P.2d 1283, 1286 (1973). Romero's claim of apparent authority was based on Mervyn's alleged placement of Wolf in a position that would lead a reasonably prudent third party to believe Wolf possessed authority to bind Mervyn's in a contract to pay medical bills. While actual authority is determined in light of the principal's "manifestations of consent" to the agent, apparent authority arises from the principal's manifestations to third parties, *Restatement (Second) of Agency* § 8 (1958), and can be created by appointing a person to a position that carries with it generally recognized duties. *Id.* § 27 comment a.

We believe substantial evidence was presented on the issue of Wolf's actual authority. When Romero was hurt, Mervyn's other employees called for the "manager." Wolf was both acting manager and operations manager. When he appeared on the scene, the employees already present deferred to his handling of the situation. Mervyn's presented testimony that it was

2. Sufficiency of evidence to submit a case to a jury, or to support a verdict, cannot be raised on appeal unless the lack of substantial evidence on a material issue has been specifically called to the trial court's attention by, e.g., a motion for a directed verdict, objection to instructions, or a motion for j.n.o.v. *See Blacklock v. Fox*, 25 N.M. 391, 183 P. 402 (1919).

indeed part of Wolf's job to deal with customer injuries, that no one else at the store other than Wolf had such authority, and indeed that there was no one else to whom an injured customer could go. Pursuant to his duties, Wolf inquired whether Romero was hurt and gathered information concerning the accident. It was at this point, according to testimony, that the first promises were made.

Mervyn's argues there was no testimony from Wolf or another agent of Mervyn's to suggest that it lay within Wolf's actual authority to bind Mervyn's. Moreover, Mervyn's argues, the evidence supported Mervyn's allegation that store policy in fact prohibited employees from admitting responsibility for customer injuries. Neither of these points mandated a different verdict. The jury was not obliged to believe the testimony concerning store policy. In addition, an agent's actual authority need not be proved by direct testimony; it can be inferred from attending circumstances. *Jameson v. First Savings Bank & Trust Co.*, 40 N.M. 133, 138–39, 55 P.2d 743, 747 (1936).

Mervyn's also argues that Wolf's statements at the time of the accident should not be considered as evidence of his actual authority. Mervyn's theory is that the extrajudicial statements of an agent cannot be used to prove agency, and the admissions of an agent are not binding on the principal unless made within the scope of authority. True, but here it is uncontroverted that Wolf was the acting manager of the store. After prima facie proof of managerial agency, extrajudicial declarations of the agent are admissible and may be considered in determining the scope of the agent's authority. *See id.* The fact that Wolf made an offer to pay Romero's medical expenses could be considered as evidence of authority to make a contract.

We believe substantial evidence also supported an instruction on apparent authority. Mervyn's alleged policy prohibiting employees from admitting responsibility for customer injuries is not controlling because the existence of such a policy was not public knowledge. A third person who deals with an agent is not bound by any secret or private instructions given to the agent by the principal. *Chevron Oil Co. v. Sutton,* 85 N.M. at 682, 515 P.2d at 1286.

The focus of our inquiry, rather, is the existence of substantial evidence from which the jury could find that Mervyn's placed Wolf in such a position and clothed him with such indicia of authority as would lead a third party, such as Romero, reasonably to conclude Wolf had the authority to make the promise at issue. Given the circumstances surrounding the accident itself and the role Wolf played as an employee of Mervyn's upon arriving at the scene, the jury could have concluded that Mervyn's had placed Wolf in such a position.

(4) *Directed verdict in favor of Wolf did not require directed verdict in favor of Mervyn's.* Mervyn's argues that, under principles of *respondeat superior,* the granting of a directed verdict in favor of Wolf impelled the granting of a directed verdict in favor of Mervyn's. We disagree. Principles of *respondeat superior* apply when the claim is based in tort and the plaintiff alleges the employer is liable for the conduct of an employee because the employee was acting within the scope of employment. *See McCauley v. Ray,* 80 N.M. 171, 180, 453 P.2d 192, 201 (1968).

This case, by contrast, involved a contract claim. When an agent with the authority to do so negotiates a contract for a disclosed principal, the agent is not liable personally unless the agent expressly is made a party to the contract or the agent acts in a manner indicating an intent to be bound personally. *Roller v. Smith,* 88 N.M. 572, 544 P.2d 287 (Ct.App.), *cert. denied,* 89 N.M. 6, 546 P.2d 71 (1975). The issue of substantial evidence of authority has been discussed above. Because there was no evidence that Wolf ever said he *personally* would pay Romero's medical expenses, the directed verdict in favor of Wolf was appropriate. It did not, however, require a directed verdict in favor of Mervyn's.

(5) *Trial court acted correctly in instructing the jury on the issue of punitive*

damages and in denying j.n.o.v. or new trial. Over Mervyn's objection, the trial court submitted an instruction that the jury could find Mervyn's liable for punitive damages if it determined the acts of Mervyn's were "maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the Plaintiff's rights." *See* SCRA 1986, 13–1827.

Although Mervyn's agreed to the wording of the instruction, it nevertheless objected that there was no proof of any malicious or wanton conduct in this case. First, Mervyn's objection could be deemed to imply that the instructions on malicious or wanton conduct raised false issues when combined with the other words used to describe the nature of the alleged wrong for which punitive damages were sought, i.e., acts that were fraudulent, oppressive, or committed recklessly. When a party has submitted to the jury instructions providing alternative bases for relief, it is reversible error to submit any one alternative for which there is no substantial evidence. *Salinas v. John Deere Co., Inc.,* 103 N.M. 336, 707 P.2d 27 (Ct.App.1984), *cert. quashed,* 103 N.M. 287, 705 P.2d 1138 (1985).

After objecting to the absence of proof of any malicious or wanton conduct, however, Mervyn's also stated it did not believe *any* punitive damage instruction would be proper in such a situation. Thus, secondly, Mervyn's objection may be construed as an argument that malicious or wanton conduct is a prerequisite to punitive damages. We feel this argument raises important questions concerning the meaning and purpose of New Mexico's punitive damage rule when applied to contract cases. In the following two sections, therefore, we discuss these issues. We conclude our discussion on punitive damages with an examination of the evidence supporting an instruction of malice.

—Malice, wantonness and punitive damages. Our previous cases clearly establish that, in contract cases not involving insurance, punitive damages may be recovered for breach of contract when the defendant's conduct was malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights. *Green Tree Acceptance, Inc. v. Layton,* 108 N.M. 171, 769 P.2d 84 (1989); *Hood v. Fulkerson,* 102 N.M. 677, 699 P.2d 608 (1985); *Loucks v. Albuquerque Nat'l Bank,* 76 N.M. 735, 418 P.2d 191 (1966); *Stewart v. Potter,* 44 N.M. 460, 104 P.2d 736 (1940). *Cf. Jessen v. National Excess Ins. Co.,* 108 N.M. 625, 776 P.2d 1244 (1989) (gross negligence or recklessness provides basis for recovery of punitive damages by insured against insurer on claim for breach of insurance contract); *United Nuclear Corp. v. Allendale Mutual Ins. Co.,* 103 N.M. 480, 485, 709 P.2d 649, 654 (1985) (bad faith refusal to pay proceeds due on insurance contract supports award of punitive damages).[3]

Each of the terms listed, standing alone, will support an award of punitive damages. *See Green Tree Acceptance,* 108 N.M. at 174, 769 P.2d at 87. In a literal sense, therefore, it is incorrect to argue that "malice" or "wantonness" are essential terms to the exclusion of, e.g., fraud or oppression. However, in the sense that malice and wantonness, interpreted broadly, suggest an absence either of a good faith reason or of an innocent mistake, they describe the conduct targeted by our punitive damages rule.

"Malice" as used in our punitive damages instruction does not imply "actual malice" or "malice in fact" in the sense of an intent to harm. *Galindo v. Western States Collection Co.,* 82 N.M. 149, 154, 477 P.2d 325, 330 (Ct.App.1970). Instead, malice, as defined in *Loucks,* means

> the intentional doing of a wrongful act without just cause or excuse. This

3. We have allowed the award of punitive damages in insurance cases under a more relaxed standard in part because of the fiduciary obligations inhering in insurance relationships and because of concerns arising from the bargaining position typically occupied by the insured and insurer. *See Chavez v. Chenoweth,* 89 N.M. 423, 430, 553 P.2d 703, 710 (Ct.App.1976) (relationship between insurer and insured imposes fiduciary obligation on insurer to deal with insured in good faith in matters pertaining to performance of insurance contract).

> means that the defendant not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrong when he did it.

76 N.M. at 747, 418 P.2d at 199. This definition is a broad one and undoubtedly encompasses situations that also connote "fraudulent" or "oppressive" conduct. The term "wanton," as used in our punitive damages instruction, suggests a similar quality of wrongfulness when the evidence demonstrates conduct committed without concern for the consequences, rather than intentionally, and connotes an "utter indifference to or conscious disregard for the rights of others." *See Curtiss v. Aetna Life Ins. Co.*, 90 N.M. 105, 108, 560 P.2d 169, 172 (Ct.App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976).

Thus, these words broadly distinguish "wrongful" breaches of contract from those committed intentionally for legitimate business reasons or those that are the result of inadvertence. In this sense, it may be argued that "malice" or "wantonness" are prerequisites to punitive damages. Nonetheless, we remain convinced that the nuances distinguishing the terms "malice," "fraud," and "oppression" make it useful to retain these words as distinct standards to guide the jury's exercise of discretion in particular cases.

—Purpose of punitive damages in contract cases. Mervyn's argues, even taking the evidence in the light most favorable to Romero, "the only thing shown was that Mr. Wolf said Mervyn's would pay the bill and then refused to do so." Mervyn's argues this conduct does not demonstrate malice or wantonness and, unless we reverse the award of punitive damages, "every breach of contract, even if justified, will result in a claim for punitive damages."

As discussed below, we believe substantial evidence of malicious or wanton behavior was presented in this case. However, Mervyn's argument raises an important issue. Our rule on punitive damages never was intended to make punitive damages available for every intentional breach of a contract. Although our previous cases have articulated clearly the standard for awarding punitive damages, they have not discussed in general terms the purpose of awarding punitive damages in contract cases. Before discussing whether substantial evidence supported submission of the issue of punitive damages to the jury, we undertake such a discussion.

The proposition is often repeated that, in general, "the purpose of awarding [contract] damages is ... compensation and not punishment." *Restatement (Second) of Contracts* § 355 comment a (1981).[4] The Supreme Court of California explained its reluctance in contract cases to allow the award of tort damages, including punitive damages, as follows:

> [P]arties of roughly equal bargaining power are free to shape the contours of their agreement and to include provisions for attorney fees and liquidated damages in the event of breach. They may not be permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured. In such contracts, it may be difficult to distinguish between breach of the covenant and breach of contract, and there is the risk that interjecting tort remedies will intrude upon the expectations of the parties.

Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal.3d 752, 769, 686 P.2d 1158, 1167, 206 Cal.Rptr. 354, 362 (1984) (footnote omitted).[5]

4. Professor Corbin has noted, however, "The truth of such a statement turns on rather nice distinctions between compensation and punishment." 5 A. Corbin, *Corbin on Contracts* § 1077, at 437–38 (1964). Another commentator has lamented that "[t]he functional purposes of contract damages * * * are obscured by a thick overlay of judicial decisions and scholarly commentary which uncritically recite that the object of damages in contract is solely [compensatory]." Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 Minn.L.Rev. 207, 219 (1977).

5. Some scholars have advanced similar explanations. One commentator has suggested that extension of punitive damages, at least in commercial contracts, would unjustifiably introduce

The general rule limiting recovery in contract case to compensatory damages thus seems in part calculated to leave undisturbed the allocation of risks and benefits to which both parties have agreed. Such a policy readily is accommodated by awarding money damages, if the measure of damages is based on the justified expectations of the injured party under the contract. Moreover, in most commercial settings,

> [t]he fact that [compensatory] damages must be paid tends directly to the prevention of breaches of contract. It makes, therefore, for the security of business transactions and helps to make possible the vast structure of credit, upon which so large a part of our modern prosperity depends.

5 A. Corbin, *Corbin on Contracts* § 1002, at 34 (1964).

Notwithstanding the general exclusion of punitive damages from contract cases, however, exceptions long have been recognized. *See, e.g., Welborn v. Dixon,* 70 S.C. 108, 49 S.E. 232 (1904) (punitive damages allowed for fraudulent breach of contract); *Stewart v. Potter,* 44 N.M. 460, 104 P.2d 736 (1940) (same). Many courts have conceptualized the conduct necessary to afford recovery of punitive damages as consisting of an independent tort. *See, e.g., Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc.,* 437 N.E.2d 1360 (Ind.Ct.App.1982) (breach of contract may support an award of punitive damages when elements of fraud, malice, gross negligence, or oppression mingle in the controversy); *Consolidated Am. Life Ins. Co. v. Toche,* 410 So.2d 1303 (Miss.1982) (punitive damages available when breach attended by intentional wrong, insult, abuse, or such gross negligence as to consist of an independent tort); *see generally,* 1 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* § 5.16 (1985); Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change,* 61 Minn.L.Rev. 207, 236–40 (1977). Similarly, the text of Section 355 of the *Restatement (Second) of Contracts* recognizes an exception when "the conduct constituting the breach is also a tort for which punitive damages are recoverable."

Other jurisdictions, including California, have justified the award of punitive damages in terms of breach of the implied covenant of good faith and fair dealing, particularly in cases involving insurance contracts. *See Gruenberg v. Aetna Ins. Co.,* 9 Cal.3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973). "Broadly stated, that covenant requires that neither party do anything which will deprive the other of the benefits of the agreement." *Seaman's Direct Buying Serv.,* 36 Cal.3d at 768, 686 P.2d at 1166, 206 Cal.Rptr. at 362.

We believe, regardless of whether conceptualized in terms of an independent tort, breach of the implied covenant of good faith, or, as in New Mexico, in terms of the quality of the conduct constituting the breach itself, the award of punitive damages in some cases serves important social ends. In *Seaman's Direct Buying Service,* the court held that tort remedies, including punitive damages, were recoverable against a party who attempted "to avoid all liability on a meritorious contract claim by adopting a 'stonewall' position ('see you in court') without probable cause and with no belief in the existence of a defense." 36 Cal.3d at 769–70, 686 P.2d at 1167, 206 Cal.Rptr. at 363. In justifying its position, the court noted:

> Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics. Acceptance of tort remedies in such a situation is not likely to intrude upon the reasonable expectations of the contracting parties.

Id. (citation omitted).[6]

uncertainty and confusion into business transactions. Simpson, *Punitive Damages for Breach of Contract,* 20 Ohio St.L.J. 284 (1959). Another has suggested that, because parties freely create their contractual obligations, "unlike the commission of a tortious act, failure to discharge these self-imposed obligations does not inevita-

Overreaching, malicious, or wanton conduct such as targeted by our rule is inconsistent with legitimate business interests, violates community standards of decency, and tends to undermine the stability of expectations essential to contractual relationships. When this is the case, it is appropriate to allow the jury to determine whether "the public interest will be served by the deterrent effect punitive damages will have upon future conduct." *Jones v. Abriani,* 169 Ind.App. 556, 578, 350 N.E.2d 635, 649 (1976) (quoting, *Vernon Fire & Cas. Ins. Co. v. Sharp,* 264 Ind. 599, 608, 349 N.E.2d 173, 180 (1976)).

—*Substantial evidence supported instructions on malice and wanton conduct, denial of j.n.o.v. or new trial not error.* Contrary to Mervyn's argument, we do not believe the evidence demonstrated only that Wolf made a promise which subsequently he did not keep. Consistent with the definition of malice under *Loucks,* the trial court instructed the jury that malice denoted "the intentional doing of a wrongful act without just cause or excuse. This means * * * [Mervyn's] not only intended to do the act which is ascertained to be wrongful, but that it knew it was wrong when it did it." We note that, in closing argument to the jury, Romero's attorney contended Mervyn's made the promise to pay her client's medical bills in order to get her out of the store without causing a disturbance, but had its "fingers crossed" and never intended to keep that promise.

The evidence reasonably could be viewed as indicating the promise was made because, on one of the busiest shopping days of the year, Wolf wanted to get the Romeros out of the store as quickly as reasonably possible without causing a scene. Mervyn's also presented evidence that Wolf's promise was inconsistent with the store's policy regarding customer injuries, and that Wolf subsequently took no action other than to submit the claim to Mervyn's insurer. This evidence reasonably supports the inference that Wolf entered into the contract simply to end his encounter with Romero and her daughters, without intending to follow through on the promise, and with knowledge that his employer thereafter would not perform.[7]

We thus conclude the jury could have inferred knowledge on Wolf's part that his employer would not honor the contract with Romero, and thus that he acted with malice. This determination leads to the conclusion that the jury also could infer Wolf made the promise with a conscious disregard for whether his employer subsequently would perform, and thus that he acted recklessly with a wanton disregard for Romero's rights. We conclude substantial evidence supported the instructions on malicious or wanton conduct. Consequently, the denial of j.n.o.v. and of a new trial was well within the

bly violate objective standards of societal conduct." *Sullivan, supra* note 4, at 219.

6. There is insufficient evidence of the decision making process that led Mervyn's to refuse payment of Romero's medical expenses to warrant a conclusion that it was adopting a "stonewall" position, anticipating that the limited nature of Romero's claim would make it impractical for her to secure legal representation and take her claim to court. Mervyn's well may have believed in good faith that it possessed one or more valid defenses to the claim when it made the decision to litigate. While we have been willing to expose an insurer to punitive damages when it refuses to pay a claim for frivolous or unfounded reasons, *see United Nuclear,* 103 N.M. at 485, 709 P.2d at 654, the fiduciary obligations on which this relaxed standard is based here are lacking. We note, however, that punitive damages long have been recognized as an appropriate remedy in situations in which exposure merely to compensatory damages is an inadequate deterrent to prevent such oppressive conduct. *See A. Corbin, supra,* note 4 § 1077. Although we do not decide this issue in the present case, logic suggests that punitive damages be available when a party has breached a contract believing the wronged party cannot afford to contest the matter in court.

7. Direct evidence of knowledge that an act was wrongful is not necessary to establish malice. *See Galindo,* 82 N.M. at 154, 477 P.2d at 330 (familiarity of defendant with collection claim procedures and his failure to disclose knowledge of plaintiffs' whereabouts permitted inference that he intentionally chose to post notice of a garnishment claim on courthouse bulletin board as method of service because he knew plaintiffs thereby would not receive actual notice).

discretion of the trial court. *See Cienfuegos v. Pacheco,* 56 N.M. 667, 248 P.2d 664 (1952). Furthermore, the amount of the award of punitive damages is not so plainly unrelated to the injury or actual damages, such as to raise a question of sympathy, passion and prejudice as a matter of law. *See Faubion v. Tucker,* 58 N.M. 303, 270 P.2d 713 (1954).

(6) *Admission of medical bills not error.* Mervyn's argues it was error to admit Romero's medical bills without testimony that the treatment received was reasonably necessary as a result of the injury, and that the resulting bills were reasonable in amount. *See Frei v. Brownlee,* 56 N.M. 677, 248 P.2d 671 (1952). Romero responds by pointing out: (1) Romero's physician testified at the first trial as to these issues; and (2) while Mervyn's made an objection to this testimony as it dealt with reasonableness in the amount of the Lovelace Bill, Mervyn's did not object as to the necessity of either bill. Romero argues the doctrine of judicial estoppel should prevent Mervyn's from maintaining on remand following appeal of the first trial that the bills were not necessary for the contract claim. *See Chapman v. Locke,* 63 N.M. 175, 315 P.2d 521 (1957). On the issue of reasonableness, Romero urges us to extend to the facts here present the principle from worker's compensation cases that proof of a bill from a doctor is prima facie proof of its reasonableness. *See, e.g., Pritchard v. Halliburton Servs.,* 104 N.M. 102, 717 P.2d 78 (Ct.App.), *cert. denied,* 103 N.M. 798, 715 P.2d 71 (1986).

In *Pritchard,* the court held that introduction of supplemental medical bills in a second hearing should be prima facie evidence of the reasonableness and necessity of those bills, so long as they relate to the same injury at issue in the prior hearing. Romero, rather than submitting supplemental bills, introduced the original bills themselves without again calling her physician as an expert witness to repeat testimony given at the first trial. As Romero pointed out to the trial court on remand, her claim is for breach of a promise to pay medical bills, not for damages due to the injury; thus, in seeking to establish the extent of her bills, she is in a somewhat analogous position to an injured employee seeking reimbursement for medical expenses, rather than disability.

We do not decide, however, whether principles developed in worker compensation cases necessarily apply under circumstances such as those present here. We note that the sole objection made by Mervyn's to the introduction of the bills was foundational in nature, i.e., the medical bills could not be admitted without testimony that they were reasonable in amount and reasonably necessary. Mervyn's did not object that, absent such testimony, the jury lacked substantial evidence from which to fix the damages incurred by Mervyn's alleged breach of the contract. Under the circumstances, we believe the trial court properly took judicial notice of the testimony in the previous trial and, absent presentation of evidence by Mervyn's disputing the reasonableness and necessity of the bills, properly admitted those bills into evidence.

Court's refusal to award plaintiff's requested witness fees was not error. Romero argues the trial court abused its discretion in refusing to award witness fees arising from the testimony of Romero's physician in the first trial, and in fixing too low the amount to be paid the medical records keepers who testified at the second trial. We disagree.

Romero's physician testified only at the first trial, and Romero chose for economic reasons to forego his testimony at the second trial. The first trial ended in a verdict in favor of Mervyn's on the negligence claim, and Romero's physician's testimony was introduced as part of her evidence of damages as to that claim. *See* SCRA 1986, 1-054(E) (costs shall be awarded to prevailing party as a matter of course unless court otherwise directs). Under these circumstances, the trial court did not err in the second trial in refusing to award the cost of testimony in the losing effort at the first trial. *Cf. Mills v. Southwest Builders, Inc.* 70 N.M. 407, 374 P.2d 289 (1962) (when first trial ended as mistrial

and second trial resulted in verdict for plaintiff on the same issues, court did not err in awarding costs arising from first trial).

The trial court fixed the amount of the witness fees for the record keepers in accordance with the statute and regulations applicable at the time they testified. We find no merit in Romero's argument that we should give retroactive effect to subsequent changes in the law, or that we should fix the amount of witness fees in accordance with the law applicable at a time the claim first was filed rather than at the time of their testimony.

For the foregoing reasons, the judgment of the trial court is affirmed in its entirety.

IT IS SO ORDERED.

SOSA, C.J., and BACA, J., concur.

784 P.2d 1003

FARMERS INSURANCE COMPANY, Plaintiff–Appellant,

v.

Donald BURTON, Defendant–Appellee.

No. 18279.

Supreme Court of New Mexico.

Jan. 4, 1990.

Civerolo, Hansen & Wolf, William P. Gralow, Albuquerque, for plaintiff-appellant.

Thomas Overstreet, Alamogordo, for defendant-appellee.

OPINION

SOSA, Chief Justice.

We are asked to interpret a homeowner's insurance policy issued by Plaintiff–Appellant, Farmers Insurance Company of Arizona (Farmers), to Defendant–Appellee, Donald L. Burton (Burton). Both parties moved for summary judgment, and Burton was successful. The issue at the hearing on the motions for summary judgment is the same before us on appeal: Did Burton's policy cover an accident to a third party that occurred at a different home owned by Burton than the one listed in the policy?

The policy unquestionably covered Burton's home located at 1301 16th Street ("Premises A") in Alamogordo, but the accident occurred at another home he owned,

located at 509 16th Street ("Premises B"). In his deposition, Burton testified that he had rented Premises B to others "from 1978 through 1986." In his affidavit submitted for the motion, Burton testified:

> No later than April 1, 1986 [he] decided to move from [his present residence] and use [Premises B] as his residence * * * [and that] he began the necessary repairs and maintenance to [Premises B] to occupy that as his personal residence. At all times during the period of April 1, 1986 to May 1, 1986 and thereafter [he] considered [Premises B] no longer rental property, but was to be used as his personal residence.

The accident on Premises B occurred in May, 1986, and Burton actually occupied Premises B in July 1986. When the accident occurred at Premises B, no one was living on the premises.

Farmers contends that the following exclusion in the policy mandates reversal of the summary judgment. The exclusion provides the policy does not cover bodily injury "Arising out of a premises owned by or rented to an **insured** which is not at an **insured location.**" (Emphasis in original.)

As for "insured location," the policy reads:

> **Insured location** means:
>
> a. the residence premises.
>
> b. any other premises acquired by you during the policy period for your use as a residence.

(Emphasis in original.)

Burton argues that the language of the policy contemplates the possibility of an insured's change in residence, and argues further that Burton in effect did change his residence from Premises A to Premises B before the accident. Burton also contends that the words, "any other premises *acquired* by you during the policy period for your use as a residence" does not mean that Burton had to *purchase* a new residence. Instead, Burton argues that his moving from Premises A to Premises B meets the requirement of "acquiring" another residence within the definition of the policy.

We agree with Burton's position that it was not necessary for him actually to have moved into the premises in order to hold it for use as his residence. Since he admittedly did not move into the property until July (after the accident), there may have been a fact issue before the trial court as to whether or not he converted this property to personal-residence use between the date the last tenant moved out (February) and the date the accident occurred (May). We have quoted from Burton's affidavit that he decided to use Premises B as his residence not later than April 1. In addition, although he had listed the property for rent at the Air Force base housing office when the previous tenant moved out in February, he testified in his deposition that he had removed it from the base housing list on April 1. These statements, under oath, were sufficient to meet Burton's burden on summary judgment to establish the absence of a genuine issue of fact as to when he began using Premises B as his residence. At that point the burden shifted to Farmers to come forward with some evidence to raise a genuine issue as to this fact. *See Goodman v. Brock*, 83 N.M. 789, 792, 498 P.2d 676, 679 (1972).

Our review of the record discloses no evidentiary facts adduced by Farmers sufficient to create any issue that Burton did not, as he testified, take steps as of April 1, 1986 looking toward his occupancy of Premises B. Therefore, we conclude that summary judgment properly was entered in his favor.

IT IS SO ORDERED.

RANSOM, BACA and MONTGOMERY, JJ., concur.

WILSON, J. (not participating).

[redacted]

[redacted]

784 P.2d 1006

STATE of New Mexico,
Plaintiff–Appellee,

v.

James NEWMAN, Defendant–Appellant.

No. 10848.

Court of Appeals of New Mexico.

Oct. 17, 1989.

Certiorari Denied Dec. 21, 1989.

Hal Stratton, Atty. Gen., William McEuen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Sheila Lewis, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

DONNELLY, Judge.

Defendant appeals his convictions of two counts of criminal sexual contact of a child under thirteen, contrary to NMSA 1978, Section 30-9-13(A)(1) (Repl.Pamp.1984). Five issues are raised on appeal: (1) whether the trial court erred in allowing the child's therapist to testify as an expert witness; (2) whether defendant received effective assistance of counsel; (3) claim of unauthorized contact between the trial judge's secretary and the jury; (4) whether there was sufficient evidence to support defendant's convictions; and (5) whether defendant was denied due process of law. An additional issue, asserting that the trial court erred in failing to declare a mistrial sua sponte, was not raised below, or addressed in the docketing statement or memorandum in opposition to summary affirmance and thus has not been properly preserved on appeal. *See State v. Aranda,* 94 N.M. 784, 617 P.2d 173 (Ct.App.1980) (where issue not raised in docketing statement, it may not be raised for the first time in brief in chief unless pursuant to recognized exceptions). *See also State v. Rael,* 100 N.M. 193, 668 P.2d 309 (Ct.App.1983).

Defendant's twelve-year-old daughter lived with him during the summer of 1985. At the end of the summer the child requested and was permitted to remain with her father in Albuquerque during the 1985-86 school year. In June 1986 the child went to live with her stepmother in El Paso, Texas, where, on October 13, 1986, she reported that defendant had sexually molested her during the summer of 1985. The child's stepmother after being told of defendant's actions, immediately took the child to see Jean Kiddney, a therapist experienced in counseling victims of sexual abuse with the El Paso Guidance Center. In December 1986 the child was interviewed in El Paso by a New Mexico police officer and gave a statement implicating defendant. The child told the officer that she had reported the incident to Frances Hubbard, her paternal grandmother, shortly after the occurrence and that she had also reported the occurrence to an Albuquerque schoolmate, D.W., in January 1986. Defendant was indicted by the grand jury on May 6, 1987, and following a jury trial was convicted of the charges which are appealed herein.

I. *Qualifications and Testimony of the State's Expert Witness.*

The state gave notice that it would call Jean Kiddney, a counselor and therapist at the El Paso Guidance Center, to testify at trial. Following the child's report to her stepmother of the alleged sexual abuse, Kiddney interviewed the child and provided psychological counseling.

Defendant moved to preclude the state from calling Kiddney as an expert witness, arguing that Kiddney was not qualified to testify as a counselor or child therapist. The court reserved ruling on the issue until it had an opportunity to hear the witness testify as to her credentials.

At trial defendant questioned the witness on voir dire concerning her qualifications as a child therapist. On voir dire Kiddney testified that she was not required to undergo any board examination or certification procedure to practice as a therapist in the state of Texas, held no certification in any state, and had never been qualified to testify in any court of any jurisdiction although she had testified at administrative hearings. Her academic credentials include a bachelor's degree in sociology and a master's degree in guidance and counseling, and she had worked one year as an investigator for the Texas Department of Human Services followed by approximately four years as a counselor and therapist in sexual abuse and other cases. Kiddney

administered no clinical or other tests to the child.

At the conclusion of voir dire, defendant renewed his objection to Kiddney's being allowed to offer opinions in the areas permitted by the court. Defendant argued that the witness was not qualified as an expert counselor, therapist, or psychologist and that the probative value, if any, of the witness's testimony was outweighed by its prejudicial effect. The trial court sustained defendant's motion in part, ruling that the witness would not be permitted to testify as to her belief concerning whether the child was truthful about the alleged sexual incident or whether the child's condition was caused by sexual abuse. However, the trial court held that the witness could state her opinion concerning whether the child's behavior was consistent with that of a sexually abused child. Defendant sought and was granted a continuing objection to any testimony by the witness describing her observations while treating the child, or whether these observations were consistent with the witness's experience, knowledge, and education concerning child abuse victims.

Defendant contends that Kiddney was not qualified by education or experience to testify concerning behavioral patterns of sexually abused children or that the child in question had exhibited behavior consistent with that of a sexually abused child. Defendant argues that the witness's testimony concerning the behavorial patterns of sexually abused children and whether the child's behavior was consistent with such patterns was tantamount to offering a medical diagnosis and that since the witness was not qualified as a psychologist or a psychiatrist, it was error to permit such testimony.

It is the responsibility of the trial court to determine whether a witness is qualified to testify as an expert. *State v. Garcia,* 76 N.M. 171, 413 P.2d 210 (1966); *State v. Chavez,* 100 N.M. 730, 676 P.2d 257 (Ct. App.1983). Absent a showing of abuse, the trial court's discretion will not be overturned on appeal. *Id.* The applicable rule is SCRA 1986, 11–702, which states,

> 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.

Under Rule 11–702, a prerequisite to permitting a witness to testify as an expert is a showing (1) that the proffered witness has sufficient qualifications to be considered an expert in some specialized knowledge and (2) that the specialized knowledge of the witness will assist the jury in determining a fact or issue in the case. *See* 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[02], at 702–18 to 702–20 (1988).

Testimony concerning the general characteristics of sexually abused children is not limited to testimony from a psychologist or psychiatrist. *See, e.g., Poyner v. State,* 288 Ark. 402, 705 S.W.2d 882 (1986) (expert with bachelor's in special education, master's in school psychology, and three-and-one-half years experience as a school counselor with twenty-five to fifty child abuse cases permitted to testify concerning child abuse in general); *Wheat v. State,* 527 A.2d 269 (Del.1987) (witness with master's degree in clinical work and experience as child abuse specialist for Congress and with experience in treating or counseling approximately seventy-five sexually abused children permitted to testify as expert in field of intrafamily sexual abuse). Under the record herein, Kiddney's training, education, and experience were sufficient to allow her to testify on the general characteristics observed in child abuse victims. Accordingly, the trial court did not abuse its discretion in accepting her as an expert in this area.

Defendant also argues that Kiddney's testimony was more prejudicial than probative and that it was used by the state to convince the jury of the truthfulness of the child. To support this contention, defendant relies primarily on cases in which the testimony under review concerned the behavioral patterns of post traumatic stress

disorder (PTSD) and rape trauma syndrome (RTS).[1] Although the terms RTS and PTSD were never used in the instant case, defendant claims that Kiddney's testimony was analogous to the expert testimony given in those cases, and he points out that New Mexico has previously upheld a trial court's preclusion of this type of testimony. *See State v. Bowman,* 104 N.M. 19, 715 P.2d 467 (Ct.App.1986) (no abuse of discretion in excluding PTSD and RTS testimony by psychologist where rape could not be identified as the specific stress factor causing the victim's symptoms).

Bowman does not, however, require that Kiddney's testimony be excluded. *Bowman* assumed, but did not decide, that PTSD or RTS testimony was admissible. In the instant case, the question before the court is not whether RTS and PTSD testimony was admissible but whether the testimony presented by Kiddney relating to the nature of the reaction of a child victim of sexual abuse was admissible. Kiddney's testimony described the child's on-going behavior, including aggression, problems with academic studies and relationships, and lengthy delay in reporting the incident, which she indicated were frequently exhibited by child victims of sexual molestation.

As observed in *State v. Moran,* 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986), "[d]eciding whether expert testimony will aid the jury and balancing the usefulness of expert testimony against the danger of unfair prejudice are generally fact-bound inquiries uniquely within the competence of the trial court." [Citations omitted.] In *People v. Bledsoe,* 36 Cal.3d 236, 247–48, 681 P.2d 291, 298, 203 Cal.Rptr. 450, 457 (1984), the court observed that expert testimony in child abuse cases plays a "useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths."

Under the record before us, we find no error in the admission of Kiddney's testimony. Here, the trial court determined that expert testimony on child sexual abuse was admissible to assist the jury in understanding the behavior of sexually abused children, a subject beyond the knowledge of an ordinary juror. We agree.

The courts in several jurisdictions have upheld the admissibility of expert testimony concerning the reaction of victims of child abuse. *See Sexton v. State,* 529 So.2d 1041 (Ala.Crim.App.1988) (clinical psychologist testified concerning generally accepted symptoms of a child sexual abuse victim including fear and anxiety, increased knowledge of sexual issues, delayed reporting); *People v. Payan,* 173 Cal.App.3d 27, 220 Cal.Rptr. 126 (1985) (physician's testimony on child sexual assault syndrome was proper, even on the truthfulness of the victims); *State v. Myers,* 359 N.W.2d 604 (Minn.1984) (evidence of typical child abuse behavior permissible despite previous holding that RTS evidence was inadmissible); *Townsend v. State,* 103 Nev. 113, 734 P.2d 705 (1987) (probative value of expert testimony that child under the age of fourteen had been sexually assaulted outweighed prospect of unfair prejudice); *State v. Middleton,* 294 Or. 427, 657 P.2d 1215 (1983) (permissible for qualified expert to give testimony on the reaction of the typical child victim of familial sexual abuse but not on whether the victim is telling the truth); *Compare State v. Moran* (allowing expert to explain seemingly strange behavior of child sexual abuse victims, but not permitting expert opinion that victim was in fact sexually abused); *State v. Myers,* 382 N.W.2d 91 (Iowa 1986) (expert testimony concerning the veracity of children about sexual abuse held inadmissible); *State v. Catsam,* 148 Vt. 366, 534 A.2d 184 (1987) (upholding admissibility of social worker's expert testimony regarding profile or syndrome evidence of child abuse victim, but not allowing opinion evidence that sufferers of the syndrome do not fabricate claims of sexual abuse).

1. PTSD and RTS describe recuperative stages through which trauma victims pass following the trauma, *see* Burgess & Holmstrom, *Rape Trauma Syndrome,* 131 Am.J.Psychiatry 918 (Sept. 1974); Fox & Scherl, *Crisis Intervention with Victims of Rape,* 17 Social Work 37 (Jan. 1972).

Testimony by a properly qualified expert is admissible if the evidence would assist the jury in its deliberations. *State v. Chavez.* The fact that relevant evidence may tend to prejudice the defendant is not in and of itself grounds for excluding it. *State v. Singleton,* 102 N.M. 66, 691 P.2d 67 (Ct.App.1984); SCRA 1986, 11–403. Admission or exclusion of evidence is discretionary with the trial court. *State v. Worley,* 100 N.M. 720, 676 P.2d 247 (1984). An abuse of discretion is found when the trial court's decision is contrary to logic and reason. *Davila v. Bodelson,* 103 N.M. 243, 704 P.2d 1119 (Ct.App.1985). We find no abuse of discretion in the trial court's determination that the probative value of Kiddney's testimony outweighed its capacity to prejudice the defendant.

Defendant further argues that Kiddney's unsolicited testimony as to the truthfulness of the child violated the court's order prohibiting such testimony and could not be cured by the court's admonition to the jury to disregard the comments. This argument is raised for the first time on appeal. The record shows that the comment was not solicited by the state and although an objection was made the third time Kiddney stated she believed the truthfulness of the child, defendant's attorney did not move for a mistrial and instead sought and was granted a cautionary instruction to the jury. Defense counsel stated:

> I would like an instruction at this point in time to the jury that it's up to them to decide whether [the child] is telling [the] truth or not, whether Ms. Kiddney believes that [the child] is telling [the] truth.

The trial court admonished the jury to disregard the witness's testimony regarding her belief as to the truthfulness of the child's statements concerning the alleged sexual abuses by her father. Thus, under the facts before us defendant cannot complain that he was not accorded the relief he specifically sought. Generally, a prompt admonition from the court to the jury to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which might otherwise result. *State v. Gardner,* 103 N.M. 320, 706 P.2d 862 (Ct.App.1985). Absent a showing of plain or jurisdictional error, a reviewing court will not reverse a trial court on a ground that the trial court was not asked to consider nor had the opportunity to rule upon. *State v. Casteneda,* 97 N.M. 670, 642 P.2d 1129 (Ct.App.1982). Moreover, the decision of whether to grant a mistrial rests within the sound discretion of the trial court. *State v. Gardner.* A reviewing court will generally refuse to reverse a trial judge for failing to grant a mistrial sua sponte. Whether a defendant wishes a mistrial, as opposed to only a curative instruction, is a tactical matter. Defense counsel may well have thought that Kiddney's testimony had little impact on the jury and may have thought that the jury seemed sympathetic to defendant or that particular testimony was helpful to the defendant. The United States Supreme Court has recognized that the defendant has a right, absent a showing of manifest necessity, to have the trial go on to its conclusion. *See Arizona v. Washington,* 434 U.S. 497, 503–04, 98 S.Ct. 824, 829, 54 L.Ed.2d 717 (1978); *see also State v. DeBaca,* 88 N.M. 454, 541 P.2d 634 (Ct.App. 1975). Therefore, when a mistrial is declared over the defendant's objection, the defendant cannot be retried unless the mistrial was "manifestly necessary." *State v. DeBaca.*

II. *Ineffective Assistance of Counsel.*

Defendant asserts that he was deprived of due process of law because his counsel rendered ineffective assistance of counsel and fell below the standard required of defense counsel. Specifically, defendant contends he demonstrated ineffective assistance of counsel by his attorney's failure to seek a mistrial based on the testimony of Kiddney and the witness's failure to follow the ruling of the court that she should not testify concerning whether she believed the child was truthful about the alleged sexual incident. Defendant concedes that a prompt admonition generally cures the claimed error, *see State v. Vialpando,* 93 N.M. 289, 599 P.2d 1086 (Ct.App.1979), but

argues that here the court's admonishment did not remove the prejudice from the jurors' minds, *see State v. Rowell,* 77 N.M. 124, 419 P.2d 966 (1966) (witness's prejudicial testimony improper and not cured by admonitions to jury). Defendant argues that a reasonably competent defense attorney would have moved for a mistrial and points out that the case was closely contested and that Kiddney's improper testimony could easily have tipped the balance.

The state, however, contends that defense counsel's decision not to move for mistrial was a matter of trial tactics. In reviewing claims of ineffective assistance of counsel, the appellate court will not attempt to second guess tactics and strategy of trial counsel. *State v. Dean,* 105 N.M. 5, 727 P.2d 944 (Ct.App.1986).

The standard for ineffective assistance of counsel is whether defense counsel exercised the skill, judgment and diligence of a reasonably competent attorney. *State v. Orona,* 97 N.M. 232, 638 P.2d 1077 (1982); *State v. Talley,* 103 N.M. 33, 702 P.2d 353 (Ct.App.1985). Defendant bears the burden of showing both the incompetence of his attorney and proof of prejudice, and absent such a showing by defendant, counsel is presumed competent. *State v. Dean.* We do not believe that the trial counsel's failure to move for a mistrial rises to the level necessary to satisfy defendant's burden of showing both incompetence and prejudice. Instead, trial counsel elected to request an admonishment instruction. We have examined the full record and find that defendant's trial counsel vigorously acted on defendant's behalf. In order to establish a claim of ineffective assistance of counsel, defendant's trial must be shown to have been unreliable and as a result, the fact finder must have reached an unjust result. *State v. Duran,* 105 N.M. 231, 731 P.2d 374 (Ct.App.1986). Under the record before us, we find defendant's claim of ineffective assistance of counsel unpersuasive.

III. *Other Issues.*

Defendant also raises three other issues pursuant to *State v. Franklin,* 78 N.M. 127, 428 P.2d 982 (1967), and *State v. Boyer,* 103 N.M. 655, 712 P.2d 1 (Ct.App.1985). Defendant argues that unauthorized contact occurred between the judge's secretary and the jury during their deliberations, requiring a reversal of his convictions. Defendant fails to indicate where this issue was preserved below and provides no factual explanation or record citation, argument or authority. We determine this issue is without merit. *See State v. Casteneda* (issues raised on appeal are deemed to be abandoned where appellant fails to cite authority or present argument).

Defendant also asserts that there was insufficient evidence to support each of his convictions. We have reviewed the evidence and testimony presented at trial and find the record contains substantial evidence on which the jury could find defendant guilty of the charges against him. On appeal a reviewing court views the evidence in the light most favorable to the verdict and resolves all conflicts in the evidence in favor of the verdict of the jury. *State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984). As shown by the record defendant's daughter who was fourteen years old at the time of trial, testified concerning the incident giving rise to the charges. Her testimony directly supports the findings of the jury.

Defendant's final point on appeal contends that he was denied due process by delay in obtaining funds to hire an expert witness. Defendant did not raise this issue at trial and fails to accompany this claim with any argument or authority or to indicate how the delay in fact prejudiced his case. We find this claim without merit.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

APODACA, J., concurs.

HARTZ, J., specially concurs.

HARTZ, Judge (specially concurring).

I concur in the opinion of the court. In particular, I agree that Ms. Kiddney had sufficient experience to testify as an expert

concerning whether the child's conduct was consistent with that observed in victims of sexual abuse. I write separately, however, to emphasize that the opinion does not purport to decide a challenging evidentiary issue that will probably arise in other prosecutions for sexual abuse of children. The issue concerns the relevance of some of Ms. Kiddney's testimony and the propriety of some of the prosecutor's comments on that testimony. Because defense counsel failed to raise a sufficiently specific objection (perhaps for tactical reasons), the state had no opportunity to attempt to explain or remedy the possible defect. Therefore, we need not rule on this evidentiary question. Nevertheless, the topic merits discussion to prevent a misreading of our decision in this case.

To clarify the issue in question, it helps to understand in what way Ms. Kiddney's testimony was certainly relevant. In the opening statement for defendant, counsel contended that among the reasons the jury should doubt the child's testimony were her failure to report the alleged abuse to anyone in authority for fifteen months, her expression of a desire to return to her father in Albuquerque one month after the alleged abuse, and her having given different versions of the abuse story. Ms. Kiddney's experience with child victims of sexual abuse would qualify her to testify that such behavior, which would appear to most lay persons as being inconsistent with the child's having been a victim of sexual abuse, is common among such victims. Such "explanatory" testimony is appropriate. As Justice Roberts explained in her concurrence in *State v. Middleton,* 294 Or. 427, 440–41, 657 P.2d 1215, 1222 (1983):

> While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to the trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. As the expert's testimony demonstrates the routine indicia of witness reliability—consistency, willingness to aid the prosecution, straightforward rendition of the facts—may, for good reason, be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.
>
> Because the experts in this case have demonstrated that significant numbers of sexually abused children respond to the assault with the same patterns of "superficially bizarre behavior," * * * the testimony was properly admitted. [Footnote omitted.]

Accord State v. Moran, 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986).

The state, however, may have had additional purposes for offering Ms. Kiddney's testimony—purposes that are, at the least, not clearly proper. Portions of the prosecutor's examination of Ms. Kiddney and of his final argument suggest that the state wished the jury to conclude from the expert's testimony that the child was a victim of sexual abuse because she fit the profile of such victims. In other words, the state wanted the jury, on the basis of Ms. Kiddney's testimony, to "diagnose" the child as a victim of sexual abuse. The question thus arises as to whether Ms. Kiddney's testimony was admissible for that purpose. If it was not, then her testimony would be inadmissible, except for those portions that were relevant for another purpose (such as the explanatory purpose discussed above).

Central to the analysis is the failure of Ms. Kiddney herself (or any other expert witness) to make the diagnosis. Perhaps, as the trial judge apparently concluded, she was not qualified by education, training, and experience to express a view that someone exhibiting the behavior of the child was probably a victim of sexual abuse. (This case does not present the question of whether such testimony—even by a highly trained expert—is inadmissible. *See State v. Moran* (similar testimony held inadmissible).) Rather than making a diagnosis, Ms. Kiddney testified that the behavior of the child was "consistent" with that of a victim of sexual abuse. The jury was then left to infer that the child was in fact a victim of sexual abuse.

In my view, the jury should not be permitted to draw that inference from such

testimony by Ms. Kiddney. The inference requires support from expert testimony actually making the "diagnosis" on the basis of the child's behavior. In other contexts testimony that certain symptoms are consistent with a particular diagnosis is not, standing alone, admissible to prove the diagnosis. For example, an "expert witness" might testify that having acute appendicitis is consistent with having a temperature of 99.0 degrees Fahrenheit, dandruff, and a sore wrist. Yet a special verdict that the individual had acute appendicitis could not stand if the above testimony were all the evidence with respect to the diagnosis of acute appendicitis. For a jury to rationally diagnose a condition on the basis of testimony that certain symptoms are consistent with the condition, the jury also needs expert testimony regarding how probable the condition would be if those symptoms were present. Thus, courts ordinarily do not permit juries to draw a conclusion regarding medical diagnosis or medical causation without expert testimony directly supporting the conclusion. Indeed, it is generally required that the expert medical witness testify to his or her conclusion to a "reasonable medical probability," or words of similar import. *See Poertner v. Swearingen,* 695 F.2d 435 (10th Cir.1982); *Zerr v. Trenkle,* 454 F.2d 1103 (10th Cir.1972). Similarly, I think it is questionable whether a jury should be permitted to make a "diagnosis" that a child is a "sexually-abused child" on the basis of expert testimony that goes no further than to say that the child's behavior was "consistent" with that of a sexually-abused child.

I recognize that there is a difference between medical diagnosis of appendicitis in a suit for, say, medical malpractice and "diagnosis" of a child as being sexually abused in a criminal prosecution for sexual abuse. Most importantly, in a prosecution for sexual abuse there would usually be direct testimony by the victim of such abuse. The verdict would therefore be supported by more than just the diagnosis of the child as a sexually-abused child. One might conclude that evidence that a child's behavior is consistent with being a sexually-abused child is relevant because it has a tendency to make the fact that the child was sexually abused by the defendant "more probable * * * than it would be without the evidence." SCRA 1986, 11–401. On the other hand, in the absence of expert testimony concerning how probative the "consistent behavior" is as to whether the child was in fact a victim of sexual abuse, the trial judge might well exclude the portion of the consistent-behavior testimony that was not admissible for "explanatory" purposes. Under SCRA 1986, Rule 11–403, relevant evidence may be excluded because of the "danger of unfair prejudice, confusion of the issues or misleading the jury." SCRA 1986, Rule 11–702 excludes expert testimony if it would not "assist the trier of fact to understand the evidence or to determine a fact in issue."

In summary, it was within the district court's discretion to find that Ms. Kiddney was qualified to testify that the child's behavior was consistent with that of victims of child sexual abuse. Also, such testimony, or at least some of it, was relevant as "explanatory" testimony to rebut defendant's contention that the child's behavior suggested that she had fabricated her accusation. On the other hand, some of the testimony—and some of the prosecution argument based on that testimony—apparently was intended solely to persuade the jury to "diagnose" the child as a victim of sexual abuse. If specific objection had been made to such testimony and argument, failure to sustain the objection might have been, on the record before us, an abuse of discretion. Because there was no objection, however, the state had no opportunity to cure any defect or to present evidence or argument supporting its actions. Moreover, defense counsel's failure to pose a specific objection may have been tactical. Defendant's brief-in-chief recites testimony that for a period of time after the alleged sexual abuse the child appeared very happy and well adjusted, made good grades, and was involved in school activities. Insofar as Ms. Kiddney's testimony could support a conclusion that such behavior was inconsistent with that of a victim of child sexual abuse, defendant may have

believed that Ms. Kiddney's testimony on those matters could be helpful. Defense counsel's objection to Ms. Kiddney's testimony may have been intentionally imprecise, because a more precise objection might have strengthened the argument for the admissibility of the testimony most damaging to defendant (the explanatory testimony) while leading to exclusion of evidence arguably helpful to defendant (the diagnosis testimony). Given these realistic possibilities, it would be inappropriate to reverse when no precise objection was made. *See* 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 103[07] (1988). *Cf. Moore v. United States,* 399 F.2d 318 (5th Cir.1968), *cert. denied,* 393 U.S. 1098, 89 S.Ct. 893, 21 L.Ed.2d 789 (1969) (explicit waiver of objection by trial counsel for tactical reasons).

See also, 107 N.M. 56, 752 P.2d 248.

784 P.2d 1014

Joseph SCHLEFT, Individually and William A. Schleft and Connie Schleft, Individually and as parents and next friends of Joseph Schleft, Plaintiffs–Appellants,

v.

The BOARD OF EDUCATION OF the LOS ALAMOS PUBLIC SCHOOLS, Defendant–Appellee.

No. 10170.

Court of Appeals of New Mexico.

Oct. 19, 1989.

Certiorari Denied Dec. 5, 1989.

Steven L. Tucker, John Wentworth, Jones, Snead, Wertheim, Rodriguez &

Wentworth, P.A., Santa Fe, for plaintiffs-appellants.

John B. Pound, James C. Murphy, Montgomery & Andrews, P.A., Albuquerque, for defendant-appellee.

OPINION

APODACA, Judge.

Plaintiffs Joseph Schleft (Joseph) and William A. and Connie Schleft, Joseph's parents, appeal the trial court's judgment entered in favor of defendant Board of Education of Los Alamos (the Board). After a bench trial, the trial court held the Board was immune from suit, that such immunity was not waived by the New Mexico Tort Claims Act, NMSA 1978, Sections 41-4-1 to -29 (Repl.1986 and Cum.Supp. 1988) (the Act), and that the Board had no duty to inspect or maintain the electrical facility causing Joseph's injuries or to warn against any inherent dangers. We disagree with the trial court and conclude that: (1) immunity was waived under the Act; and (2) the Board had a duty to plaintiffs, as a matter of law. We thus reverse and remand for the entry of findings and conclusions on the issue of negligence. As a sub-issue of issue 2, plaintiffs also contend that the trial court erred in concluding a certain deed was ambiguous and permitting the introduction of parol evidence to prove the parties' intent. On this issue, we hold the deed was ambiguous and that the trial court was correct in allowing parol evidence.

FACTS:

Joseph, who was fifteen years of age at the time of the accident, was injured on the grounds of Mountain Elementary School in Los Alamos. The youth, along with a friend, entered the school grounds during the summer, when school was not in session. A transformer platform was located on the grounds, positioned horizontally and supported approximately twenty feet in the air by two "telephone poles." Three transformers were located on the platform, with at least six bare, uninsulated copper wires five feet above the floor of the platform. The platform, the supporting poles and the transformers, referred to at trial as "the H-frame," are referred to collectively in this opinion as the facility.

Joseph and his friend climbed onto the platform. Having noticed they were standing on loose boards, they decided to climb down. The friend descended from the platform, but before Joseph could do so, his forehead came in contact with one of the uninsulated copper wires. He received an electrical shock of 7,620 volts and fell off the platform, unconscious and not breathing. The youth was revived by CPR administered by a bystander. As a result of the accident, Joseph sustained permanent brain damage, speech impairment, spastic motor impairment and fourth degree burns to the bone marrow in his forehead. He will never walk or speak normally.

BACKGROUND OF PROCEEDINGS:

Joseph and his parents brought suit against the Board, which owned the school property on which the facility was located, and against the County of Los Alamos (the County), which owned and maintained the facility. Before trial, plaintiffs settled their dispute with the County.

Plaintiffs contend the Board was liable under Section 41-4-6. That section waives immunity for negligence caused by a public entity's employees "while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings." We shall refer to that language in this opinion as the "building exception." Relying on *Castillo v. County of Santa Fe,* 107 N.M. 204, 755 P.2d 48 (1988), a case decided by our supreme court after the trial court in this appeal entered judgment in the Board's favor, plaintiffs argue that waiver of immunity under the Act encompasses a dangerous condition on the premises. Specifically, plaintiffs claim the "building exception" language is not strictly limited to the actual words used, but includes the surrounding premises on which a public building is located. The trial court, having found that the County owned the facility, concluded on that basis that immunity of the Board was not waived under the Act. Similarly, the trial court also based its hold-

ing that the Board owed no duty to plaintiffs on the County's ownership.

Plaintiffs also argue that a 1966 deed conveying the school property from the United States to the Board also conveyed the secondary electrical system, giving rise to a duty in the Board for the operation and maintenance of that system. Plaintiffs finally contend the Board was negligent in not fencing the facility to prevent persons from climbing on the platform. The trial court held the deed was ambiguous and thus admitted parol evidence. It concluded that the deed showed ownership of the facility in the County rather than in the Board.

Ordinarily, it would be proper to determine initially whether there existed a duty of care on the part of the Board, before deciding whether there was a waiver of immunity under the "building exception" of the Act. However, because we believe that *Castillo* is dispositive of the waiver issue, we shall discuss that issue first. Both issues are somewhat interrelated, but we shall discuss them separately nonetheless.

WAIVER OF IMMUNITY:

In determining the interpretation to be given to the "building exception" language, we must bear in mind the principle stated by our supreme court in *Miller v. New Mexico Department of Transportation,* 106 N.M. 253, 741 P.2d 1374 (1987), that the words used in a statutory waiver provision must first be interpreted in light of the intended purpose of the provision. Additionally, *Castillo* held that the Act contemplated waiver of immunity where, due to the alleged negligence of public employees, an injury arose from an unsafe, dangerous or defective condition on property owned and operated by the government.

> A plain reading of Section 41-4-6 convinces us that the legislature intended to ensure the safety of the general public by imposing upon public employees a duty to exercise reasonable care in maintaining premises owned and operated by governmental entities. By the legislature's inclusion of both buildings and parks within the waiver provision, we discern no intent to exclude from that waiver liability for injuries arising from defective or dangerous conditions on the property surrounding a public building.

Id. 107 N.M. at 206, 755 P.2d at 50.

Castillo thus held that the common grounds surrounding a county housing project fell within the "building exception" language. "[T]here is a nexus between the defendant's obligation to maintain the common premises ... in a safe condition and the intent behind the waiver of immunity under Section 41-4-6." *Id.* at 206, 755 P.2d at 50, n. 1. We see no reason to distinguish between the premises area in *Castillo* and the grounds surrounding a public school. We believe it was not the legislature's intent that waiver of immunity stop at the schoolhouse door. We hold, therefore, that waiver of immunity under Section 41-4-6 applies to maintenance of the school grounds as well as to the school building itself.

Relying on ownership and control of the facility itself, which was installed within an easement located on the school grounds, the Board attempts to distinguish *Castillo* and cases from other jurisdictions that determined existence of a duty on the part of a landowner or occupier of land. Similarly, the Board distinguishes *Weiss v. United States,* 787 F.2d 518 (10th Cir.1986), on which plaintiffs rely. Specifically, the Board argues that in those cases the landowner had actual control of the land on which the injuries occurred. It contends further that under the facts of this appeal, the Board did not have any control or right to maintain the facility or easement. As a basis for this argument, the Board refers us to the trial court's findings, which it claims provided "not merely substantial evidence, but overwhelming evidence [supporting] the trial court's conclusion that the County * * * exercised exclusive control of the [facility]." The Board then concludes that, because plaintiffs failed to attack those specific findings on appeal, they have waived the right to challenge them. We determine, however, that the existence of such findings, and plaintiffs' alleged failure to challenge them, are factors not relevant to the issue before us. We have arrived at

this determination based on our discussion below of the issue of the Board's duty. We note that in their brief-in-chief, plaintiffs challenged the findings as not supported by *admissible* evidence. We understand plaintiffs' argument as a contention that extrinsic or parol evidence was not admissible and, therefore, the trial court's findings must fail because they were based solely on the inadmissible parol evidence. We shall address the propriety of the parol evidence admission later in this opinion.

EXISTENCE OF DUTY:

The term "maintenance" involves more than simply performing repairs; it includes keeping an area in a safe condition. *See Fireman's Fund Ins. Co. v. Tucker,* 95 N.M. 56, 618 P.2d 894 (Ct.App. 1980). *See also Miller v. New Mexico Dep't of Transp.* 106 N.M. at 254–55, 741 P.2d at 1375–76. ("We decline to hold that 'maintenance' of a highway must be limited only to physical care and upkeep; the obvious purpose for imposing the duty on public employees of maintaining highways safely and in a non-negligent manner reflects the legislature's intent that highway be so maintained as to provide for the safety of the traveling public.") We thus conclude that maintenance of the school yard in this instance involved keeping the yard in a safe condition.

The Board emphasizes that Joseph was not a student of Mountain Elementary School and that the school term was not even in session when he sustained his injuries. Implicit in this factual rendition of the Board is an underlying contention that those facts somehow negate any duty of care the Board might otherwise have owed to Joseph. This argument, however, ignores the existence of a duty under *Castillo* and also runs counter to cases from other jurisdictions noted below that recognize such a duty. We do not narrowly view the holding in *Castillo* as applying only to injured persons who are not trespassers. Instead, we consider these facts (that Joseph was not a student of Mountain Elementary School and that the school term was not in session) as factors for the trier of fact to weigh in determining the question of foreseeability specifically and liability generally.

In this connection, plaintiffs argue in their brief-in-chief that New Mexico recognizes a duty of care owed by a landowner to trespassing children under what is universally recognized as the Attractive Nuisance Doctrine. *See* SCRA 1986, 13–1312. *See generally Latimer v. City of Clovis,* 83 N.M. 610, 495 P.2d 788 (Ct.App.1972); *Restatement (Second) of Torts* § 339 (1965). Although our supreme court adopted a former version of Section 339 in earlier decisions, *see, e.g., Klaus v. Eden,* 70 N.M. 371, 374 P.2d 129 (1962), the present section, which differs from its predecessor, has not been addressed in this state. Because of our disposition of this appeal, we need not consider plaintiffs' contention that the Attractive Nuisance Doctrine is applicable.

The Board argues, nonetheless, that its duty did not extend to protecting against a danger not located *on the land* it controlled and that, because the facility was located on an easement over which it had no control, this exempted the Board from any duty to protect against any danger caused by the facility. We are not persuaded by this argument, which we believe relies on unwarranted distinctions. Other jurisdictions have recognized a duty of care on the part of a landowner where a plaintiff's injuries occurred on property adjacent to or abutting the landowner's property. *See, e.g., Herdt v. Koenig,* 137 Mo.App. 589, 119 S.W. 56 (1909); *Limberhand v. Big Ditch Co.,* 218 Mont. 132, 706 P.2d 491 (1985); *Piedalue v. Clinton Elementary School Dist. No. 32,* 214 Mont. 99, 692 P.2d 20 (1984); *Lukasiewicz v. City of Buffalo,* 55 A.D.2d 848, 390 N.Y.S.2d 341 (1976); *Rockefeller v. Standard Oil Co.,* 11 Wash. App. 520, 523 P.2d 1207 (1974).

Recently, this court declined to extend this duty in an appeal where the injury occurred at a considerable distance from the landowner's property. *See Calkins v. Cox Estates,* N.M., No. 9886 (Ct.App.1988), *cert. granted* February 7, 1989. In *Calkins,* we were urged by plaintiff to hold that a landlord had a duty, as a matter of

law, to maintain and repair a fence around the landlord's property to prevent children of tenants from crossing into what plaintiff claimed was adjoining property, on which an alleged dangerous condition existed. We rejected plaintiff's argument in *Calkins* and held there was not duty, as a matter of law, to protect against a dangerous condition existing some 945 feet from the fence. We held essentially that it was not a landowner's duty to fence out all conceivable dangers existing outside the premises. In this appeal, however, we have before us an entirely different factual pattern compelling us to a different result. Here, the easement on which the facility was installed was actually located on the Board's premises, not across the property line or at some great distance.

Existence of the easement did not relieve the Board of a duty owed to Joseph. Neither did its existence affect the Board's right of possession or control over its own land, as long as the Board did not interfere with the easement. *See, e.g., Dyer v. Compere,* 41 N.M. 716, 73 P.2d 1356 (1937) (rights of one holding an easement). The landowner may make any reasonable use desired of the land on which the easement exists. *Id.* This could include installation of a fence or other barrier, as well as warning against the danger. We will not hesitate to recognize liability or fault when injuries are caused by a dangerous condition installed on an easement that in turn is located *on* the landowner's property, not *outside* of it.

Our holding is supported by decisions in other jurisdictions. In *Weiss,* plaintiff was injured in a helicopter accident when his helicopter struck an aerial tramway cable located approximately 150 feet above the ground. The cable was part of an abandoned mining operation. One end of the cable was connected to a tower located on federal land. The United States government did not erect the cable or the support towers, nor did it own, maintain or use the cable before the accident. Plaintiff sued the government, alleging negligence in its failure to remove the cable or to warn of its existence. The trial court granted summary judgment to the government on the basis that it did not own or control the dangerous instrumentality and thus had no duty to plaintiff. The Tenth Circuit, applying Colorado law, reversed the trial court, quoting from *Mile High Fence Co. v. Radovich,* 175 Colo. 537, 547, 489 P.2d 308, 314 (1971):

> [T]he basic theme running through the *Restatement* [*(Second) of Torts*] is that the possessor of land is liable to a person whether *licensee* or *invitee* or even *trespasser* for his negligence if (1) he knows of the condition, (2) knows that it involves an unreasonable risk of harm to a person, and (3) fails to take reasonable precaution to correct it. Whatever qualifications or modifications there are to the several rules in the *Restatement,* they bear on the reasonable man standard[.] [Emphasis in original.]

Similarly, in *Sutton v. Monongahela Power Co.,* 151 W.Va. 961, 158 S.E.2d 98 (1967), a ten-year-old boy was electrocuted when he was playing on a pile of sawdust near a sawmill. He came in contact with a 2,400–volt electrical transmission line owned by a local power company. The sawdust pile, thirty feet high, was on land owned by the owner of the sawmill. The power company owned an easement for its transmission line.

Holding that both the power company and the landowner had duties of care in connection with the dangerous instrumentality, the court in *Sutton* stated:

> The mere presence of a thirty foot sawdust pile by itself is not a dangerous instrumentality. There is no question but that a power line carrying 2400 volts of electricity is a dangerous instrumentality. The presence of both the sawdust pile and the leaning power line in close proximity to each other constitutes a dangerous instrumentality. [Citations omitted.]

Id. at 971, 158 S.E.2d at 104.

ADMISSION OF PAROL EVIDENCE:

Both parties have included considerable argument in their respective briefs addressing the question of ownership of the facility generally and, particularly, owner-

ship of what the parties have termed the *primary* and *secondary* electrical systems. We view these respective arguments as intended by the parties to bear on the existence of the Board's duty of care. This court, however, believes that determination of such ownership is not necessary to our decision on the existence of such a duty.

We nevertheless recognize that ownership of various parts of the facility may be important on remand of this appeal, in connection with the question of comparative negligence, assuming there is a finding by the trier of fact that the duty was breached. For example, ownership or non-ownership of the "secondary electrical system" by the Board may assist the trier of fact in setting the boundaries of the respective faults, if any, when comparing negligence. For this reason, we feel compelled to address the question of whether there was ambiguity in the 1966 deed conveying the school property from the United States to the Board and the trial court's holding that parol evidence was admissible in determining: (1) the meaning of various terms used in the deed; and (2) the intent of the parties.

Plaintiffs argue on appeal that, "because the * * * deed clearly and unambiguously conveyed to the * * * Board everything at the school but the primary electrical system, the easement to the primary and the meter, extrinsic evidence should not have been admitted to vary and contradict the terms of the deed[.]" In determining whether the trial court erred in holding the deed was ambiguous, we must examine some of the important language in the deed to ascertain what, if anything, was clearly and unambiguously conveyed. First, at page four, the property for the Mountain Elementary School is described as follows:

> *Parcel No. 10* (Mountain Elementary School)
>
> TRACT: D
>
> SUBDIVISION PLAT: North Community No. 1
>
> FILED FOR RECORD: Plat Book 1, Page 64, Document No. 4743
>
> DATE OF FILING: September 10, 1965
>
> SUBJECT TO THE FOLLOWING EASEMENT:
>
> *For primary electrical system:* A strip of land located within that portion of Tract D lying easterly of a line lying parallel to and 20.0 feet westerly from the easterly line of Tract D (the westerly line of Diamond Drive).

We shall refer to this description as the easement provision. At the bottom of page four and in the middle of page five, the following pertinent language is found:

> EXCEPTING AND RESERVING UNTO THE GRANTOR, ITS SUCCESSORS AND ASSIGNS WITHIN EACH PARCEL OF THE AFORESAID REAL ESTATE:
>
> * * * * * *
>
> 2. All water, gas, sewer, *electrical,* and telephone, *main* or *primary systems,* and all *meters* installed in connection with the furnishing of such utilities services.
>
> * * * * * *
>
> 4. All easements shown on or referred to in the description of each parcel of the aforesaid real estate, *including necessary access and egress,* for the purpose of constructing, reconstructing, operating, maintaining, relocating and removing, within and subject to existing easements or rights of use, any of the *fixtures, utilities systems, lines* and *appurtenances* referred to above. [Emphasis added.]

When a deed or other written instrument is clear and unambiguous, extrinsic evidence will not be admitted or considered to alter or vary the terms used in the instrument. *Northrip v. Conner,* 107 N.M. 139, 754 P.2d 516 (1988). Whether ambiguity exists is a question of law. *Levenson v. Mobley,* 106 N.M. 399, 744 P.2d 174 (1987). In determining whether parol evidence will be admitted, the standard applied is that such evidence is permitted "if [the instrument] is reasonably and fairly susceptible of different constructions." *Id.* at 401, 744 P.2d at 176.

Those provisions of the deed noted above contain various technical terms, for exam-

ple, "primary electrical system," "main or primary systems," and "meters." It is generally recognized that parol evidence is permitted to explain technical terms; such evidence is admissible to define or explain the meaning of technical words or phrases applicable to a particular industry or trade. *Sierra Life Ins. Co. v. First Nat'l Life Ins. Co.,* 85 N.M. 409, 512 P.2d 1245 (1973). Plaintiffs so concede.

At oral argument, plaintiffs relied on the fact that the easement language, which referred to a specific plat introduced in evidence, clearly described a rectangular tract whose boundaries were delineated in the plat. The facility was located on this tract. Plaintiffs also emphasized the tract shown on the plat did not extend to include the underground "secondary electrical" line that originated at the top of the facility and continued downward through a conduit alongside one of the poles and then underground to the meters located in the school building. We understand plaintiffs' argument to be that, if the deed was intended to convey the secondary electrical system to the Board, the easement language would have necessarily included an extended tract to encompass the underground line terminating at the meters. Failure of the parties to have extended this tract, plaintiffs' argument continued, clearly indicated that the United States reserved only the primary electrical system, thus conveying the secondary system to the Board.

If the pertinent language used in the deed had been confined to the easement language, and nothing further had been stated, we might agree that plaintiffs' argument had some validity. Such was not the case, however, since the reservation provisions followed at page five of the deed. The various provisions are to be read together and we should not isolate any particular term or provision in determining its meaning, without reading all the provisions as a whole. It is especially revealing, for example, that although the deed clearly reserved ownership of the meters in the United States, an easement permitting access to such meters was neither shown on the plat nor described in the deed. The plain fact is, we believe, that even a cursory review of the deed's relevant language reveals that the instrument was poorly drafted, at best. It is precisely this poor draftmanship, in our view, that created the ambiguous document the trial court found to exist. Viewed in this light, we hold that, as a matter of law, the deed's provisions were ambiguous. It follows that the trial court did not err in admitting parol evidence not only to define the terms used by the parties but to determine the parties' intent.

Irrespective of our holding, however, even if we were to assume for the sake of discussion that, upon first reading, the deed appeared unambiguous, it is readily apparent to us, after having reviewed the properly admissible expert testimony allowed by the trial court to explain the meaning of the deed's technical terms, that existence of an ambiguity became clear. This testimony showed that the various terms were "reasonably and fairly susceptible of different constructions." *See Levenson v. Mobley,* 106 N.M. at 401, 744 P.2d at 176. For example, defendant's expert witness, an electrical engineer, testified that the "meter" was the *point of delivery,* and that this juncture was generally recognized as the line of demarcation between utility control and consumer control. He also stated that generally, a public utility had ownership of the electrical system all the way to the point of delivery. Additionally, another expert witness testified that the terms "primary" and "secondary" acquired their meaning from the speaker's perspective. The same conduit or line, he stated, could be "secondary" to the County, yet "primary" to the school. In the context of this testimony explaining or defining the various terms used in the deed, we can reasonably conclude that the grantor, in conveying the subject property to the Board, was not using the phrase "primary electrical system" in its true, technical sense, as plaintiffs have interpreted it.

We thus conclude that the trial court properly admitted the challenged parol evidence and that its findings were therefore supported by *properly admissible* evidence. We need not determine whether

such findings were supported by substantial evidence, since we do not understand plaintiffs' argument to challenge the sufficiency of the evidence admitted on the ambiguity issue, but only that it was error to permit it in the first place.

CONCLUSION:

In summary, we hold that, as a matter of law, the Board owed a duty of ordinary care to Joseph to protect against the danger of the facility. *See Schear v. Board of County Comm'rs,* 101 N.M. 671, 687 P.2d 728 (1984) (whether duty exists is question of law for courts to decide). However, whether that duty was breached so as to constitute negligence on the part of the Board, and whether any such breach was the proximate cause of Joseph's injuries, are questions of fact. *See id. See also* SCRA 1986, 13–1603; *Knapp v. Fraternal Order of Eagles,* 106 N.M. 11, 738 P.2d 129 (Ct.App.1987) (whether or not defendant breached duty is a question of the reasonableness of conduct, and thus a fact question); *Reynolds v. Swigert,* 102 N.M. 504, 697 P.2d 504 (Ct.App.1984) (proximate cause is generally deemed a factual issue). Likewise, the question of any comparative negligence is a matter for the fact finder. *Sheraden v. Black,* 107 N.M. 76, 752 P.2d 791 (Ct.App.1988).

Because the trial court did not make a determination on these issues, we remand for the entry of findings of fact, conclusions of law and a judgment based on those findings and conclusions. Plaintiffs are awarded their costs on appeal.

IT IS SO ORDERED.

ALARID and MINZNER, JJ., concur.

784 P.2d 1021

STATE of New Mexico, Plaintiff–Appellee,

v.

Darrin JAMES, Defendant–Appellant.

No. 10744.

Court of Appeals of New Mexico.

Nov. 2, 1989.

Certiorari Denied Dec. 21, 1989.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

J. Michael Norwood, L. Vol. Whitley, Patti Swift, UNM Clinical Law Program, Albuquerque, for defendant-appellant.

OPINION

CHAVEZ, Judge.

Defendant appeals his conviction of embezzlement of over $100 but less than $2,500, contrary to NMSA 1978, Section 30-16-8 (Repl.Pamp.1984). He challenges the sufficiency of the evidence to support his conviction and the propriety of the aggravating circumstances used by the court to increase his sentence. Defendant raises two other issues pursuant to *State v. Franklin,* 78 N.M. 127, 428 P.2d 982 (1967), *cert. denied,* 394 U.S. 965, 89 S.Ct. 1318, 22 L.Ed.2d 566 (1969). We affirm defendant's conviction and remand for resentencing.

Defendant was employed by the Allsup's store in Clovis for two years, working his way up to manager. In April of 1987, he was fired for violating company secured cash handling policies. Jay Finnell, defendant's immediate supervisor, testified that he entered the store and found defendant had left more than $2,200 in cash on the counter, unsecured. After defendant was fired, another $2,400 in cash was found under the check stand behind some books and papers, instead of in the floor safe. Later, irregularities with the record keeping of the store for the month of April 1987 were noticed. Discrepancies were found between the amount of the receipts on daily sales reports and the amount on the bank deposit tickets. Also, Judith Gatley, office operations manager for Allsup's, testified that money orders were sold and not reported to the main office. An investigation of these irregularities implicated defendant.

Finnell and Gatley testified regarding company procedures for reporting daily sales. The daily sales report reflected daily receipts and was compiled from information on the bank deposit slip and the cash register readings. The report was then sent to the main office where the daily sales report was compared to the detailed cash register tape. The main office also verified deposit tickets to make sure that cash receipts were actually deposited. It was the responsibility of the store manager or the assistant manager to complete this paperwork for the store.

The evidence indicated that the manager and assistant manager were also responsible for sending money order logs to the main office. The money order logs contained the numbers of the money orders in the cash register. As money orders were sold, the person selling them listed the amount of the money order and placed his

or her initials next to the number of the money order. For each money order sold, the store retained a copy reflecting the amount and number of the money order, and copies were attached to the log when it was sent to Allsup's main office.

SUFFICIENCY OF THE EVIDENCE

Defendant claims that the case against him is based solely on circumstantial evidence. Therefore, he argues, there is no substantial evidence to support his conviction. In reviewing the evidence for sufficiency, we view the facts in the light most favorable to the state, resolving all conflicts therein and indulging in all permissible inferences in favor of the verdict. *State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978). The fact that the evidence is circumstantial makes no difference. *State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984). Circumstantial evidence is sufficient to establish the corpus delicti of a crime. *State v. Bejar,* 101 N.M. 190, 679 P.2d 1288 (Ct. App.1984). We do not reweigh the evidence on appeal, *State v. Santillanes,* 86 N.M. 627, 526 P.2d 424 (Ct.App.1974), nor do we consider whether there are explanations of the evidence consistent with innocence. *State v. Brown.*

The state presented evidence of discrepancies between the daily sales reports and deposit slips indicating shortages on six days in April 1987. It also presented evidence that during the month of April, the Allsup's store sold money orders that were not reported to the main office. Defendant contends the state did not establish beyond a reasonable doubt that he converted the missing money. He claims that other employees must have been responsible for the shortages or the shortages must have resulted from errors or machine malfunctions.

Evidence was presented that only the manager and assistant manager prepared the reports, counted the money, deposited the cash and had access to the floor safe. Defendant argues that there was evidence the assistant manager also prepared daily sales reports and money order logs. He argues that she had equal access to the money and that she prepared the daily sales reports on three of the occasions in question. The assistant manager, however, testified at trial and denied ever taking or converting Allsup's money for herself. Thus, the facts relied upon by defendant are not uncontroverted and consist of issues of credibility to be resolved by the jury as finders of fact. *See State v. Clokey,* 89 N.M. 453, 553 P.2d 1260 (1976).

Defendant argues that on two of the days when there were shortages, he was not present in the store, that although the evidence showed he signed the reports, he often signed the reports before they were final. The assistant manager testified that on several days when she noticed discrepancies, she called defendant to the store. On one day, he could not find the discrepancy because the cash was no longer available for counting. On another day, he claimed the assistant manager miscounted the money. On the other sales reports that did not match the deposit slips, defendant could not explain the discrepancies, but stated that it must have been an error and not willful conversion. He also suggested the discrepancies might have been due to a machine malfunction. The assistant manager testified, however, that she never noticed any such malfunction.

There was evidence of a $200 discrepancy on a money order defendant admitted selling. The original money order was for $210, but the white copy retained in the store's records was printed for only $10. Defendant's explanation was that he sold it to a clerk in his store who later reprinted the face original of the money order. There was also evidence, however, that the $200 discrepancy was not a reprint but was made at the time of the sale, thus implicating defendant.

There was evidence of other money orders sold for which there was no accounting. Defendant presented evidence that a clerk, whose initials appear on the log next to one of the missing money orders, quit the store upon learning of defendant's dismissal. He argues that her unexplained flight strongly suggests culpability. *See State v. Hardison,* 81 N.M. 430, 467 P.2d 1002 (Ct.App.1970).

All of this evidence created factual questions for the jury. The fact finder may reject defendant's version of events. *See State v. Gattis,* 105 N.M. 194, 730 P.2d 497 (Ct.App.1986). Conflicts in the evidence created by defendant's testimony do not make the state's evidence insubstantial. *See State v. Mora,* 81 N.M. 631, 471 P.2d 201 (Ct.App.1970). The question is not whether substantial evidence would have supported an opposite result but whether such evidence supports the result reached. *See State v. Sutphin,* 107 N.M. 126, 753 P.2d 1314 (1988). Based on the evidence presented, it was reasonable for the jury to reach the conclusion that defendant was responsible for at least a portion of the missing money. Defendant was found guilty of embezzlement over $100 but less than $2,500, a fourth degree felony. There was sufficient evidence to support the verdict. We affirm the trial court on this issue.

AGGRAVATED SENTENCE

After defendant was found guilty, the trial court held a sentencing hearing. At the hearing, the court heard from, among others, the prosecutor, defense counsel, the probation officer who prepared the presentence report, and defendant himself. The judge found aggravating circumstances warranting an increase of six months to the eighteen-month basic sentence provided by law. *See* NMSA 1978, § 31–18–15.1 (Repl.Pamp.1987). The judgment entered by the court provided in applicable part:

> Defendant is * * * sentenced to be imprisoned by the Department of Corrections for a term of two (2) years with the Court having found *aggravating circumstances, to-wit: the Defendant refuses to admit any wrong doing and the Defendant having lied while under oath.*
>
> Execution of sentence is hereby suspended with the exception of twelve days already served, and Defendant is ordered placed on probation for a period of five (5) years * * * * [Emphasis added.]

If a court alters the basic sentence because of mitigating or aggravating circumstances, it must state its reasons for the alteration in the record. § 31–18–15.1(A). Defendant argues the trial court's reasons for aggravating the sentence are improper. He claims that using suspected perjury as a sentencing factor impermissibly chills his right to testify and violates his due process rights because it is, in effect, punishment for a crime without the procedural safeguards of indictment, trial, and conviction. He also argues it is improper for a trial court to consider a defendant's failure to admit wrongdoing as this infringes on the fifth amendment privilege not to incriminate one's self.

Although the legislature has fixed basic sentences for non-capital offenses, NMSA 1978, Section 31–18–15 (Repl.Pamp.1987), sentencing judges have discretion to alter the basic sentence by one-third upon a finding of "any mitigating or aggravating circumstances surrounding the offense *or concerning the offender.*" § 31–18–15.1(A) (emphasis added). Among the factors that may be considered are "unusual aspects of the defendant's character, past conduct, age, health, any events surrounding the crime, pattern of conduct indicating whether he or she is a serious threat to society, and the possibility of rehabilitation." *State v. Segotta,* 100 N.M. 498, 501, 672 P.2d 1129, 1132 (1983); *State v. Bernal,* 106 N.M. 117, 739 P.2d 986 (Ct.App.1987). Thus, judges have wide discretion in the sources and types of information used to assist them in determining the kind and extent of punishment to be imposed. *State v. Montoya,* 91 N.M. 425, 575 P.2d 609 (Ct.App.1978).

In *United States v. Grayson,* 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978), the United States Supreme Court held that, in determining an appropriate sentence, a trial court may consider its belief that defendant lied while testifying. *Grayson,* although reaffirming the authority of the sentencing judge to evaluate the testimony of defendant on the witness stand, implicitly determined that the sentence to be imposed must be for the underlying offense, not for perjury. *Grayson* also emphasized that in determining whether or not to aggravate a defendant's sentence after consideration of his trial testi-

mony, the sentencing court must determine whether "that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society." 438 U.S. at 55, 98 S.Ct. at 2618. After discussing the evolution of individualized sentencing and the broad discretion afforded a judge when selecting the sources of information used in determining an appropriate sentence, *Grayson* observed that a defendant's dishonesty while under oath is a reliable indicator of his prospects for rehabilitation and thus, constitutes a valid sentencing consideration. *Id.*

Defendant urges this court not to adopt *Grayson* and to find that the New Mexico due process requirements prohibit the use of suspected perjury as a sentencing factor. He claims that New Mexico has different due process requirements on sentencing procedures from those in effect at the time of the *Grayson* decision. In New Mexico judges must state specific reasons for aggravating a sentence and may only alter the basic sentence by one-third, whereas the federal guidelines for sentencing at the time of *Grayson* allowed a broader range within which to sentence a defendant without the requirement that a judge state the reasons for choosing a particular sentence. This fact, however, does not mean our due process requirements are different. While we decline to address whether New Mexico's due process requirements are identical to federal due process requirements, we hold that a trial judge at sentencing may consider whether the defendant's trial testimony contained willful and material falsehoods, and if so, to use this as a factor in determining whether or not to enhance defendant's sentence, subject, however, to certain safeguards set forth by the *Grayson* decision.

A majority of jurisdictions permit the trial court, in assessing defendant's prospects for rehabilitation, to consider its belief that defendant lied while testifying. *See, e.g., Fox v. State,* 569 P.2d 1335 (Alaska 1977); *People v. Redmond,* 29 Cal.3d 904, 176 Cal.Rptr. 780, 633 P.2d 976 (1981); *People v. Wilson,* 43 Colo.App. 68, 599 P.2d 970 (1979); *People v. Meeks,* 81 Ill.2d 524, 44 Ill.Dec. 103, 411 N.E.2d 9 (1980); *State v. May,* 227 Kan. 393, 607 P.2d 72 (1980); *Commonwealth v. Thurmond,* 268 Pa.Super. 283, 407 A.2d 1357 (1979); *In re Welfare of Luft,* 21 Wash.App. 841, 589 P.2d 314 (1979); *State v. Finley,* 355 S.E.2d 47 (W.Va.1987); Annotation, *Propriety of Sentencing Judge's Consideration of Defendant's Perjury or Lying in Pleas or Testimony in Present Trial,* 34 A.L.R.4th 888 (1984). *But see Commonwealth v. Coleman,* 390 Mass. 797, 461 N.E.2d 157 (1984) (perceived perjury may not enter into the judge's determination of the severity of a sentence); *State v. Vandiver,* 321 N.C. 570, 364 S.E.2d 373 (1988) (perjury may not constitute a valid aggravating factor for sentencing purposes). But, while the majority of courts hold it permissible to consider defendant's perjury within the scope of evaluating character, many stress the clearly improper practice of enhancing a sentence as punishment for the substantive offense of perjury without an indictment, trial or conviction thereon. *See, e.g., State v. Finley.* Therefore, several jurisdictions have enunciated safeguards to assure that the perceived perjury is not improperly used by the sentencing judge. *See, e.g., Strachan v. State,* 615 P.2d 611 (Alaska 1980); *Commonwealth v. Thurmond.*

The *Grayson* Court set forth safeguards and cautioned:

> Nothing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine—with a consciousness of the frailty of human judgment—whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society.

Id. 438 U.S. at 55, 98 S.Ct. at 2618.

Three safeguards are apparent from the *Grayson* language above. First, the Court

allows consideration of the suspected perjured trial testimony only as *one factor* among others which may bear upon a defendant's character and prospects for rehabilitation. Since *Grayson*, other jurisdictions demonstrate support for the Court's reasoning. In *Wilson*, the trial court imposed the maximum term solely on the judge's belief that defendant lied while testifying. In vacating the sentence, the Colorado appellate court held that the fact defendant may have lied under oath was insufficient, standing alone, to warrant the increase in sentence. Consideration must be given to all the factors which comprise the goals of sentencing. *Id. See also Strachan v. State.* But, in *Redmond*, where the trial court stated many specific reasons for imposing an increased sentence, the California Supreme Court held that the judge's belief that defendant had committed perjury was properly considered as one of many factors bearing on defendant's character.

A second safeguard found in *Grayson* is that the sentencing authority may legitimately consider evidence heard during trial and the demeanor of the accused. *Id.* 438 U.S. at 50, 98 S.Ct. at 2615, *citing Chaffin v. Stynchcombe*, 412 U.S. 17, 32, 93 S.Ct. 1977, 1985, 36 L.Ed.2d 714 (1973). The *Grayson* Court notes that the trial judge's opportunity to observe the defendant can frequently provide insights into an appropriate disposition. The cold record of the testimony and verdict affords a meager basis for determining whether defendant's testimony demonstrated a character that is not susceptible to rehabilitation. *United States v. Grayson; Commonwealth v. Thurmond.* The judge cannot simply rely on the jury's verdict in determining whether the testimony was false, but must make a careful, independent evaluation of defendant's rehabilitative potential. *Grayson.*

Third, under *Grayson* the sentencing judge should determine that the testimony was willfully and materially false before considering it as a sentencing factor. Thus, a misstatement by a defendant during his testimony constitutes an insufficient basis upon which to aggravate the sentence unless it is attributable to a willful decision to give false and material testimony. *Commonwealth v. Thurmond; State v. Finley.* The fact that a defendant cannot recollect or is uncertain regarding certain events is not a sufficient basis to increase a sentence based on suspected perjury. *Commonwealth v. Thurmond.*

Because the dividing line between the permissible and impermissible sentencing practice is difficult to discern, we hold that the consideration of false testimony is justified only under circumstances guaranteeing its probative value to sentencing *for the underlying offense.* We find these three safeguards to be the minimum required by due process.

Many courts have strongly discouraged consideration of suspected perjury as a sentencing factor. *See, e.g., United States v. Moore*, 484 F.2d 1284 (4th Cir.1973); *State v. Finley.* We find the admonition of the Fourth Circuit in *Moore* instructive on the potential dangers inherent in this practice:

> We caution, however, that sentencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. Witnesses induced by sordid motives or fear have been known to fabricate accusations with such guile that even conscientious triers of fact have been misled. Moreover, some essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence. It is better in the usual case for the trial judge who suspects perjury to request an investigation. Then, if the facts warrant it, the [state] may institute prosecution for this separate and distinct crime.

United States v. Moore, 484 F.2d at 1287–88.

Defendant argues the judge relied on the fact of conviction to conclude that he had committed perjury; that unlike the judge in *Grayson,* the trial judge did not make an independent evaluation of defendant's testimony before concluding that he had given false material testimony. At the sentencing hearing, the court stated, "the jury found that he lied * * * we don't have to make that decision, the jury did that * * * those aggravating circumstances are * * * the lying under oath that the jury's already found". Our supreme court in *State v. Segotta,* recognized that a sentencing judge in determining whether or not to mitigate or aggravate a defendant's sentence may properly consider, among others, defendant's "character, past conduct, age, health and any events surrounding the crime, pattern of conduct * * *, and the possibility of rehabilitation." The supreme court in *Segotta,* however, noted that "Section 31–18–15.1 requires the trial court to issue a brief statement of reasons for the alteration of the sentence, and must include these findings in the record * * * for appellate review."

Grayson was careful to point out that its decision only "reaffirm[ed] the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand [and] determine * * * whether that testimony contained willful and material falsehoods." *Id.* 438 U.S. at 55, 98 S.Ct. at 2618. Here, the record is not clear as to whether the judge made an independent evaluation of defendant's testimony.

The verdict of guilty merely established that the jury did not believe defendant's testimony. It did not establish that defendant had willfully lied on a material fact. Only willful and material falsehoods sufficiently bear on a defendant's character to justify aggravation. *Commonwealth v. Thurmond.* In the instant case, there is no indication in the record whether the judge determined that defendant willfully offered false testimony on a material fact.

Finally, aside from the suspected perjury in the present case, the record is silent as to whether or not the judge considered other factors bearing on defendant's character and prospects for rehabilitation. *United States v. Grayson.* Here, the judgment entered by the court listed two aggravating circumstances, *i.e.,* the suspected perjury and defendant's refusal to admit wrongdoing. As both the state and defendant point out in their briefs, however, the two reasons are so intertwined it is difficult to separate which was the primary one or whether they are different. As such, if the defendant's refusal to admit guilt is based on the suspected perjury, the trial court clearly considered the suspected perjury as the only factor for aggravating the sentence. This is impermissible. *See Strachan v. State; People v. Redmond; People v. Wilson.* Moreover, to expect an admission of guilt at the sentencing hearing, would infringe on defendant's fifth amendment right not to incriminate himself and jeopardize any post-conviction relief he may seek. *See State v. Zamora,* 84 N.M. 245, 501 P.2d 689 (Ct.App.1972) (fifth amendment privilege can be asserted whenever there is a reasonable cause to apprehend danger of a legal detriment);, *see also Bushnell v. State,* 97 Nev. 591, 637 P.2d 529 (1981) (a court may not impose a harsher sentence based upon a defendant's exercise of his constitutional rights); *Fox v. State.* In any case, the record does not indicate whether the suspected perjury was considered together with other existing factors which may bear upon defendant's character, prospects for rehabilitation, or other relevant matters. *United States v. Grayson.*

We hold that the trial court's statement of reasons for aggravation of defendant's sentence was insufficient to permit meaningful appellate review and the cause should be remanded for resentencing and specific articulation of the reasons for mitigating or aggravating defendant's sentence based upon the court's independent assessment of the factors enumerated in *Segotta,* or other pertinent factors. *See generally* ABA *Standards Relating to a Appellate Review of Sentences,* Standard 20–2.3.

SUMMARY ISSUES

Defendant argues that he should be granted a new trial because of newly dis-

covered evidence: the concealed bias of one of the state's key witnesses. The record does not show that defendant moved for a new trial below. Therefore, this issue is not properly before this court. SCRA 1986, 12–216.

Defendant's fourth issue is raised by a motion to amend the docketing statement pursuant to *Franklin.* Defendant asserts that the trial judge "rushed" the jury during its deliberations, so as to deprive him of a fair trial. We deny the motion to amend as the issue defendant seeks to raise is unsupported by the record and, therefore, without merit. *State v. Rael,* 100 N.M. 193, 668 P.2d 309 (Ct.App.1983).

CONCLUSION

Defendant's conviction is affirmed; we remand for resentencing consistent with this opinion.

IT IS SO ORDERED.

DONNELLY, J., concurs.

HARTZ, J., concurs in part, dissents in part.

HARTZ, Judge (specially concurring in part and dissenting in part).

I concur in the affirmance of the conviction and join in the portions of the majority's opinion addressing defendant's challenges to his conviction. I respectfully dissent, however, with respect to the remand for resentencing.

I agree with the thrust of the majority's discussion of the potential problems with enhancing a defendant's sentence because of perjury during trial. In particular, I agree that it is impermissible to enhance a sentence solely "for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution." *United States v. Grayson,* 438 U.S. 41, 53, 98 S.Ct. 2610, 2617, 57 L.Ed.2d 582 (1978). I also agree that it would be impermissible to infer perjury solely from the defendant's having testified and been convicted.

On the other hand, I do not agree fully with the majority's discussion of its three "safeguards." With respect to the first safeguard, the majority indicates that the sentencing court must articulate factors relating to rehabilitation in addition to the defendant's perjury. *Grayson* does not impose such a requirement; nothing in that opinion suggests that the sentencing judge noted any additional factors relating to rehabilitation. It should suffice that perjury is considered only insofar as it helps assess the defendant's prospects for rehabilitation. As for the second safeguard, I think it should be permissible for a sentencing judge who was not present at the defendant's trial to consider the defendant's perjury during trial. There is nothing unusual about a sentencing judge considering a defendant's misconduct even though the judge did not personally observe it. The sentencing judge should be permitted to consider reliable sources of information other than his or her own senses. With respect to the third safeguard, a witness, including a defendant, may commit perjury by testifying to lack of memory as well as by testifying to a specific event. Therefore, I would not impose, as the majority apparently does, a strict requirement that the sentencing judge could not enhance a sentence because of defendant's testifying to a failed or uncertain memory. Neither *Grayson,* nor due process, nor public policy requires the rigid safeguards set by the majority.

In my view the trial judge acted within his discretion in enhancing defendant's sentence. A district court's findings in support of an enhanced sentence need not be in writing. *See State v. Bernal,* 106 N.M. 117, 119, 739 P.2d 986, 988 (Ct.App.1987). At sentencing, the judge said the following:

> You've impressed me with the fact that you probably did just about anything you could get away with the last eleven years. Lying and stealing and cheating and breaking the law has just been a habit of yours for eleven years. Now you're going to have to break the habit or you're going to have to probably spend a lot of the rest of your life behind bars. * * *
>
> I certainly agree with you on one thing. Putting you in the penitentiary is not going to help you any. It's not going

> to help your alcohol problem. It's not going to help restitution. It's not going to get you rehabilitated, because you certainly need rehabilitation. You need help. You need to get out there on your own two feet and learn how to be a useful citizen.
>
> * * * I'm going to take a chance with you, but I'm not going to let you get too far away. I'm going to have * * * one arm on the rope that we turn you loose with. * * * What I'm going to do is, sentence you to the New Mexico State Penitentiary for a year and a half and I'm going to find aggravating circumstances and add six months onto it, which is two years, that's the maximum I can give you under the jury verdict. * * * Those aggravating circumstances are: your refusal up to this point to admit that you've done anything wrong, the lying under oath that the jury's already found, * * * your consistent refusal to admit any wrongdoing. * * * Then I'm going to suspend that jail sentence, with the exception of what you've already spent in jail * * * and I'm going to put you on probation for five years which is the maximum time I can put you on probation. * * *
>
> If you violate any part of [the conditions of probation], you'd be subject to having your probation revoked and sent to the New Mexico State Penitentiary. * * * You're not going to take advantage of the leniency of the Court. Because that's what I consider leniency, in the form of trying to help you, maybe, as a last chance of keeping you out of the penitentiary for a life time. Because that's where you're headed. You know that, don't you? * * *
>
> It's all back on your shoulders. It's up to Darrin James.

The trial court then enhanced defendant's sentence of imprisonment by six months for a total term of two years, but *suspended* all but the twelve days already served and ordered that defendant be placed on probation for a period of five years.

The trial judge considered defendant's perjury at trial for precisely the proper purpose. He viewed defendant's trial testimony as simply the latest example of an eleven-year history of "lying and stealing and cheating and breaking the law"—engaging in wrongdoing and then refusing to accept any responsibility. The trial judge thought that defendant needed a lengthy period of probation in order to rehabilitate himself but felt that defendant required a stiff sentence hanging over his head to induce him to straighten himself out. The enhancement of the sentence was clearly for rehabilitative purposes. If the judge had intended to *punish* defendant for perjury, I doubt that he would have suspended the sentence.

My view is not changed by the trial judge's statements referring to the jury's decision that defendant had lied, including his statement (made immediately before sentencing, in response to the prosecutor's expressing disagreement with defense counsel's characterization of defendant's testimony): "The jury found that he lied. I mean twelve people sitting up there listening to the evidence found that he lied. I don't know what the big problem is. Obviously he lied. They found him guilty. We don't have to make that decision, the jury did that." First, I see no reason for the sentencing judge not to rely on a jury's determination that the defendant lied at trial, at least so long as the circumstances of the trial make clear that to reach its verdict the jury must have decided that the defendant was lying. *See Commonwealth v. Thurmond,* 268 Pa.Super. 283, 288–89, 407 A.2d 1357, 1360 (1979) (given nature of testimony, verdict established that defendant had lied). Second, even if reliance on the jury verdict is improper, I doubt that the trial judge so relied. Because the sentencing judge himself presided over the trial, I would find it remarkable for him to have relied on the jury's verdict if he did not himself think that defendant had lied under oath. The thrust of his remarks at sentencing compels the conclusion that the judge personally believed that defendant had lied and felt reinforced in that belief by the verdict of the jury, which, given the nature of defendant's testimony, necessarily implied that the jury also believed that

defendant had committed perjury. Third, I would hold that defendant waived any claim that the sentencing judge improperly failed to make his own determination of whether defendant committed perjury. Defense counsel made no objection at sentencing to the judge's reference to the jury's having decided that defendant committed perjury. A timely objection could have enabled the judge to cure any problem by stating that he personally found that defendant had perjured himself. In the absence of a timely objection, I would hold that the issue was not preserved for appeal.

784 P.2d 1030

Theresa GRIEGO, Claimant–Appellee,

v.

BAG 'N SAVE FOOD EMPORIUM and Texas General Indemnity, Respondents–Appellants.

No. 11105.

Court of Appeals of New Mexico.

Nov. 9, 1989.

Certiorari Denied Jan. 3 and 4, 1990.

David L. Duhigg, Duhigg, Cronin & Spring, Bruce P. Moore, Albuquerque, for claimant-appellee.

E.W. Shepherd, Hatch, Beitler, Allen & Shepherd, P.A., Albuquerque, for respondents-appellants.

OPINION

MINZNER, Judge.

Employer appeals the hearing officer's determination of claimant's average weekly wages for computation of her rate of compensation, which was the only disputed issue. We reverse and remand for further proceedings.

Claimant was injured on February 26, 1988. She had worked for employer since July 1987. From July 1987 to January 1988, she had been employed as a delicatessen ("deli") clerk at employer's Santa Fe store. In January 1988, she was transferred to employer's new store in Rio Rancho.

During the three weeks prior to the week of the accident, the Rio Rancho store held its grand opening. Claimant worked an unusually high number of overtime hours during this period.

Two weeks prior to the week of the accident, claimant was promoted from deli clerk to salad bar manager. Claimant appears to have been in a unique position. Although her new title suggested employer considered her a manager, she remained an hourly employee.

After the accident, employer paid claimant benefits for temporary total disability. It is undisputed that claimant had not reached maximum medical improvement at the time of trial.

At the time of the hearing, claimant urged the hearing officer to apply NMSA 1978, Section 52-1-20(B) (Repl.Pamp.1987) (hereinafter subsection B).[1] Under that provision, claimant asked the hearing officer to make one of two different computations. The first was her average wage for the two weeks before the week of her accident, or $466.17. Claimant indicated in closing argument that figure would have given her the maximum compensation award under NMSA 1978, Section 52-1-41 (Repl.Pamp.1987). Alternatively, claimant asked the hearing officer to calculate what her earnings would have been the week of the accident. Because claimant was injured at 9:40 a.m. on a Friday, she did not work a full week the week of the accident. At the time of the injury she had completed forty hours of regular work and 1.91 hours of overtime. Her actual earnings for that week were $240.04. Claimant asked the hearing officer to assume that she would have completed an eight-hour day on Friday as well as on Saturday, and thus to determine that she would have worked approximately 14.2 hours of overtime that week. Claimant requested a finding, based on an "adjusted" last week, that, on the date of her injury, "her average weekly wage was $341.59."

Employer urged the hearing officer to apply Section 52-1-20(D) (hereinafter subsection D).[2] In effect, employer asked the hearing officer to ignore claimant's schedule during the four grand opening weeks, on the ground that the grand opening was a necessity temporarily requiring employer to pay extraordinarily high wages. *See Salcido v. Transamerica Ins. Group,* 102 N.M. 217, 693 P.2d 583 (1985). Under such circumstances, the average weekly wage is

1. Subsection B provides in pertinent part:

> B. average 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:
>
> * * * * * *
>
> (4) where the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working *at the time of the accident,* or would have worked if the accident had not intervened, to determine the daily wage; then the weekly wage shall be determined from said daily wage in the manner set forth in Paragraph (3) hereof; provided, that in no case shall the hourly rate be multiplied by less than seven[.] [Emphasis added.]

2. Subsection D provides:

> D. provided, that in case such earnings have been unusually large on account of the employer's necessity temporarily requiring him to pay extraordinary [sic] high wages, such average weekly earnings shall be based upon the usual earnings in the same community for labor of the kind the workman was performing at the time of the injury. In any event the weekly compensation allowed shall not exceed the maximum nor be less than the minimum provided by law.

based on the usual earnings in the same community for labor of the kind the worker was performing at the time of the injury.

Employer argued at trial that the hearing officer should calculate claimant's average weekly wage by identifying the average number of regular and the average number of overtime hours she had worked prior to the grand opening. Employer suggested that the correct computation should be based on approximately thirty-five regular hours and five overtime hours, or an average weekly wage of $240.00. Thus, employer asked the hearing officer to find that "the usual earnings" under subsection D were claimant's pre-grand opening average weekly wage.

The record indicates that the hearing officer accepted employer's argument that he should apply subsection D. The record also indicates that the hearing officer relied on claimant's "adjusted" last week, as well as the typical schedule followed by her supervisor, the deli manager.

The hearing officer found that:

7. Claimant's wage rate cannot be fairly calculated using Section 52-1-20(B) by reason that her job description, work location, and work hours had materially changed shortly before her accidlental [sic] injury.

8. Claimant's overtime hours were necessary to meet exigent circumstances as described in *Salcido v. Transamerica Ins. Group,* 102 N.M. 218 [217, 693 P.2d 583], to wit, to meet short term exceptional demand during a store opening.

8. [sic] Claimant was an hourly rate employee with supervisory duties over the salad bar.

* * * * * *

11. Respondent had a policy against hourly rate employee overtime.

12. The deli manager worked nine to ten hours per day, a typical schedule for a supervisor.

13. Claimant worked Monday through Saturday.

14. Claimant, as a supervisor could reasonably have worked on a normal schedule 54 hours per week, 40 at $5.60 per hour, 14 at $8.40 per hour for a weekly gross salary of $341.60.

15. The resulting comp[ensation [sic] rate for Claimant should be two thirds of $341.60, or $227.73 per week.

16. Claimant's maximum compensation rate would be $227.73 per week if totally disabled.

Employer makes five arguments on appeal. They are (a) claimant failed in her burden of proof under subsection D; (b) the hearing officer's findings of fact are insufficient to support the application of subsection D; (c) finding of fact no. 14 is inconsistent with findings of fact nos. 7, 8, 9, and 11; (d) findings of fact nos. 14, 15, and 16 are not supported by substantial evidence; and (e) the disposition order is not supported by findings of fact that are supported by substantial evidence. We address each argument in turn.

■ Under subsection D, the hearing officer recognizes unique or exigent circumstances that produce an unusually high average weekly wage. Because employer sought the benefit of this subsection, employer had the burden of proof. *See Baca v. Bueno Foods,* 108 N.M. 98, 766 P.2d 1332 (Ct.App.1988) (one who seeks relief under statute has burden of proving he or she comes within its terms). Thus, if there was insufficient evidence to support the hearing officer's determination under subsection D, employer, rather than claimant, has failed to prove its case. *Id.*

■ In the absence of such proof, we do not think the legislature intended that no award be made. The legislature surely intended to enable the fact finder to make an appropriate award rather than to frustrate the effort. *Cf. Burruss v. B.M.C. Logging Co.,* 38 N.M. 254, 259, 31 P.2d 263, 266 (1934) (applying prior law, the supreme court held "[t]he provision is to aid an award, not to prevent one."). We conclude that if employer fails to prove sufficient facts to support a determination under subsection D, the hearing officer must make a determination under subsection B or sub-

section C.[3]

Employer also contends the findings made by the hearing officer are insufficient to support his determination under subsection D. He notes that no findings were made as to the number of days that the deli manager worked or his usual earnings.

Findings by a trial court judge need not cover every material fact but only ultimate facts. *McCleskey v. N.C. Ribble Co.*, 80 N.M. 345, 455 P.2d 849 (Ct.App. 1969); SCRA 1986, 1-052(B)(1)(b). Failure of the trial judge to make specific evidentiary findings of fact is not reversible error. *Id.* The findings of which employer complains are evidentiary findings. *See id.* They were, however, entered by a hearing officer rather than a district judge. NMSA 1978, § 52-5-7(B) (Repl.Pamp.1987). Thus, the question is whether the hearing officer's findings must cover more than the ultimate facts. The answer is no.

By statute the hearing officer is required to enter a compensation order containing findings of fact and conclusions of law after a formal hearing. The legislature has repealed the provision that the rules of civil procedure govern workers' compensation claims and actions. *See* 1986 N.M. Laws, ch. 22, § 102. Under present law, the division is authorized to adopt reasonable rules and regulations to effect the purposes of the Workers' Compensation Act. *See* NMSA 1978, § 52-5-4 (Repl. Pamp.1987). Under that authority, the director may choose to require that the hearing officer make evidentiary findings. *Cf. Redman v. Board of Regents of New Mexico School for Visually Handicapped,* 102 N.M. 234, 693 P.2d 1266 (Ct.App.1984) (fact that rules of civil procedure are made inapplicable to de novo hearings does not preclude State Board of Education from adopting procedures of its own to facilitate de novo hearings). The rules and regulations issued by the director presently include a provision that formal hearings are governed by the rules of civil procedure. Rules and Regulations, New Mexico Workmen's Compensation Administration, Rules of Procedure for Formal Hearings, I(1) (Undated).

The rule that a trial court must make ultimate findings of fact serves the purpose of providing a record of the basis for the fact finder's conclusion. *See generally* 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 52.06[1], at 52-139 (2d ed. 1989). The further principle that the trial court need not make evidentiary findings unless requested, *see* SCRA 1986, 1-052(B)(1)(f), excuses the fact finder from a task that imposes a burden without corresponding benefit. Given the purpose of the further principle, we apply it to hearing officers within the Workers' Compensation Division until such time as the director makes a different provision under Section 52-5-7(B).

Employer's argument that the hearing officer failed to make certain findings seems to be in effect a challenge to the comparison the hearing officer made between claimant and her supervisor. His argument that certain findings are inconsistent with others is similar.

Employer appears to contend that, in the absence of evidence of a worker in a position similar to claimant, under subsection D her average weekly wage must be based on her pre-grand opening schedule of regular and overtime hours. We disagree. Under subsection D, the hearing officer was required to try to determine "the usual earnings" for "labor of the kind the workman was performing."

Statutes are to be read in a way that facilitates their operation and the

3. Subsection C provides:

> C. provided, 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 the fact that the injured employee has not worked a sufficient length of time to enable his earnings to be fairly computed thereunder, or has been ill or in business for himself, 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[.]

achievement of their goals. *See Miller v. New Mexico Dep't of Transp.*, 106 N.M. 253, 741 P.2d 1374 (1987). In this case, the position of salad bar manager was eliminated after the accident. The testimony at the hearing supports an inference that the position was unique. As indicated above, we believe the legislature intended to facilitate an award, not frustrate one.

Thus, we conclude that if there is no evidence of a worker in a position similar to claimant's, the hearing officer may rely on other evidence to determine "the usual earnings." He may, for example, be able to determine what claimant herself would have earned under normal circumstances.

The record supports a conclusion that the hearing officer relied in part on claimant's own earning record, as well as that of the deli manager, in order to identify "the usual earnings" under subsection D. If the evidence on which he relied was sufficient, then we must affirm. Employer's final two arguments address the sufficiency of the evidence.

Employer specifically contends the hearing officer improperly used the number of hours claimant's supervisor, the deli manager, worked daily in calculating claimant's weekly wage, because the deli manager was not performing the same work as claimant. It notes that the deli manager was paid a fixed salary, as were most managers, but claimant was paid on an hourly basis. It notes that in accord with company policy, although the deli manager could have worked overtime hours, he would have not received compensation for them. However, in accord with company policy, an hourly employee would not have been allowed to work overtime. Thus, employer contends the hearing officer could not use the deli manager in calculating claimant's wages.

The critical facts are whether claimant's new position as salad bar manager included supervisory duties which required overtime, and how much overtime she was likely to work. These were questions of fact for the hearing officer to decide.

We find evidence to support the officer's finding that claimant's new position required overtime in the personnel manager's authorization of her promotion to "department manager, salad bar," and in claimant's testimony concerning her duties and responsibilities. It was the hearing officer's duty to weigh the evidence and resolve any conflicts. Even if this court might have decided differently, a reviewing court is not permitted to determine how it would have decided the issue. *Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 767 P.2d 363 (Ct.App.1988). If there is sufficient evidence in the record for a reasonable mind to accept as adequate support for the conclusion reached, the court will not disturb the finding. *Id.* We conclude the hearing officer did not abuse his discretion when he determined that claimant, as a supervisor, would work overtime on a regular basis in her position as a salad bar manager.

Once the hearing officer determined that claimant would work overtime regularly, he then had to determine the amount of overtime she would reasonably work. The hearing officer had before him the time sheets for claimant and her fellow workers in both supervisory and non-supervisory positions at the stores where she worked. The hearing officer found the deli manager typically worked nine to ten hours per day. From this evidence, the hearing officer concluded that claimant, although a low-level supervisor, might reasonably work an average of fourteen hours of overtime weekly since she worked a six-day week, or one hour of overtime for each of five days Monday through Friday and nine hours of overtime for Saturday.

Our review must be of the whole record. *Id.* Having reviewed the whole record, we cannot say that the record supports the hearing officer's determination.

There is insufficient evidence in the record to show that claimant's overtime hours during the two weeks after her promotion were the result of the promotion. Rather, the evidence was that the hours worked during the grand opening were unusual for all employees and that at the end of the grand opening all employees returned to pre-grand opening schedules. There was evidence that full-time employ-

ees tended to work approximately forty hours a week, some of which might be overtime hours, if the employee worked on a Saturday or Sunday. Claimant's schedule prior to the grand opening is consistent with that evidence. There is no evidence to the contrary. Under these circumstances, on a whole record review, finding no. 14 is not supported by substantial evidence.

Because finding no. 14 supports the hearing officer's decision that claimant's average weekly pay was $341.60, the compensation order must be reversed and the case remanded for entry of amended findings and conclusions. We have determined that employer had the burden of proof under subsection D and that the evidence is insufficient to support the determination of an average weekly wage under that subsection. Thus, we remand to permit the hearing officer to calculate claimant's average weekly wage pursuant to subsection B or subsection C.

We recognize that employer has not challenged the determination that subsection B is inapplicable. Findings of fact not challenged become the facts on appeal. *See Latta v. Harvey,* 67 N.M. 72, 352 P.2d 649 (1960). However, claimant has asked this court to hold that the trial court erred in failing to apply subsection B, in the event we determine that subsection D is not applicable. *See* SCRA 1986, 12–201(C). Because we have determined that the determination under subsection D was not supported by substantial evidence, we consider the applicability of subsection B.

Subsection B offers the usual rule for computation of average weekly wage using the claimant's own monthly, weekly, daily, or hourly wage. Where wages can be calculated by the precise methods outlined in subsection B to fairly compute the worker's average weekly salary, subsection B controls. *Eberline Instrument Corp. v. Felix,* 103 N.M. 422, 708 P.2d 334 (1985). Although the hearing officer found that claimant's wage could not be fairly calculated, because her job description, work location, and hours had materially changed shortly before her injury, the preliminary question is whether the average weekly wage is easily determinable under the statutory formula.

In *Eberline,* the supreme court reviewed subsection B and concluded that it must be applied unless "the workman's average weekly wage is not easily determinable." *Id.* at 425, 708 P.2d at 337. In that case the claimant was paid $9.72 per hour for his job as a welder. However, two months before his injury, he accepted a lower-paying job as a machine operator at $6.35, rather than being laid off due to lack of work. The supreme court held that because the claimant was receiving $6.35 at the time of the injury and his wage was easily calculable, he should be compensated at such rate using the subsection B analysis. *Id.* at 424, 708 P.2d at 336.

Even though the case before us involves the issue of the number of hours of overtime worked as opposed to the hourly rate issue in *Eberline,* we believe the rule set forth in that case is applicable because both determinations must be combined in order to calculate the average weekly wage. Under *Eberline,* the fact finder must apply subsection B if an average weekly wage is easily determinable under the statutory formula.

We must consider the statute in its entirety in applying it. *See Batte v. Stanley's,* 70 N.M. 364, 374 P.2d 124 (1962). The statute does not specifically include overtime, which is at issue in this case; however, overtime is usually included in "wages" even though it may not necessarily be guaranteed. *See Neeley v. Union Potash & Chemical Co.,* 47 N.M. 100, 137 P.2d 312 (1943); *see generally* 2 A. Larson, *The Law of Workmen's Compensation* § 60.12(d) (1989); *cf. Hernandez v. Mead Foods, Inc.,* 104 N.M. 67, 716 P.2d 645 (Ct.App.1986) (calculation of benefits without overtime wages was substantially correct and thus would be sustained on appeal).

Unlike statutes in many states, the New Mexico statute does not require that a worker have been employed for a specific designated period prior to the injury in order to make the average weekly calculation. *See* 2 A. Larson, *supra,* at § 60.11(b). However, the term "average weekly wage" indicates a legislative expectation the fact

finder will identify a representative week. In identifying a representative week, the fact finder may adopt any method that fairly calculate the worker's usual earnings. *See Neeley v. Union Potash & Chemical Co.*

On the present record, there has been no determination of a representative week. Claimant contends, in effect, that as a result of her promotion none of the weeks prior to the grand opening can be considered. We disagree. For the reasons stated above, we believe there is insufficient evidence in the record to support a determination that the overtime resulted from the promotion. The evidence showed those weeks were unusual for all employees. That does not mean that these hours are irrelevant.

Employer's theory at the hearing was that an unusual amount of overtime required application of subsection D. The theory seems to have been that the grand opening weeks must be ignored. If employer fails to prove the elements of subsection D, however, the hearing officer must apply either subsection B or subsection C. Under these subsections, the hours need not be ignored.

Under the circumstances of this case, on remand the hearing officer has two options. He may choose to average the grand opening weeks with some number of pre-grand opening weeks to determine if a representative wage can be determined under subsection B. If, on remand, he determines that the calculation under subsection B does not produce a fair figure, he may calculate the average weekly wage under subsection C.

We reverse and remand for further proceedings not inconsistent with the opinion. We have determined that oral argument is unnecessary. SCRA 1986, 12–214.

IT IS SO ORDERED.

BIVINS, C.J., and CHAVEZ, J., concur.

784 P.2d 1037

STATE of New Mexico, Plaintiff–Appellee,

v.

Ronnie LARA, Defendant–Appellant.

No. 11123.

Court of Appeals of New Mexico.

Nov. 14, 1989.

Certiorari Denied Dec. 21, 1989.

Hal Stratton, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Sheila Lewis, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BIVINS, Chief Judge.

Defendant appeals two convictions of aggravated assault with a deadly weapon. Defendant raises five issues on appeal, the first and last pursuant to a motion to amend his docketing statement: 1) whether evidence of defendant's failure to appear at a mandatory pretrial conference may be introduced; 2) whether evidence of defendant's misdemeanor shoplifting plea may be introduced to prove identity; 3) whether defendant's self-defense instruction should have been given; 4) whether evidence regarding a prosecution witness's conviction for allowing himself to be served alcohol as a minor should have been admitted for impeachment purposes; and 5) whether the jury instruction for aggravated assault with a deadly weapon was improper. We deny the motion to amend the docketing statement to include a new issue and to reframe another issue, and affirm defendant's convictions.

Facts

Defendant, suspected of shoplifting, was followed out of the store into the parking lot by two store employees. The two testified that they intended to grab the man and take him back inside. When they surrounded him, defendant pulled out an object and began swinging his arm. Seeing a shiny object and believing it to be a knife, the two backed off; defendant fled.

Motion to Amend the Docketing Statement—Evidence of Failure to Appear and Instruction on Aggravated Assault

Defendant has moved to amend his docketing statement to add one issue and to "reframe" another issue. We deny the motions because we perceive both motions to involve adding totally new issues that are so without merit as not to be viable. *See State v. Rael,* 100 N.M. 193, 668 P.2d 309 (Ct.App.1983).

Defendant first seeks to amend to add an issue alleging error in the court's admission of "other crimes" evidence. No such issue concerning "other crimes" was raised in the trial court. The state sought to admit evidence of defendant's failure to appear for an earlier setting. In response to a motion in limine, the court would not allow police officers to testify and would not allow evidence that failure to appear is a separate crime. The court's ruling allowed the prosecutor to testify to defendant's flight from prosecution as evidence of consciousness of guilt. Its admission in this regard was proper. *See State v. Rodriguez,* 23 N.M. 156, 167 P. 426 (1917); *State v. Vallejos,* 98 N.M. 798, 653 P.2d 174 (Ct.App.1982). Most of defendant's brief is devoted to a discussion of the prejudicial effect of the introduction of evidence of other distinct crimes. SCRA 1986, 11–404(B) does not, however, require exclusion of the evidence admitted. The evidence was admissible for a purpose other than to prove defendant's character "in order to show that he acted in conformity therewith." Contrary to the assertion in defendant's brief, the specific purposes listed in Rule 11–404(B) are not the exclusive purposes for which other-crime evidence is admissible. If defendant believed the testimony given went beyond the court's ruling allowing evidence of flight to show consciousness of guilt, he should have objected or asked for a limiting instruction. *See State v. Sandoval,* 88 N.M. 267, 539 P.2d 1029 (Ct.App.1975).

The issue briefed was not raised below and does not allege error that can be raised for the first time on appeal. It is therefore so totally without merit as not to be viable, and a docketing statement amendment should not be allowed. *State v. Rael.* Moreover, the issue appears to have been omitted from the docketing statement because trial counsel was well aware that the evidence of flight was admissible, and trial counsel did not preserve what is being argued for the first time on appeal. *See State v. Moore,* 109 N.M. 119, 782 P.2d 91 (Ct.App.1989).

Defendant next seeks to add an issue under the guise of "reframing" an old issue. The issue sought to be reframed was raised in the docketing statement as whether the instruction for aggravated as-

sault improperly expanded the charge in the information. *See State v. Trivitt,* 89 N.M. 162, 548 P.2d 442 (1976). This issue is not briefed and is therefore abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985). The issue briefed is whether instructing in the alternative, when the use note to the uniform jury instructions indicates that one or another alternative phrase should be used, and whether omitting the word "deadly" from one part of the instruction, constitute reversible error. Instructions in the alternative are permitted. *See State v. Utter,* 92 N.M. 83, 582 P.2d 1296 (Ct.App.1978); *State v. Ortiz,* 90 N.M. 319, 563 P.2d 113 (Ct.App.1977). The word "deadly" appeared in other portions of the instruction, and therefore the instructions, when read as a whole, substantially followed the statute and were sufficient. *See State v. Doe,* 100 N.M. 481, 672 P.2d 654 (1983). Therefore, this issue too is so totally without merit as not to be viable, and a docketing statement amendment to raise it should not be allowed.

Self-Defense Instruction

Defendant argues that the trial court erred in refusing to give the jury his self-defense instruction. A defendant is entitled to an instruction on his theory of the case if there is evidence to support it. *State v. Armijo,* 90 N.M. 614, 566 P.2d 1152 (Ct.App.1977). In order for defendant to be entitled to a self-defense instruction, there must be evidence that defendant was put in fear by an apparent danger of immediate bodily harm, that his assault resulted from that fear, and that defendant acted as a reasonable person would act under those circumstances. *See* SCRA 1986, 14–5181; *State v. Branchal,* 101 N.M. 498, 500, 684 P.2d 1163, 1165 (Ct.App.1984).

Defendant did not testify. To summarize the evidence: Witness Gonzales testified that he was working as a checker at Farmers' Market when he noticed defendant walking around the store picking up packages of cigarettes and putting them in a paper sack. When Gonzales asked defendant what he was doing, defendant responded that he was getting cigarettes and was going to cash a check to pay for them. Gonzales saw defendant go to another checkstand but then run out of the door with the paper sack. The checker at that stand said that defendant had not paid for the items. Gonzales and another employee, Nunez, then chased after defendant. They caught up with defendant as he was trying to get into a car from which he was apparently locked out. They approached defendant to try to apprehend him and take him back into the store until police could take custody; but defendant flashed something shiny and the two men jumped back. Defendant then ran away. Gonzales also showed the jury a videotape which had recorded defendant's actions in the store. Nunez testified that he was stocking shelves when he observed Gonzales approach defendant and ask him what he was doing. He heard defendant tell Gonzales that he was going to cash a check. He saw defendant run outside with a bag of cigarettes. He heard the checker tell defendant to come back because he had not paid for the cigarettes. Nunez then joined Gonzales in running after defendant. He saw defendant pull something shiny, which appeared to be a weapon, and backed away. He then saw defendant run off. Witness Buckner, the assistant manager of the store, heard a checker holler that someone had run out the door with ten cartons of cigarettes. He went after the individual, but Gonzales and Nunez were already out of the door before he began his pursuit. He saw the man waving a knife at the two employees and told the employees to go back to the store.

Use Note 1 to UJI Crim. 14–5181 states that the self-defense instruction may be used "in nonhomicide cases when the self-defense theory is based upon * * * reasonable grounds to believe a design exists to commit an unlawful act." From the evidence at trial, one could infer that defendant reasonably believed that Gonzales and Nunez were intending to seize him; such a seizure would ordinarily be unlawful. In this case, however, the two store employees had a lawful right to seize defendant; and the evidence was overwhelming that no reasonable person in defendant's position

could have doubted that the purpose of Gonzales and Nunez was to seize defendant for shoplifting. No reasonable juror could have viewed the evidence otherwise. Thus, the evidence did not justify the self-defense instruction. *Cf. State v. Noriega,* 142 Ariz. 474, 690 P.2d 775 (1984) (En Banc) (doctrine of self-defense is not intended as license for a burglar to threaten force to escape from the scene of a crime with stolen property).

Admission of Misdemeanor Guilty Plea

Defendant argues that evidence of his misdemeanor plea to prove a fact essential to his conviction was improperly admitted. The state sought to introduce through testimony of a municipal court judge defendant's plea of guilty to the shoplifting charges, which arose from the same incident. The purpose of the evidence was to show identity. The jury was cautioned twice to consider the evidence only for that purpose.

Because we hold that admission of the misdemeanor plea in this case was harmless error, we need not pass on the propriety of its admission. For error by the trial court to be considered harmless, there must be (1) substantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear so miniscule that it could not have contributed to the conviction; and (3) no substantial evidence to discredit the state's testimony. *State v. Moore,* 94 N.M. 503, 612 P.2d 1314 (1980).

In this case, both victims of the aggravated assault made positive in-court identifications of defendant as their assailant. The only other eyewitness to the incident also positively identified defendant. Defense counsel did not cross-examine any of the witnesses regarding these identifications and did not present any evidence denying defendant's identity. Moreover, the evidence that defendant committed the shoplifting was overwhelming. If it was error to admit evidence of defendant's misdemeanor plea, an issue we need not reach, that error was harmless.

Impeachment of Victim

Defendant argues that the trial court erred in refusing to allow him to impeach the victim through use of misdemeanor convictions for allowing himself to be served alcohol as a minor. The trial court's exclusion of these convictions is supported by *State v. Bobbin,* 103 N.M. 375, 707 P.2d 1185 (Ct.App.1985). Defendant seeks to have us reconsider this decision. We decline to do so, particularly on the record before us. Defendant made no offer of proof regarding the circumstances of the offenses. The trial judge ruled that allowing oneself to be served alcoholic beverages was not a crime involving such dishonesty or moral turpitude as to be appropriate for impeachment. In the absence of specific evidence of the conduct of the witness that led to the convictions, we cannot say that the trial judge abused his discretion in excluding impeachment based on the prior offenses.

Conclusion

Defendant's conviction on two counts of aggravated assault with a deadly weapon is affirmed.

IT IS SO ORDERED.

MINZNER and HARTZ, JJ., concur.

784 P.2d 1041

STATE of New Mexico,
Plaintiff–Appellee,

v.

Craig R. LUCERO,
Defendant–Appellant.

No. 10944.

Court of Appeals of New Mexico.

Nov. 30, 1989.

Hal Stratton, Atty. Gen., Margaret B. Alcock, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Sheila Lewis, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BIVINS, Chief Judge.

Defendant appeals his convictions, following a jury trial, of attempted first degree criminal sexual penetration, first degree criminal sexual penetration, criminal sexual contact of a minor, and kidnapping. He raises six issues on appeal: (1) whether use of a videotaped deposition of the child victim violated defendant's sixth amendment confrontation rights; (2) whether a mistrial should have been granted when the state brought out defendant's prior conviction for larceny; (3) whether prior consistent statements of the child were admissible under SCRA 1986, 11-801(D)(1)(b); (4) whether the trial court erred in denying defendant an opportunity to explore mother's motive to influence the child to lie; (5) whether the prosecutor impermissibly commented on defendant's failure to testify; and (6) cumulative error. Defendant voluntarily abandoned three other issues raised in his docketing statement.

We hold the trial court erred in excluding evidence offered to show mother's motive to influence the child to lie by naming defendant as her molester. Accordingly, we reverse on that issue and remand for new trial. Because the issues concerning use of the child's prior consistent statements and the videotaped deposition are likely to arise on retrial, we discuss those issues. We do not reach the remaining issues, since they are not likely to arise again.

Background

The victim, a seven-year-old girl, told her teacher that a neighbor had sexually molested her. The teacher suggested that she tell her mother. The child informed her mother, naming defendant as her assailant. Defendant and the child's mother were long-time friends. The child also repeated the incident to Officer Chavez and Detective Craig, to the latter by a videotaped statement, and to Sabrina Garcia and Julia Barker. Garcia and Barker are psychologists who saw the child.

The child testified by a videotaped deposition taken about a month before trial. The child's prior consistent statements to the other witnesses were introduced through those witnesses. Defendant did not cross-examine the child at her deposition about these statements, although he knew of them, nor, apparently, did he request the deposition be continued so he could cross-examine her about them after they had been admitted into evidence. (We note, however, the trial court ruled at the deposition that there would be no second opportunity to have the child testify.)

1. Mother's Motive to Influence Child to Lie

Defendant argues mother had a motive to influence the child to fabricate that he was the offender. Defendant claimed that the child was molested by one of her mother's boyfriends, not by him. He alleged that mother improperly influenced the child to name him as the assailant. Defendant's claim on appeal is that the trial court erred in excluding his proffered testimony concerning mother's motive for influencing the child.

Defendant provided evidence suggesting that the child had been molested by someone other than defendant. Defendant's sister, a long-time friend of the child's mother, testified that she had observed at a birthday party shortly before the incident involving defendant one of mother's boyfriends in the child's bedroom near the foot of the child's bed. When she entered the room, the man left without speaking, and the child asked defendant's sister to remain with her. Later the man abruptly left the party when he saw the sister sit down next to mother. The jury could infer from these facts that another adult male may have been the child's assailant.

Defendant also provided evidence that the child's implication of defendant as the assailant was the result of deliberate influence by mother. The child described her assailant to her teacher as "a neighbor." Yet defendant was very close to the family; the child referred to him as her uncle. Defendant suggests that it would have been peculiar for the child to identify him simply as "a neighbor." Also, while there was some confusion as to the exact time, the jury could believe the child related the incident to her mother while mother was preparing to go to a Tina Turner concert. Instead of abandoning those plans and immediately calling the police or confronting defendant, mother kept her engagement, waiting until the following day to report the incident. If the jury believed that version, it could infer from the delay that either the matter was not important enough for mother to forego her plans or that she wanted to use the time to change the story.

The gap in defendant's evidence to the jury was the lack of any motive for mother to accuse defendant rather than the real culprit. Absent such a motive, the jury might find it difficult to understand why mother would want to accuse a close family friend. Supplying the motive was the purpose of the evidence excluded by the court. Defendant argued to the court that mother was trying to avoid a custody dispute with the child's father. Defendant tendered to the court, through an inquiry of mother outside the presence of the jury, that she and the child's father had engaged in a custody dispute; that father had sought sole custody, alleging that mother's home was an unsuitable environment for the child; and that mother knew the court's joint custody arrangement could be changed at any time.

Defendant attempted to argue to the court that the custody dispute provided a motivation for mother to influence the child to name defendant, an old family friend, rather than her boyfriend. Presumably, defendant's position was that father would have weaker grounds to seek a change in custody if the abuser was an old friend of both parents, rather than one of mother's apparently numerous boyfriends. The trial court, saying it could not "follow the defendant's logic or reasoning at all," denied his motion to introduce this evidence, as well as additional evidence defendant attempted to tender on this point.

In general, evidence of motive is admissible to prove that a person acted in accordance with that motive. *See* IA J. Wigmore, *Wigmore on Evidence* §§ 117, 118 (1983). Certainly, defendant's contention that mother induced her child to falsely accuse defendant as her abuser would be much more convincing to the jury if defendant could establish a motive for mother to protect the true offender and implicate defendant.

Although defendant's theory of motive was somewhat attenuated, we believe the jury could have found that the tendered evidence showed mother had a motive to induce her daughter to lie as to the identity of her assailant. Because evidence of motive is such a material issue in any trial, and because the child's identification of defendant as her assailant was the only evidence against defendant, we hold the trial court abused its discretion by refusing to allow defendant to present this evidence.

2. Prior Consistent Statements

The child initially told her teacher she had been sexually molested. She described the assailant not by name, but as a neighbor. She then told her mother. From that point on, whenever the child related the incident, she named defendant. Defendant claimed at trial, and on appeal, that mother exerted influence on the child to name defendant rather than one of mother's boyfriends. Thus, the claimed improper influence or motive to name defendant occurred as of October 20, 1985, the date the child related the incident to her mother.

After that date, the child related the incident to Officer Chavez, Detective Craig, Sabrina Garcia, and Julia Barker. Defendant argues that the child's statements to those persons constituted inadmissible hearsay, since they were made *after* the

alleged improper influence or fabrication. The state contends the statements were not hearsay, were admissible as prior consistent statements under Rule 11-801(D)(1)(b), and that it does not matter if the statements do not antedate the time of the alleged fabrication or improper motive.

Rule 11-801(D)(1)(b) provides:

> A statement is not hearsay if * * * [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive * * *.

The precise question defendant presents has not been decided in New Mexico. *But see Bendorf v. Volkswagenwerk Aktiengeselischaft,* 90 N.M. 414, 564 P.2d 619 (Ct. App.1977) (holding without discussion that trial court properly exercised discretion in excluding two statements made after accident and at time when motive was present to deny any wrongdoing).

Under Rule 11-801(D)(1)(b), a prior statement is not excludable as hearsay, and may be offered for the truth of the matter asserted, when two requirements are met. First, the declarant must testify at trial and must be subject to cross-examination concerning the statement. We address this requirement under the next issue, "Videotaped Deposition." Second, the statement must be consistent with the declarant's testimony and must be offered to rebut an express or implied charge of recent fabrication or improper influence or motive.

In addition to the above two requirements, some courts have imposed a further requirement that, in order to be admissible, a prior consistent statement must also have been made before the motive to fabricate existed. *United States v. Harris,* 761 F.2d 394 (7th Cir.1985). There is a split among the federal circuit courts concerning whether, to be admissible under Rule 11-801(D)(1)(b), a prior consistent statement must have been made prior to the existence of a motive to fabricate. 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(1)(B)[01], at 801-154 (1988).

By a small majority, the federal courts of appeal have adopted the position that a prior consistent statement is admissible, for substantive purposes, only when it was made prior to the time the alleged improper influence or motive arose. *See, e.g., Breneman v. Kennecott Corp.,* 799 F.2d 470 (9th Cir.1986); *United States v. Bowman,* 798 F.2d 333 (8th Cir.1986), *cert. denied,* 479 U.S. 1043, 107 S.Ct. 906, 93 L.Ed.2d 856 (1987); *United States v. Harris; United States v. Henderson,* 717 F.2d 135 (4th Cir.1983), *cert. denied,* 465 U.S. 1009, 104 S.Ct. 1006, 79 L.Ed.2d 238 (1984); *United States v. Quinto,* 582 F.2d 224 (2d Cir.1978).

The rationale behind this requirement that the statement antedate the alleged motive to fabricate is simply that a consistent statement made after the declarant has a motive to fabricate has no probative value with regard to the declarant's credibility. It is not relevant. *See United States v. Miller,* 874 F.2d 1255 (9th Cir.1989) (requirement emerges from relevancy concerns under Federal Rules of Evidence 402 and 403). "Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force 'for the simple reason that mere repetition does not imply veracity.' " Weinstein, *supra,* at 801-150 to -151 (quoting *United States v. McPartlin,* 595 F.2d 1321, 1351 (7th Cir.), *cert. denied,* 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979)).

Other circuits have rejected this requirement. *See United States v. Lawson,* 872 F.2d 179 (6th Cir.), *cert. denied,* — U.S. —, 110 S.Ct. 110, 107 L.Ed.2d 72 (1989) (requiring, however, that there be other indicia of reliability surrounding the statement to make it relevant to rebut the charges of fabrication); *United States v. Anderson,* 782 F.2d 908 (11th Cir.1986); *cf. United States v. Rios,* 611 F.2d 1335 (10th Cir.1979) (the consistent statement need not predate an inconsistent statement).

In addition, rather than opting for a per se rule of inadmissibility when the state-

ment does not antedate the alleged motive to fabricate, several federal circuits have held prior consistent statements may be admitted for the more limited purpose of rehabilitating the declarant's credibility, but not to prove the truth of the matter asserted, even though they did not antedate the alleged motive to fabricate. *See United States v. Pierre,* 781 F.2d 329 (2d Cir.1986); *United States v. Harris; United States v. Parodi,* 703 F.2d 768 (4th Cir.1983). *Cf. State v. Foster,* 87 N.M. 155, 530 P.2d 949 (Ct.App.1974) (although defendant's prior statement was not admissible to prove the truth of the matter asserted, it was admissible to rebut the implied charge of recent fabrication). *But see United States v. Miller* (holding that a statement which has no probative value in rebutting a charge of fabrication cannot have probative value in rehabilitating the witness); Note, *Prior Consistent Statements: Temporal Admissibility Standard Under Federal Rule of Evidence 801(d)(1)(B),* 55 Fordham L.Rev. 759 (1987) (advocating that the antedating requirement be identical for both substantive and rehabilitative uses of prior consistent statements).

There is a serious problem, however, with drawing a distinction between admission for rehabilitative purposes and to prove the truth of the matter asserted. We doubt a jury can be expected to discern this distinction, even if a limiting instruction is given. That would be like asking a jury to consider a defendant's confession, not for the truth but only that he made it.

We adopt the position of those circuits which do not make it an absolute condition of admissibility that the declarant's statements have been made prior to the existence of the alleged motive to fabricate. Like the sixth circuit in *United States v. Hamilton,* 689 F.2d 1262 (6th Cir.1982), *cert. denied,* 459 U.S. 1117, 103 S.Ct. 753, 74 L.Ed.2d 971 (1983), we hesitate to adopt a bright line rule that would allow admission of prior consistent statements only if made before the supposed motive to fabricate arose. *See also United States v. Lawson.* We choose a more flexible position that would permit the trial court to examine the circumstances under which the statement was made and make a determination of the statement's relevancy and probativeness to rebut a charge of recent fabrication or improper influence or motive. *Id.* While these factors are, of course, more likely to be found where the statement was made prior to the alleged discrediting influence, "temporal priority should not be a condition precedent to admissibility." *Id.,* 872 F.2d at 182.

We admonish, however, that the approach we take does not allow wide-open admission of just any prior consistent statement. Where there are other indicia of reliability that make the prior consistent statement relevant to rebut a charge of recent fabrication or improper motive, then the fact that the statement was made after the alleged motive to fabricate should not preclude its admissibility. *Id.* The trial court, however, has at its disposal SCRA 1986, 11–403, where the danger of unfair prejudice outweighs the probative value. *Id. See State v. Carr,* 95 N.M. 755, 626 P.2d 292 (Ct.App.), *cert. denied,* 454 U.S. 853, 102 S.Ct. 298, 70 L.Ed.2d 145 (1981).

To take a rigid position disallowing all prior consistent statements unless they antedate the event allegedly giving rise to the recent fabrication could unduly limit the use of those statements. In fact, an opponent could bar the use of otherwise admissible consistent statements by simply alleging the declarant fabricated his statements from the time they were first made. We emphasize that even though the prior consistent statements need not always antedate the motive to fabricate to be admissible for rehabilitation purposes, the statements must, of course, still meet the requirements of Rule 11–801(D)(1)(b) (must be offered to rebut charge of recent fabrication or improper influence or motive), SCRA 1986, 11–402 (relevancy), and Rule 11–403 (balancing probative value against prejudice).

On retrial it will be for the trial court to determine whether any of the child's prior consistent statements can be admitted to rebut the claim of recent fabrication, if made. The fact that a party makes a claim of recent fabrication does not automatically

open the door to admission of all prior consistent statements.

3. Videotaped Deposition

The state filed a pretrial motion, pursuant to NMSA 1978, Section 30–9–17 (Repl. Pamp.1984), and SCRA 1986, 5–504, requesting the issuance of an order permitting the child to testify by videotaped deposition outside defendant's presence in lieu of giving direct testimony at trial before the jury. At the motion hearing on November 12, 1986, the state presented two witnesses. Based on their testimony, the trial court granted the state's motion. Defendant argues his right of confrontation was denied on three separate grounds.

(a) *Use of Victim's Prior Consistent Statements*

The videotaped deposition was taken approximately one month prior to trial. At the commencement of trial, defendant stated for the first time that he was charging fabrication, collusion, and improper influence of the child by her mother. The prosecutor then announced his intention to use prior consistent statements of the child to rebut the charge of recent fabrication. *See* R. 11–801(D)(1)(b). Defendant objected to the use of the statements on the ground that he did not have an opportunity to cross-examine the child about those statements at the deposition.

A defendant's right of confrontation is satisfied where he has both the opportunity and a similar motive to develop testimony. *State v. Massengill,* 99 N.M. 283, 657 P.2d 139 (Ct.App.1983). The opportunity for cross-examination, rather than the actual cross-examination, is the key to determining whether confrontation rights are satisfied. *State v. Tafoya,* 105 N.M. 117, 729 P.2d 1371 (Ct.App.1986), *vacated,* 487 U.S. 1229, 108 S.Ct. 2890, 101 L.Ed.2d 924 (1988) (*Tafoya I*), *aff'd on remand,* 108 N.M. 1, 765 P.2d 1183 (Ct. App.1988), *cert. denied,* — U.S. —, 109 S.Ct. 1572, 103 L.Ed.2d 938 (1989) (*Tafoya II*). Defense counsel admitted he knew about the child's prior statements prior to the deposition. Nevertheless, he argues he could not cross-examine her concerning those statements at the deposition because the state did not elicit them on direct examination. We are not persuaded by defendant's argument.

Defendant waited until after the deposition to charge recent fabrication, even though defendant knew of the statements well in advance of the deposition. Defendant could have made the child his own witness at the deposition in order to question her about the statements. In addition, defendant could have preserved his objection to the admissibility of prior consistent statements by making any cross-examination of the child relating to prior consistent statements subject to the admissibility of those statements. Defendant was well aware that the deposition was scheduled to be his only opportunity to cross-examine the child. Defense counsel's decision not to examine the victim concerning her prior statements may have been a sound tactic, but the decision was tactical nonetheless. Failure to exercise an opportunity to examine a witness for tactical reasons does not constitute the lack of opportunity to examine on which a violation of the right to confrontation may be grounded. *See State v. Massengill.*

Similarly, we reject the implication that the state created defendant's dilemma by failing to introduce the statements on direct examination of the child. Those statements were inadmissible hearsay until defendant made the charge of fabrication. *See* R. 11–801(D)(1)(b). We conclude that defendant's right of confrontation was satisfied inasmuch as he had an opportunity to cross-examine the child concerning her prior statements. *See Tafoya I; State v. Vigil,* 103 N.M. 583, 711 P.2d 28 (Ct.App. 1985).

(b) *Compliance with Section 30–9–17 and Rule 5–504*

Defendant next argues that the state failed to make the required showing that the child would suffer unreasonable and unnecessary harm if forced to testify at trial. *See* R. 5–504; § 30–9–17. This issue was not raised in the docketing state-

ment. Accordingly, we need not consider it. *State v. Aranda,* 94 N.M. 784, 617 P.2d 173 (Ct.App.1980). In his reply brief, defendant requests this court to construe his argument as a motion to amend the docketing statement. We note that the motion is untimely, since it was filed after the time for filing the brief-in-chief had expired. *State v. Moore,* 109 N.M. 119, 782 P.2d 91 (Ct.App.1989). *Moore* was decided while defendant's case was pending in this court. The law at the time defendant filed this appeal ambiguously stated that motions to amend were timely if filed within the original "briefing time." *State v. Hicks,* 105 N.M. 286, 731 P.2d 982 (Ct.App.1986); *State v. Rael,* 100 N.M. 193, 668 P.2d 309 (Ct.App.1983). Although this arguably would allow a defendant to make the motion as late as the reply brief, we doubt this court would have granted such a late motion to amend in those cases. *Moore* makes clear that a motion to amend in a case assigned to a non-summary calendar is timely only up until the brief-in-chief is due. Therefore, we deny defendant's motion to amend.

In any event, we do not need to consider this subissue. Because we remand for new trial, it will be necessary for the state, if it wishes to present the child's testimony through a videotaped deposition, to make the required showing under Section 30–9–17 and Rule 5–504. Even if that showing had been made in 1987 when the first trial commenced, that does not mean the same holds true today.

(c) *Right to Face-to-Face Confrontation*

Finally, defendant contends that the use of the videotaped deposition, taken outside his presence, violated his right to face-to-face confrontation. The procedures used in this case were similar to those in *Tafoya.* Defendant could see the child on a television monitor, but the child could not see him. Defendant maintained voice contact with his attorney.

In *Tafoya I,* we questioned the need for face-to-face confrontation where the defense was not claiming recent fabrication. 105 N.M. at 121, 729 P.2d at 1375. Defendant maintains that this case is distinguishable because he charged fabrication. *See Coy v. Iowa,* 487 U.S. 1012, 1019–1021, 108 S.Ct. 2798, 2802, 101 L.Ed.2d 857, 866 (1988). In *Tafoya II,* this court, after remand from the United States Supreme Court, addressed the issue of face-to-face confrontation in light of *Coy.* The statute the Supreme Court considered in *Coy* permitted an automatic presumption of trauma; for that reason, the Court deemed it a violation of the defendant's constitutional right to confront his accuser. In contrast, under New Mexico's law, a specific and individualized finding must be made that the victim will suffer unreasonable and unnecessary mental or emotional harm as a result of testifying face-to-face with the defendant. *See* R. 5–504. In *Tafoya II,* this court distinguished *Coy* and recognized an exception to a defendant's right to face-to-face confrontation where there has been a specific individualized showing and finding of necessity by the trial court that the harm to the victim outweighed the defendant's right to a face-to-face meeting.

The present case, like *Tafoya,* is also distinguishable from *Coy.* There was testimony demonstrating that the child would suffer unreasonable and unnecessary harm if forced to testify at trial. There was ample evidence that the child would have difficulty testifying in defendant's presence. Julia Barker testified that the child would have difficulty sitting in the witness chair or talking if defendant were present. The trial court could properly determine that the potential for harm was substantial enough to outweigh defendant's right to a face-to-face confrontation. *See Tafoya II; State v. Vigil,* 103 N.M. 583, 711 P.2d 28 (Ct.App.1985); *see also State v. Vincent,* 159 Ariz. 418, 768 P.2d 150 (1989).

Conclusion

We reverse and remand for a new trial consistent with this opinion.

IT IS SO ORDERED.

HARTZ and CHAVEZ, JJ., concur.

784 P.2d 1049

Eloy VARELA, Claimant–Appellant,

v.

ARIZONA PUBLIC SERVICE, Respondent–Appellee.

No. 11259.

Court of Appeals of New Mexico.

Nov. 30, 1989.

Certiorari Denied Dec. 21, 1989 and Jan. 4, 1990.

Dennis F. Armijo, Farmington, for claimant-appellant.

Michael P. Watkins, Gallagher, Casados & Mann, P.C., Albuquerque, for respondent-appellee.

OPINION

APODACA, Judge.

The opinion filed on November 14, 1989 is withdrawn on the court's own motion and this opinion is filed in its place. Claimant Eloy Varela (worker) appeals from the hearing officer's order awarding benefits to worker of 15% permanent partial disability. Since the injury occurred in June 1986, this case is governed by the transient provisions of the Workers' Compensation Act, NMSA 1973, Sections 52–1–1 to –68 (Orig. Pamp. & Cum.Supp.1986) (the Interim Act). The hearing officer's award was based on the provisions of Section 52–1–25. Worker contends, however, that he was entitled to an award of total disability benefits under Section 52–1–24(A) instead. In *Barela v. Midcon of New Mexico, Inc.*, 109 N.M. 360, 785 P.2d 271 (Ct.App.1989), this court concluded that an award of benefits for partial disability under Section 52–1–25 must be considered in determining whether a worker is wholly unable to earn comparable wages and thus is totally disabled under Section 52–1–24. This appeal presents us with yet another aspect of the relationship between the two separate definitions of permanent total disability and permanent partial disability. Specifically, did a finding by the hearing officer of permanent partial disability under Section 52–1–25 preclude a separate finding of permanent total disability under Section 52–1–24(A)?

We hold that the hearing officer is not so precluded but additionally is required to consider whether the evidence can also sustain a finding of permanent total disability, irrespective of a finding of partial disability. We thus remand for entry of findings and conclusions on worker's entitlement to total disability benefits.

The Interim Act defines permanent total disability as follows:

a *permanent physical impairment* to a workman resulting by reason of an accidental injury arising out of and in the course of employment whereby a workman is wholly unable to earn comparable wages or salary. In determining whether a workman is able to earn comparable wages and salary, the hearing officer shall consider the benefits the worker is entitled to receive under Section 52–1–43 NMSA 1978. If the benefits to which the workman is entitled under Section 52–1–43 * * * and the wage he is able to earn after the date of maximum medical improvement * * * is comparable to the wage the worker was earning when he was injured, he shall be deemed to be able to earn comparable wages[.] [Emphasis added.]

§ 52–1–24(A). This provision thus describes the various factors the hearing officer must evaluate in determining whether a worker is able to earn comparable wages or salary.

Partial disability, on the other hand, is defined as follows:

a *permanent physical impairment* to a workman resulting from an accidental injury arising out of and in the course of employment, whereby a workman has any anatomic or functional abnormality existing after the date of maximum medical improvement as determined by a medically or scientifically demonstrable finding as presented in the American medical association's guides[.] [Emphasis added.]

§ 52–1–25. We first note that both sections initially describe the respective disabilities under each as a "permanent physical impairment." In *Barela,* we concluded that an award of benefits received under Section 52–1–43 included those for partial disability as defined in Section 52–1–25 for purposes of calculating comparable wages.

The hearing officer entered findings that: (1) worker suffered an accidental injury arising out of and in the course of his employment; (2) the disability was causally connected to this injury; (3) worker suffered a permanent physical impairment; and (4) worker had reached maximum medical improvement. Neither party disputes these findings. The hearing officer, however, made no findings on worker's ability to earn a comparable wage.

Worker argues he presented uncontradicted evidence of his anticipated wages, demonstrating he was unable to earn a comparable wage or salary under Section 52–1–24(A) and that the hearing officer erred in refusing to make these findings. In so arguing, worker relies on the testimony of a vocational rehabilitation expert, who stated that worker was unable to return to his job as a welder due to his physical limitations and that worker had the aptitude, skills and desire for a career in accounting. The expert also testified that worker's anticipated salary as an accountant, after vocational rehabilitation, would be approximately $1800 per month, based on a national survey. Worker's weekly benefits for 15% partial disability would be approximately $180. At the time of his injury, he was earning $2793 per month and, at the time he left work, he was earning $2992 per month. The nature of the expert's testimony thus appears to encompass the kind of factors the hearing officer may decide to consider under Section 52–1–24(A) in determining whether worker was able to earn a comparable wage.

The difficulty in this case, however, arose because the hearing officer's findings clearly support the award of partial disability under Section 52–1–25. Our task in this appeal, therefore, is to attempt to reconcile what may at first glance be perceived as an incongruity in the two sections of the Interim Act. Specifically, was the hearing officer permitted to select between the two sections to determine what benefits worker was entitled to, or was he required to consider any evidence on comparable wages, in spite of his having determined that the evidence also supported a finding of a partial disability? In its answer brief, employer argues that we have before us only a substantial evidence question and that the evidence clearly supports the hearing officer's award of 15% permanent partial disability benefits under Section 52–1–25. Employer suggests affirmance is thus

mandated. It contends further the hearing officer was not required to make findings on comparable wages under Section 32–1–24(A) because he had initially found that only partial disability under Section 52–1–25 existed. We disagree.

We believe the definitions of partial and total disability under the Interim Act are not mutually exclusive. Instead, we hold worker may satisfy all of the requirements under both definitions, yet, be entitled only to benefits under the section providing the most in benefits. These provisions cannot be read or applied in isolation, but must be construed together. *See Garcia v. Schneider, Inc.*, 105 N.M. 234, 731 P.2d 377 (Ct.App.1986). The provisions of the Interim Act are to be construed liberally in favor of a worker. *Anaya v. New Mexico Steel Erectors, Inc.*, 94 N.M. 370, 610 P.2d 1199 (1980). There being no indication to the contrary in the Interim Act, we apply the case law applicable under the prior statutory provisions. *Cf.* NMSA 1978, § 52–5–1 (Repl.Pamp. 1987).

A brief discussion of the history of various workers' compensation schemes may be helpful in construing the two sections of the Interim Act in question. Historically, most states have adopted compensation schemes based on considerations of whether the worker was to be compensated for: (1) a pure wage loss; (2) a pure physical impairment; or (3) an impairment of earning capacity, a combination of (1) and (2). *See generally* 2 A. Larson, *The Law of Workmen's Compensation* § 57.14 (1989). According to Larson, there are three competing schools of thought or theories on which most workers' compensation schemes are based. Larson describes them as the "wage loss theory," "earning capacity theory," and the "physical impairment theory." *Id.* Wage loss schemes were the basis of all early compensation acts, which sought only to compensate an injured worker for actual wages lost. *Id.* This wage loss scheme gradually gave way with the introduction of "scheduled injuries" principles, which had evolved in turn from the physical impairment theory. This second theory examined loss of physical functioning rather than earning power. *See id.* The physical impairment theory recognized at least one flaw in the wage loss theory: a worker who lost a finger, a hand, or was disfigured might still be able to return to his full wages and earning capacity as before, yet not be entitled to an award. Thus, even though a worker received nothing to compensate him for a physical loss of disfigurement, he nevertheless lost his common law right to sue the employer for his injuries. *Id.*

The impairment of earning capacity theory attempts to reconcile the expanded "scheduled injuries"/physical impairment theory with the wage loss theory. *Id.* This theory relates compensable physical impairment ultimately to employability. Larson suggests that the earning capacity theory holds to the original concept of compensating loss of earning power, but recognizes that to get a true calculation of loss, one cannot always make a arithmetical comparison of earnings before and after. In the impairment of earning capacity theory, new elements are factored in to get a true calculation of *loss* to the worker. *Id.*

A study of the evolving law in New Mexico under the various workers' compensation acts enacted by the legislature, in light of the discussion in Larson of the three competing theories, reveals that our various acts have, at one time or another, embraced all three schools of thought. We believe that some of the difficulty in interpreting the Interim Act's definitions of disability may arise from the fact that the legislature, in enacting the two sections, adopted two of the competing schools of thought. Under Section 52–1–25, it is clear that partial disability is measured purely by the loss of physical function; loss of wages or earning power absolutely plays no part in the determination. In contrast, the legislature, in requiring a determination of a worker's ability to earn a comparable wage under Section 52–1–24(A), apparently applied the "earning capacity theory" of compensation. We believe each section, then, represents two different schemes of compensation, based on two distinct theories. *See generally* Larson,

supra. Read in this light, it becomes immediately apparent that the two sections state different theories of recovery and that it is possible for a worker to prove entitlement to benefits under both sections. Consequently, this appeal raises the additional question of the hearing officer's obligation to enter findings and conclusions when a worker seeks to recover under a theory of total disability under the Interim Act and the employer seeks to limit the worker's recovery under a theory of partial disability.

Based on the liberal construction we have given the provisions of the Interim Act, we conclude the hearing officer was not entitled to elect between granting partial or total disability benefits where the evidence would support both. Implicit in *Barela*'s holding, we believe, was the requirement that the hearing officer must first make a determination of permanent partial disability before making a determination of permanent total disability. We further conclude that if the worker satisfied all the requirements for both partial and total disability, he is entitled to an award under the section providing the most benefits.

The record does not indicate the hearing officer considered whether worker was entitled to total disability benefits after it was determined worker was entitled to partial disability benefits. However, the record discloses that, although worker had requested findings on comparable wage, the hearing officer did not make such findings. The legal effect of a refusal to make a finding is a finding against the party requesting it. *H.T. Coker Constr. Co. v. Whitfield Transp., Inc.,* 85 N.M. 802, 518 P.2d 782 (Ct.App.1974). Nevertheless, a finding of fact induced by an error of law can not stand. *See Walker v. L.G. Everist, Inc.,* 102 N.M. 783, 701 P.2d 382 (Ct.App. 1985). We therefore reverse and remand for: (1) the entry of findings and conclusions on the merits of worker's entitlement to total disability benefits under Section 52–1–24(A) based on the evidence already presented at the formal hearing; and (2) a reconsideration of the appropriate amount of attorney fees in light of the hearing officer's determination on total disability. In the event the hearing officer determines worker is entitled to total disability benefits, worker is hereby awarded the sum of $3,000 for attorney fees on appeal. This award shall be paid by employer and is in addition to any attorney fees awarded by the hearing officer for services rendered below. *See* § 52–1–54(E). Worker is allowed costs on appeal.

IT IS SO ORDERED.

ALARID and MINZNER, JJ., concur.

785 P.2d 221

Marc SCOTT, d/b/a Rainbow Construction Company and Rainbow Construction Company, Inc., Plaintiffs-Appellants,

v.

BOARD OF COMMISSIONERS OF the COUNTY OF LOS ALAMOS, Thomas Edgerton, Leroy Sanchez, Betsy Lucido, Defendants-Appellees.

No. 18040.

Supreme Court of New Mexico.

Oct. 31, 1989.

Rehearing Denied Dec. 5, 1989.

Roth, VanAmberg, Gross, Amarant & Rogers, Carl Bryant Rogers, Santa Fe, for plaintiffs-appellants.

Caldwell, Lenssen, Mandel, John L. Lenssen, Santa Fe, for defendants-appellees.

OPINION

LARRABEE, Justice.

Plaintiffs-appellants, Marc Scott, d/b/a Rainbow Construction Company and Rainbow Construction Company, Inc. (Rainbow), appeal from the district court's order granting summary judgment in favor of defendants-appellees, Board of Commissioners of the County of Los Alamos, Thomas Edgerton, Leroy Sanchez, and Bet-

sy Lucido (the County defendants). We affirm.

On June 3, 1986, Rainbow entered into a contract with the County of Los Alamos to construct a new entrance to the municipal annex building in Los Alamos. The contract called for completion 120 days from receipt of a notice to proceed. That notice was received on June 11, 1986, with completion due October 9, 1986.

The contract also provided for liquidated damages of $250 per day for each day beyond the scheduled completion. Substantial completion of the project was granted on November 28, 1986, or forty-nine days late. Pursuant to the contract the County granted extensions of seventeen days and assessed liquidated damages of $8,000. Edgerton, Sanchez and Lucido, who are respectively the Director of Public Works, County Engineer, and Project Manager and Assistant County Engineer, made the determination to enforce the contractual provision for liquidated damages. The decision to withhold the $8,000 as liquidated damages at $250 per day for thirty-five days was made by Edgerton, Sanchez, and Lucido, and ratified by the Board of County Commissioners of Los Alamos.

Rainbow initiated this lawsuit alleging various tort and contract claims, and a substantive due process claim under 42 U.S.C. Section 1983 (1979) against the County defendants in their individual and official capacities for unreasonable, arbitrary and capricious conduct causing the deprivation of plaintiffs' property without due process. The district court granted the summary judgment motion of the County defendants finding that: "Section 42 U.S.C. 1983 does not apply to a case based upon alleged breach of contract"; and "Plaintiffs have a claim for breach of contract including prejudgment interest and punitive damages under Count V and therefore no basis for a claim for violation of their civil rights." We affirm the judgment of the district court.

42 U.S.C. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The initial inquiry in any Section 1983 action must focus on whether two essential elements are present: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *accord Rubio v. Carlsbad Mun. School Dist.*, 106 N.M. 446, 450, 744 P.2d 919, 923 (Ct.App.1987); *Ramah Navajo School Bd. v. Bureau of Revenue*, 104 N.M. 302, 305, 720 P.2d 1243, 1246 (Ct.App.), *cert. quashed*, 104 N.M. 201, 718 P.2d 1349, *cert. denied*, 479 U.S. 940, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986).

The issue presented in this case is whether, pursuant to the contract, the assessment of liquidated damages for untimely performance by Rainbow provides the basis for a claim under Section 1983.

Rainbow has not asserted that the state law remedy for the alleged breach of contract is procedurally inadequate. Instead, Rainbow argues that the County's arbitrary conduct in breaching the contract denied Rainbow substantive due process under the fourteenth amendment. Rainbow characterizes its interest as a "contractual entitlement to receive the $8,000 liquidated damages," and claims it has a substantive due process right not to be deprived of this interest by arbitrary, capricious or irrational government conduct. Rainbow maintains that various delays beyond its control and fault caused the project to be substantially completed forty-nine days after the original completion date. Further, Rainbow submits that, if appropriate time ex-

tensions had been granted to take into account unforeseen construction problems involving a concrete foundation and material in the wall with which the new construction was to be joined, as well as rain delays, any basis for liquidated damages would have been eliminated.

By virtue of its written contract with the County, Rainbow has a legitimate claim of entitlement to receive full payment under the agreement and, therefore, it has a cognizable property interest created under state law. *See Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Implication of a cognizable property interest, however, does not necessarily imply the existence of a cause of action under Section 1983. "Section 1983 does not create a remedy for every wrong committed under color of state law." *Ohio Inns, Inc. v. Nye,* 542 F.2d 673, 679 (6th Cir.1976), *cert. denied,* 430 U.S. 946, 97 S.Ct. 1583, 51 L.Ed.2d 794. (1977); *accord Street v. Surdyka,* 492 F.2d 368, 370–71 (4th Cir.1974); *Simmons v. Wetherell,* 472 F.2d 509, 511 (2d Cir.), *cert. denied,* 412 U.S. 940, 93 S.Ct. 2777, 37 L.Ed.2d 399 (1973).

Procedural Due Process. Breach of contract by state actors does not amount to a deprivation of property without procedural due process if adequate state law remedies exist to redress the breach.

> [I]t is no accident that the constitutional provision is labelled the Due *Process* Clause. Its focus is not on the deprivation of property alone, but only such deprivation "without due process of law." Surely, it was never intended to create, via Section 1983, a font of contract law governing ordinary contractual breaches by the state.
>
> For present purposes the teachings of *Parratt v. Taylor,* * * * in the tort law field are equally compelling here. Just as the availability of a post-deprivation state tort remedy satisfied the dictates of procedural due process in *Parratt,* so plaintiffs' right to sue for breach of contract in the state court system comports with the Fourteenth Amendment here. (emphasis in original, citations omitted.)

Buck v. Village of Minooka, 552 F.Supp. 298, 300 (N.D.Ill.,E.D.1982). "A mere allegation of a breach of a contractual right is not a deprivation of property without *constitutional* due process. *Bishop v. Wood,* 426 U.S. 341, 349–50, 96 S.Ct. 2074, 2079–80, 48 L.Ed.2d 684 (1976) (emphasis added); *Boston Envtl. Sanitation Inspectors Ass'n v. City of Boston,* 794 F.2d 12, 13 (1st Cir.1986) (per curiam). Otherwise, virtually every controversy involving an alleged breach of contract by a governmental agency would be a constitutional case. *Bleeker v. Dukakis,* 665 F.2d 401, 403 (1st Cir.1981); *see also Genesco Entertainment, A Div. of Lymutt, Inc. v. Koch,* 593 F.Supp. 743, 754–55 (S.D.N.Y.1984) ("To allow breach of contract claims to be pursued under section 1983 would truly open the flood gates of litigation.") Rainbow's action is, in essence, one for breach of contract for which the state provides a complete and adequate remedy. Therefore, this case raises no issue concerning procedural due process, nor is one claimed.

Substantive Due Process. In addition, a plaintiff does not necessarily state a substantive due process claim under Section 1983 when it is alleged that the state arbitrarily and capriciously deprived that plaintiff of a state-created property interest. "[N]ot every [interest] is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution * * * substantive due process rights are created only by the Constitution." *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (citation omitted) (Powell, J., concurring); *see also Kauth v. Hartford Ins. Co. of Ill.,* 852 F.2d 951, 957 (7th Cir.1988) ("[W]e do not believe that substantive due process protects state-created property rights."); *Mangells v. Pena,* 789 F.2d 836, 839 (10th Cir.1986) ("Rights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution.")

Even though the history of substantive due process "counsels caution and restraint," *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 502, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531 (1977) (plurality opinion), there exists some case law that recognizes substantive due process claims premised upon arbitrary governmental conduct relating to the deprivation of a property interest. *See Brenna v. Southern Colo. State College,* 589 F.2d 475 (10th Cir.1978) (decision of university officials to eliminate position of a tenured professor as opposed to a nontenured teacher was deemed arbitrary and capricious). In reviewing the issue of teacher discharges, it appears that courts have been more willing to entertain claims of substantive due process violations, perhaps because a teacher's right to continued employment implicates both liberty and property interests. *See Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 572, 92 S.Ct. 2701, 2706–07, 33 L.Ed.2d 548 (1972). In the present case, however, there is no allegation that the County's action impacted upon any articulable liberty interest of Rainbow.

The determination that a substantive due process right exists is a judgment that "certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement." *Poe v. Ullman,* 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). *See, e.g., Bateson v. Geisse,* 857 F.2d 1300 (9th Cir.1988) (city council's refusal to issue building permit violated property owner's substantive due process rights where council's actions were not objectively reasonable by singling out plaintiff to be treated discriminatorily); *Rutherford v. City of Berkeley,* 780 F.2d 1444 (9th Cir. 1986) (because substantive due process is violated at the moment the harm occurs, the existence of postdeprivation state remedies does not bar a Section 1983 action in a police brutality case where governmental conduct "shocks the conscience" or constitutes force that is "brutal" and offends "even hardened sensibilities."). However, based on the Supreme Court decisions in *Parratt* and *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), it appears where the plaintiff complains that he has been unreasonably deprived of a state-created property interest, without alleging a violation of some other substantive constitutional right, the plaintiff has not stated a substantive due process claim.

In the present case, Rainbow's basic claim is a contract claim involving liquidated damages, which clearly does not rise to the level of a deprivation of a civil right cognizable under Section 1983. There is no genuine issue of material fact on the Section 1983 claim. Where there is no genuine issue of material fact, summary judgment is an appropriate means of resolving a civil rights action. *See* SCRA 1986, 1–056(C). The judgment of the district court is affirmed. Each party shall bear its own costs and attorney fees.

IT IS SO ORDERED.

SOSA, C.J., and RANSOM, J., concur.

785 P.2d 224

STATE of New Mexico,
Plaintiff–Appellee,

v.

Toby SANCHEZ, Jr.,
Defendant–Appellant.

No. 18057.

Supreme Court of New Mexico.

Nov. 2, 1989.

Rehearing Denied Dec. 5, 1989.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Appellate Defender, Santa Fe, for defendant-appellant.

Bryan L. Hunt, Las Vegas, trial counsel.

Hal Stratton, Atty. Gen., Margaret B. Alcock, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Chief Justice.

Defendant-appellant, Toby Sanchez (Sanchez), appeals his conviction for first-degree murder. During the evening of May 26/27, 1987, in Watrous, Sanchez killed Robert Vigil by cutting Vigil's throat several times while he lay sleeping in a state of alcoholic intoxication. Sanchez and Vigil had been together at the home of another man, where several people had been drinking heavily. Sanchez was on probation for

the commission of burglary and larceny. As a condition of probation Sanchez was not permitted to drink alcoholic beverages, but he did so and progressively became intoxicated over the course of the evening. In addition, he took two prednisone pills to control his asthma. Witnesses testified that following the killing Sanchez seemed to be in a dazed state, showed no emotions, and appeared not to be shocked by Vigil's death. Sanchez asked one or more persons in the home to help him bury the victim's body, but no one agreed, and the victim was not buried. Sanchez then drove to Las Vegas and parked in front of a friend's house. The friend testified that Sanchez was crying and whimpering, and asked him to drive back to Watrous with Sanchez to determine if a killing had been committed.

At trial, Sanchez introduced the testimony of an expert medical witness, who testified that prednisone was known to produce a psychotic reaction in a small percentage of people, that the description of Sanchez' behavior at the time of the killing was consistent with such a reaction, and that, in his opinion, at the time of the killing Sanchez was unable to tell right from wrong because of his use of alcohol and drugs and was incapable of forming the deliberate intent to kill someone. The State did not rebut this testimony with contrary expert testimony but did present testimony from Sanchez' doctor, who stated that while he had read about the possibility of a psychotic reaction to prednisone, he personally had never seen such a case. He also acknowledged that it was unlikely he would have warned Sanchez about this possible side effect, even had he known about Sanchez' problems with alcohol. Sanchez' employer testified that he had found several vials of pills in areas of his house where Sanchez had been, and that a missing prescription of librium was found in a clothes hamper that could have been used by Sanchez. Sanchez' medical expert testified about a syndrome known as "librium rage" which could produce unexplained and unexpected violent behavior in someone who had ingested librium.

The State countered Sanchez' defense of incapacity to form specific intent by introducing testimony of Loretta Garcia (Garcia) and Gloria Jean Salas (Salas). Garcia testified that she had talked with Sanchez several hours before the killing. Sanchez said something about "killing time" or "killing him." During pre-trial investigation, Garcia had said that Sanchez, in speaking of "killing," had referred specifically to Vigil, but Garcia later denied this. Salas testified that following the killing, Garcia came to Salas' house to comfort Salas' daughter, who had been Vigil's girlfriend. During the conversation Garcia expressed misgivings over not warning someone about Sanchez' threat. Had she done so, Garcia said, Vigil now might not be dead.

On appeal, Sanchez raises the following arguments as to alleged prejudicial error:

(I) NO SPEEDY TRIAL, IN VIOLATION OF SCRA 1986, 5–604

Sanchez argues that his trial took place more than six months after his arraignment, in violation of SCRA 1986, 5–604, which reads, in pertinent part, as follows:

> B. * * * * The trial of a criminal case * * * shall be commenced six (6) months after whichever of the following events occurs latest:
>
> * * * * * *
>
> (7) the date the court allows the withdrawal of a plea or the rejection of a plea made pursuant to Paragraphs A to F of Rule 5–304.
>
> C. * * * * The time for commencement of trial may be extended only by the supreme court, a justice thereof, or a judge designated by the supreme court, for good cause shown * * * * If the supreme court finds that there is good cause for the granting of an extension beyond the six (6) month period, it shall fix the time limit within which the defendant must be tried.
>
> D. * * * * In event the trial of any person does not commence within the time specified in Paragraph B of this rule or within the period of any extension granted as provided in this rule, the information or indictment filed against

such person shall be dismissed with prejudice.

SCRA 1986, 5–604.

Sanchez was arraigned on July 8, 1987. The State properly received from the supreme court an extension of time to try Sanchez. The extension was to expire on February 5, 1988. In January, however, the State and Sanchez' counsel negotiated a plea of guilty to voluntary manslaughter. The State signed the agreement on February 10. Sanchez signed it on February 25, and his counsel signed it on February 26. A hearing to enter the plea was scheduled for March 15, 1988. From the record it appears that the State entered into plea negotiations based on prior approval of the plea bargain by the victim's family. On March 14, Sanchez' counsel learned that the victim's family publicly had expressed disapproval of the plea. On March 15, Sanchez' counsel filed a motion to dismiss the charges with prejudice because trial had not begun by February 5. On March 15, following testimony by the victim's family in opposition to the plea bargain, the trial court rejected the negotiated plea. Sanchez states that if the court had rejected the plea on February 5 at the latest, the time for commencement of trial would have been extended by six months to August 5. Trial actually began on September 6. Thus, Sanchez argues, trial began too late and the motion to dismiss should have been granted. The State contends that the pivotal date is March 15, arguing that the parties agreed that all proceedings were to be held in abeyance until a ruling by the court on the plea bargain. Thus, the State concludes, the State had until September 15 to start trial.

■ We agree with the State's position. It is true that the extension of time ended on February 5. Yet, twenty days after that date, on February 25, Sanchez signed a plea agreement. On the following day, February 26, his attorney signed the plea agreement, knowing that a hearing on the plea was scheduled for March 15. During the period between February 5 and March 15 it clearly was understood by the parties that the action against Sanchez was held in abeyance. By his and his attorney's actions, Sanchez expressed his implied consent to continue the date for trial past the February 5 deadline and to six months past March 15. While it is true that SCRA 1986, 5–604 does not speak to a situation in which the parties among themselves agree to have waived the strict provisions of the rule, prudence and common sense dictate here that the State was not required to obtain a second extension of time. The parties implicitly agreed to extend the February 5 deadline to March 15, thereby suspending the running of the six-month requirement of the rule until the period ending September 15. As trial actually commenced on September 6, Sanchez may not argue that he was not tried timely.

We acknowledge the latent ambiguity created by our use of the word "toll" in *State v. Flores,* 99 N.M. 44, 653 P.2d 875 (1982), as it applies to the six-month rule. "Toll" denotes "to bar, defeat, or take away," as in "to toll the statute of limitations," which denotes "to show facts which remove its bar of the action." *Black's Law Dictionary* 1334 (5th ed. 1979). Yet, "toll" may not have been the best word choice to use in this situation, because a statute of limitations may be tolled for a period of time, and then recommence in such a way that the remainder of the period remaining under the statute is extended by the period tolled. Thus, for example, a two-year statute of limitations tolled for three months is extended to two years and three months past the starting point of the statutory period.

Here, however, the six-month provision of the rule is not interrupted and then recommenced. Instead, the six-month period simply does not apply during a time in which one of the circumstances contemplated by the rule is in effect. When such a circumstance is no longer in effect, then a new six-month period in its entirety applies. Because of the ambiguity created by our earlier use of "toll," we refrained from using that word in our recent opinion of *State v. Mendoza,* 108 N.M. 446, 774 P.2d 440 (1989). Instead, we spoke of "suspen-

sion of the proceedings." *Id.* at 449, 774 P.2d at 443.

Mendoza is controlling here. In *Mendoza* the circumstance which suspended the operation of the rule was a mutually pursued mental exam to determine competency. In both cases our reasoning is the same. As in *Mendoza,* so, too, here, "the delay [was] clearly for the benefit of the defendant who cannot stand trial until the issue of [the plea bargain] has been properly assessed." *Id.* "During the time an accused's [plea bargain] is being assessed, he or she is unavailable for trial. Regardless of who initiates the proceeding a [pending plea bargain] is clearly on behalf of the accused and in no way infringes on that person's speedy trial rights." *Id.* "[Such a delay is] chargeable to the defendant and must be excluded from any speedy trial analysis. A common sense approach of [Rule 5–604(B)(7)] mandates this interpretation." *Id.*

(II) PROSECUTORIAL MISCONDUCT

Sanchez argues that during trial the prosecution was guilty of misconduct sufficiently prejudicial to constitute reversible error. Sanchez alleges that, while no one incident of the alleged misconduct may have been sufficiently egregious to constitute reversible error, taken together, and in their cumulative effect, the prosecutor's actions consisted of fundamental error, even when there was no objection. The alleged misconduct includes: (a) giving the victim's parents copies of jury questionnaires completed by members of the venire; (b) referring to Sanchez in closing argument as not having been "insane" at the time of the crime, when Sanchez had never raised the insanity defense; (c) commenting several times on Sanchez' criminal record and his violation of probation for drinking alcoholic beverages; (d) stating that Garcia was upset and crying during testimony and that he (the prosecutor) had noted this fact for the record; (e) stating that he had an "important job to do" in prosecuting Sanchez on behalf of the State of New Mexico; (f) stating that Sanchez wanted the jury to "let him go," thereby suggesting to the jury that it should consider the effects of its verdict; (g) exacting from potential jurors a "promise" to convict Sanchez if they found him guilty beyond a reasonable doubt, and then reminding the jury of their promises during closing argument; (h) telling the jury, "I believe [the victim] and his family and every decent person in this state cries out to this jury, 'Let justice be done!' "; (i) improperly commenting on the law by stating to the jury that just because Sanchez introduced expert testimony the State was not required to introduce expert testimony; and, (j) improperly referring to facts outside the case by asking the expert witness about the John Hinckley case, thereby raising a comparison between Sanchez and a notorious criminal.

The State responds by saying (a) that Sanchez did not object at trial to the prosecutor's asking the jury to "promise" to return a guilty verdict upon presentation of proof beyond a reasonable doubt, and that the court did not abuse its discretion in allowing this question; (b) that the court instructed the jury as to a possible verdict of guilty but mentally ill, and that *Black's Law Dictionary* defines "insanity" as "more or less synonymous with mental illness or psychosis"; (c) that reference to John Hinckley occurred during cross-examination of the expert in the context of the following question: "[Are you] familiar with the John Hinckley case where you had these distinguished doctors coming up and reaching completely opposite conclusions?"; (d) that the comment about Sanchez wanting to be "let go" arose in the context of the following statement: "Now [Sanchez] wants to say, 'Let me go. I was out of it. My acts were not voluntary.' You can't believe this."; (e) that the comment about the State's not having to present expert testimony arose in the context of a response to the following argument by Sanchez' counsel: "No one contradicted anything he said. The State had the burden to prove, and yet, did anyone come here and say, 'I'm as qualified as he and he's wrong?' No." The State's argument in response was, "[B]ecause the defense chooses to bring an expert does not create an obligation on the State to bring one to

argue back."; (f) that as to the comments about Garcia, the prosecution's "important job," and the "decent person's cry for justice," the State argues that Sanchez' attorney did not object at trial to any of these statements; (g) as to comments on Sanchez's intoxication as a violation of parole and the related comments on Sanchez's prior convictions, the State argues that the jury was given an instruction on involuntary intoxication and that Sanchez' knowledge of the effect which alcohol would have on him was relevant and admissible, and that a discussion of Sanchez' other crimes on cross-examination was permissible to show Sanchez' knowledge of what he was doing.

Further, counsel for Sanchez did object at trial when the prosecutor attempted to question his client about whether Sanchez had been intoxicated when he committed the burglary for which he previously was convicted, and whether he had ever been in trouble with the law on other occasions when intoxicated. Although the court did not allow Sanchez to answer these questions, neither did it admonish the jury to disregard the questions. On appeal, Sanchez argues that the prosecutor's questions constituted misconduct and, absent a curing instruction by the court, are grounds for reversal. We disagree.

In retrospect, it may be argued that because the defendant did not request an instruction on involuntary *alcohol* intoxication, but only on involuntary intoxication resulting from his ingestion of prednisone, the question of his knowledge of the effects of alcohol consumption dealt with a false issue. *See* SCRA 1986, 11–404(B), 14–5106 (involuntary intoxication is a complete defense to both first and second degree murder). The jury also was instructed on the defense of inability to form a specific intent due to alcohol *or* drug consumption. These defenses do not require that the defendant be unaware of the effects of ingesting the intoxicant; however, they only would have precluded a verdict of guilty to first degree murder. *See* SCRA 1986, 14–5110.

Nevertheless, given the importance and complexity of the issues surrounding Sanchez' ingestion of alcohol and drugs in this case, and the fact that the defendant had testified on direct examination to the former convictions, we do not believe the prosecutor's decision to ask the alcohol-related question at that point in the trial amounted to misconduct. Moreover, even if we assumed the court's decision not to admonish the jury was error, it did not amount to prejudicial error.

We find no error in any of the prosecutor's remarks. With respect to the "jury promise" issue, we note that, while a party may not elicit a promise to return a *particular* verdict from the jury, a *conditional* question asking whether the jury would return a verdict in favor of the state, *if the state proves its case,* is permissible. Here, during voir dire, the prosecutor asked the jury:

> Can everyone here promise that if the state does its job correctly, that is, provides enough evidence to base a conviction beyond a reasonable doubt, that they will return a guilty verdict? Is there somebody here who can't do that? I need to know. Can everybody here make that promise?

We do not find this statement prejudicial. "The doctrine of fundamental error should be applied sparingly, to prevent a miscarriage of justice, and not to excuse the failure to make proper objections in the court below, *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. Clark,* 108 N.M. 288, 772 P.2d 322, *cert. denied,* — U.S. —, 110 S.Ct. 291, 107 L.Ed.2d 271 (1989), as was the case here, where no objections were made.

(III) INSUFFICIENCY OF EVIDENCE TO PROVE INTENT TO MURDER

Sanchez argues that evidence of his blood alcohol content after arrest (.2%), the expert's testimony as to Sanchez' inability to distinguish right from wrong, the testimony of witnesses who stated that Sanchez appeared in a daze after the killing, the possibility that Sanchez also had taken dangerous medication, the dubious nature of

Garcia's testimony and the lack of a motive, all taken together, constitutes "overwhelming evidence of a lack of deliberate intent."

The State points to Salas' testimony that Garcia had told her that Sanchez had threatened to kill the victim, and not just "to kill" in the abstract, that another witness testified that Sanchez and the victim had argued on the evening of the killing, that following the killing Sanchez told another witness that he didn't care that he had killed the victim, that the victim's throat was cut not once, but several times, and that Sanchez was not so drunk that he could not drive an automobile to Las Vegas and safely park the automobile. The State argues that the existence or nonexistence of intent is a question for the jury, citing *State v. Sparks,* 102 N.M. 317, 694 P.2d 1382 (Ct.App.1985).

We agree with the State that there was sufficient evidence presented to permit the jury to find the requisite elements of first-degree murder, including specific intent. *Sparks* and *State v. Roybal,* 66 N.M. 416, 349 P.2d 332 (1960), are controlling. The jury found the requisite intent, and we will not disturb the jury's finding.

(IV) STATE'S FAILURE TO MAKE TIMELY DISCLOSURE OF WITNESSES AND EXHIBITS

Sanchez argues that he was prejudiced by the State's revealing to his counsel only two weeks before trial that the State intended to call Garcia and Salas as witnesses, when the State knew about these witnesses well before the date on which their names were disclosed. Further, Sanchez alleges that it was error for the State not to disclose during discovery the existence of certain photographic exhibits and to reveal these to defense counsel only during the trial. The State argues that Sanchez does not show how he was prejudiced by the State's conduct with respect to discovery. The State contends that Sanchez had fifteen days before trial to interview the witnesses, who were local people and readily available, and that the photographs were cumulative evidence rather than material in that they were of the murder scene and were used to corroborate the testimony of some of the witnesses.

We agree that Sanchez was not prejudiced by the State's delay in making disclosure of witnesses and of the photographs. The court's opinion in *State v. Tomlinson,* 98 N.M. 337, 339, 648 P.2d 795, 797 (Ct. App.), *rev'd on other grounds,* 98 N.M. 213, 647 P.2d 415 (1982), accurately states the standard which is to be applied here.

(V) ABUSE OF DISCRETION IN DENYING INDIVIDUAL VOIR DIRE OF VENIRE

During voir dire, Sanchez' counsel asked the court to permit him to ask potential jurors specific questions about their knowledge of the case and the families involved. This questioning was needed, it is alleged, because the victim's parents had been part of the venire and because the community from which potential jurors were drawn was small and the crime notorious. After a hearing in which the court ascertained from both attorneys that there had been no evidence of jury tampering, the court denied the defense motion for limited and individual voir dire. Sanchez alleges error because the victim's parents, excused from jury duty for cause, were permitted to stay in the courtroom during questioning, thus, it is contended, to influence the emotions of potential jurors and prevent them from giving impartial answers to general questions. Further, the victim's mother approached a potential juror in the hall of the courthouse and made a comment which the potential juror took to be an attempt at improper influence. The potential juror was excused for cause and the victim's parents were admonished not to speak to any other potential juror.

The State argues that the defense motion to examine potential jurors individually did not include a request that the victim's parents be removed from the venire. Further, after the victim's mother had approached the potential juror in the hall, the court convened the panel to ask if anyone on the panel had heard or discussed anything with anyone outside of the courtroom that

would affect his or her opinion of the case. No one on the panel said they had had such a communication. The court then allowed each attorney to follow up with questions, but neither did so. Defense counsel did not renew his motion for limited voir dire at this time or at trial.

Neither at trial nor on appeal does Sanchez show how he has been prejudiced by the court's conduct with respect to voir dire. *See State v. Segotta,* 100 N.M. 18, 23, 665 P.2d 280, 285 (Ct.App.1983) (record must affirmatively show that defendant was not tried by a fair and impartial jury); *State v. Coates,* 103 N.M. 353, 358, 707 P.2d 1163, 1168 (1985) (mere speculation on defendant's part that his right to an impartial jury was violated will not suffice to show that the trial court abused its discretion in not granting a mistrial). Here no affirmative showing has been made that Sanchez was not tried by a fair and impartial jury, and, far from moving for a mistrial, Sanchez' counsel at trial neither objected to the court's conduct nor availed himself of the opportunity to question the panel following the court's making it available for questioning.

For the foregoing reasons, we find that Sanchez suffered no error in his conviction. Accordingly, the judgment and sentence of the court is affirmed.

IT IS SO ORDERED.

MONTGOMERY, J., concurs.

RANSOM, J., specially concurs.

RANSOM, Justice (specially concurring).

I specially concur to emphasize that counsel for Sanchez reached a plea agreement with the prosecutor in January, *prior to the expiration of the extension.* The parties *understood* that the plea agreement would be reduced to writing and would be presented to the court on March 15, after the expiration of the extension.

Although the prosecution did not seek an additional extension, Rule 5–604 was not intended to require this Court to act each time delay is due to an express or implied stay for reasons directly related to the events specified in the Rule as triggering a recommencement. This reading of Rule 5–604 is consistent with the long standing position of this Court that the Rule should be given a common-sense interpretation to effect the prompt, orderly expedition of criminal trials and not to effect technical dismissals. *See State v. Mendoza,* 108 N.M. 446, 774 P.2d 440 (1989); *State v. Flores,* 99 N.M. 44, 653 P.2d 875 (1982); *State v. Benally,* 99 N.M. 415, 658 P.2d 1142 (Ct.App.1983).

It is in light of these principles that the six-month rule did not require dismissal of the charges in this case. Within a current six-month period, the parties at least impliedly agreed to stay proceedings pending the anticipated plea disposition, the rejection of which was an occurrence that operates to recommence the running of the six months under Rule 5–604. The Rule did not apply until the plea was rejected.

785 P.2d 231

Carl I. VIDAL, Plaintiff–Appellant,

v.

AMERICAN GENERAL COMPANIES and American General Fire and Casualty Company, Defendants–Appellees.

No. 18143.

Supreme Court of New Mexico.

Jan. 11, 1990.

William G. Gilstrap, Albuquerque, for appellant.

Gallagher, Casados & Mann, P.C., J.E. Casados, M. Clea Gutterson, Albuquerque, for appellees.

OPINION

BACA, Justice.

Vidal, plaintiff below, appeals the district court's grant of American General Fire & Casualty Company's (American General) motion for summary judgment. The trial court granted the defendants' motion, determining that because plaintiff had violated a clause in its insurance policy with American General by settling with a third-party tort-feasor without the insurer's consent, the company was not obligated to pay Vidal's underinsured motorist claim. Vidal contends that the trial court should consider the factual issue of whether American General's own settlement with the tort-feasor extinguished its right of subrogation, thereby estopping the insurer from relying on the consent clause, before finding that American General is relieved of its insurance obligation. We agree, and reverse and remand to the district court for further consideration in accordance with this opinion.

Facts

Because this is an appeal from the grant of a motion for summary judgment, we consider the facts as presented by the appellant, construing the evidence in a light most favorable to him, for the purposes of this appeal. *Gomez v. Board of Educ.*, 85 N.M. 708, 709, 516 P.2d 679, 680 (1973).

Vidal was involved in an automobile accident, colliding with a car driven by Sally Hunt. At the time of the accident, Vidal was insured under a policy issued by American General. Vidal notified American General of the accident, and appropriate files were set up to cover medical payments. Subsequently, Vidal notified American General of a claim for underinsured motorist benefits, because Hunt reportedly was insured only for minimum liability limits. A lawsuit was then filed by Vidal against Hunt, and Hunt counterclaimed, with American General retaining counsel to defend.

American General noted the possibility that Vidal would file an underinsured motorist claim and that American General would have a possible subrogation claim against Hunt and her insurance carrier for medical payments to Vidal.

The lawsuit proceeded to settlement, with Vidal agreeing to settle for the limit of Hunt's insurance policy. American General, meanwhile, authorized settlement of Hunt's counterclaim for nuisance value. Pursuant to their settlement, Vidal and Hunt executed releases of their claims and subsequently filed a joint motion to dismiss their suit with prejudice. American General apparently was not aware that Vidal had settled his claim with Hunt at about the same time that the insurer had settled Hunt's claim.

Vidal subsequently informed American General that he intended to pursue his underinsured motorist claim. American General denied the claim, maintaining that its subrogation rights had been destroyed due to Vidal's settlement of his claim with Hunt without the insurer's consent in violation of the insurance contract.

Vidal's insurance policy contained an exclusionary clause, which read: "We do not provide uninsured motorist coverage for property damage or bodily injury sustained by any person: (1) if that person or the legal representative settles the bodily injury or property damage claim without our consent." (Hereinafter referred to as the consent clause.)

Two issues have been presented for our consideration: (1) whether the insurer, by itself settling with the tort-feasor, has extinguished its own subrogation rights and nullified its right to rely on the consent to settle clause vis-a-vis the insured; and (2) whether the insured's settlement with the tort-feasor without the insurer's consent automatically releases the insurer from further liability, even if the insured can demonstrate that the insurer was not prejudiced by the settlement.

We agree with appellant's position regarding the first issue—that judgment for the insurer is conditional upon its showing that its own settlement with the tort-feasor did not extinguish its subrogation rights—and we remand accordingly. Because our resolution of the first issue is sufficient to support our determination that summary judgment was inappropriate, we will not address the question of prejudice.

Did the Insurer's Own Settlement Nullify Its Lack of Consent to the Insurer's Settlement?

American General contends that its own settlement with Hunt does not void Vidal's failure to adhere to the clause. It argues for a plain reading of the contract, stating that its validity has been upheld in New Mexico and that it is an unambiguous exclusionary clause.

Vidal maintains that, despite the plain language of the contract, we should focus on the purpose of the clause: to avoid interference with the insurer's subrogation rights. He argues that, because American General abandoned its subrogation rights of its own accord, his own breach of the clause was irrelevant and the clause should be found a nullity under the circumstances.

In *March v. Mountain States Mutual Casualty Co.*, 101 N.M. 689, 687 P.2d 1040 (1984), we addressed the validity of a consent clause with regard to an underinsured motorist claim. We found it well established that the insured's settlement with or release of a tort-feasor in violation of an express consent clause destroys the insurer's right of subrogation, and that the purpose of the clause "is to protect the insur-

er's subrogation rights." *Id.* at 692, 687 P.2d at 1043. We further held that the clause is effective in protecting the insurer's right of subrogation and does not undermine our public policy in the underinsured motorist area. *Id.* at 693, 687 P.2d at 1044. However, *March* is not dispositive on the issue presented in this appeal.

New Mexico precedent indicates that a release given by one party pursuant to a settlement with a second party constitutes an accord and satisfaction of all claims between the two parties arising out of the incident giving rise to the liability, absent an express reservation of rights by the settling party. *Harrison v. Lucero*, 86 N.M. 581, 584, 525 P.2d 941, 944 (Ct.App. 1974). Thus, the settling party is estopped from pursuing a claim of negligence against the other. *Id.; cf. Landin v. Yates*, 98 N.M. 591, 651 P.2d 1026 (Ct.App. 1982). *Harrison* relied upon *Wm. H. Heinemann Creameries, Inc. v. Milwaukee Automobile Insurance Co.*, 270 Wis. 443, 71 N.W.2d 395, *reh'g denied*, 270 Wis. 443, 72 N.W.2d 102 (1955), where the court found an accord and satisfaction and estopped the insurance company plaintiff from pursuing indemnification subsequent to a compromise settlement with the defendant, basing its decision in principles of equity and the common-sense assumption that the settlement indicated to the defendant that the insurer had no claim against him arising out of the accident.

American General contends, however, that the cited authority is inapplicable because it was decided prior to *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981), where we adopted pure comparative negligence as a theory of apportioning tort liability. American General suggests that *Harrison* and *Heinemann* actually decided that the settlement constituted an admission of negligence by one party, thus barring suit on the other party's negligence under a contributory negligence rationale. Under comparative negligence, however, the insurer argues that an admission of negligence by one party is not a bar to his recovery for the negligence of the other; therefore, the rule of *Harrison* estopping the settlor from subsequent suit can no longer apply.

Although several courts adopting a rule similar to that articulated in *Harrison* have seemed to have grounded their decisions in just such a rationale, *see, e.g., Burke v. Shaffer*, 184 Neb. 100, 101, 165 N.W.2d 352, 353 (1969) ("The theory of the rule is that it is logically and factually impossible to reconcile a valid claim by one party with a valid claim by the adverse party."), it is apparent that the rule is not necessarily based in contributory negligence theory. *Harrison* based the rule on principles of accord and satisfaction, the presumption that the parties intended to resolve their claims. *See also Cyr v. Cyr*, 560 A.2d 1083 (Me.1989); *Far West Financial Corp. v. D & S Co.*, 46 Cal.3d 796, 760 P.2d 399, 251 Cal.Rptr. 202 (1988); *Ohio Casualty Ins. Co. v. Nauth*, 5 Wis.2d 518, 520, 93 N.W.2d 514, 516 (1958) ("The rationale of [the *Heinemann* holding] was that the parties, in entering into such a settlement, will be presumed to have intended a complete accord and satisfaction of their respective claims against each other arising out of the accident. Such presumption is grounded upon public policy in order to avoid needless litigation.") This interpretation is bolstered by the fact that Wisconsin, whose accord and satisfaction rule we assumed, adopted comparative negligence in 1931, some twenty years before it adopted the rule at issue here. *See* Wis.Stat.Ann. § 895.045 (1983); Campbell, *Wisconsin's Comparative Negligence Law*, 7 Wisc.L. Rev. 222, 225 (1931). Thus, it is evident that the rule operates independently of comparative negligence principles.

A settlement is presumed to create an accord and satisfaction. *Nauth*, 5 Wis.2d at 520, 93 N.W.2d at 516. However, the presumption may be rebutted if the appropriate elements are not present, most significantly a meeting of the minds. *Austin v. Cox*, 492 So.2d 1021, 1022 (Ala. 1986). Thus, for example, estoppel may not lie for claims accruing subsequent to the settlement. *Martin v. Guttermuth*, 403 S.W.2d 282, 283 (Ky.Ct.App.1966).

Accordingly, we hold that American General's settlement with Hunt may have constituted an accord and satisfaction, if the appropriate factual predicate is found, and that the insurer may have been estopped from asserting a subsequent claim for subrogation. The purpose of the consent clause is to protect the insurer's right of subrogation, and if that right has been voluntarily relinquished by American General, it will not be able to rely on the clause to deny Vidal coverage. The fact finder should determine whether the parties intended an accord and satisfaction, considering, *inter alia,* whether the insurer expressly reserved its right to assert its own claims and whether subsequent claims arose that the insurer was not aware of when it settled. It bears noting that the insurer bears the burden of proving that the settlement did not constitute an accord and satisfaction. We therefore remand to the district court for consideration in accordance with this opinion.

IT IS SO ORDERED.

SOSA, C.J., and MONTGOMERY, J., concur.

785 P.2d 235

NAVAJO ACADEMY, INC.; Thomas Atcitty, Dr. Sam Billinson, Dillon Platero, Virgil Kirk, Anita Pfeiffer, Leonard Arviso, Andrew Natonabah, Wally Davis, David Tsosie, and Cheryl Yazzie, in their official capacities as members of the Board of Trustees of Navajo Academy, Inc., Plaintiffs–Appellees,

v.

NAVAJO UNITED METHODIST MISSION SCHOOL, INC.; George Hartzog, individually and in his official capacity as Executive Director of Navajo United Methodist Mission, Richard Lewis, Janice Caster, Broadace Elkins, Pat King, Adele Hope King, Marge Knotke, David Saucier, Betty Todacheney, Raymond Tsosie, James Miller, in their official capacity as members of The Board of Directors of United Methodist Mission School, Inc.; and Women's Division of the Board of Global Ministries of the United Methodist Church, Defendants–Appellants.

No. 18006.

Supreme Court of New Mexico.

Jan. 16, 1990.

Tomita & Simpson, Susan K. Tomita, Albuquerque, Claudeen Bates Arthur, Whiteriver, Ariz., for appellants Navajo School & Hartzog.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., J. Douglas Foster, Albuquerque, Owens, Whiteman & Bankes, Paul J. Bankes, Jr., Philadelphia, Pa., for appellant's Women's Div.

Roth, VanAmberg, Gross, Amarant & Rogers, Michael P. Gross, Santa Fe, for appellees.

OPINION

MONTGOMERY, Justice.

This appeal challenges the propriety of a district court order which, while it has the effect of terminating a tenancy as to real property, allows the tenant to remain in possession of the property for an extended period after termination. The landlord, defendant below, appeals the court's order, claiming lack of substantial evidence to support its findings of fact and lack of legal ground to support the order in favor of the tenant (plaintiff below). We hold that, given the trial court's findings and the unusual circumstances of this case, the court did not abuse its equitable discretion as a court of equity in permitting the tenant to remain on the property for three years following termination of the lease, and accordingly we affirm.

I.

The Navajo Academy, Inc. (the Academy), is a New Mexico corporation organized by the Navajo Tribe to operate a preparatory school for Navajo college-bound youth. Originally located in Ganado, Arizona, it moved its campus to Farmington, New Mexico, in 1978 at the invitation of the Navajo United Methodist Mission School, Inc. (the Mission School). The Mission School is a New Mexico corporation operated in conjunction with the United Methodist Church to conduct a school in Farmington. Its facilities were deteriorating and its student enrollment declining when it invited the Academy to move to the Farmington campus and commence operations there.

The terms and conditions of this move were not written. There was an understanding, however, between the Academy's headmaster and the Mission School's superintendent that the Academy could occupy as much of the campus, including dormitories, classrooms and support buildings, as it needed to house its program, rent-free. There was a tacit understanding that the Academy could stay on the campus for as long as it provided a quality educational program for Navajo children.

In the 1978–79 school year, the Academy's enrollment was about twenty-five students. Because of the quality of its program and the fact that it charged no tuition, whereas the Mission School did make such a charge, the Academy's enrollment climbed steadily and the Mission School's enrollment declined. Within a few years the Mission School had lost all of its students, who were now enrolled in the Academy, and by the 1986–87 school year the Academy's enrollment had grown to approximately 250 students.

The one hundred-acre Farmington campus is owned by the Women's Division of

the Board of Global Ministries of the United Methodist Church (the Women's Division). Over the years, the Women's Division had leased the campus to the Mission School in a series of four-year leases which were continually renewed. By 1982 the Academy had come to occupy virtually the entire campus. The original understanding remained unwritten but became even more clearly understood to encompass a long-term relationship of indefinite duration. At about the same time, it also became clear that something had to be done about the deteriorating condition of the campus. The Academy and the Mission School agreed on a course of action: The Academy would make application to the Bureau of Indian Affairs (BIA) for substantial sums of money to repair and renovate the facilities, and the Mission School would support this application with a commitment that the Academy would have the use of the campus for a long term. Pursuant to this arrangement, the Mission School delivered to the Academy an executed copy of a resolution by the Mission School's board authorizing and directing the development of a long-term lease with an indefinite term of no less than twenty-five years. The trial court found that this resolution constituted a promise to provide a long-term lease so that the BIA would embark on a multi-year program of providing substantial sums to the Academy for facilities repair and renovation.

In the same year, 1982, the parties began entering into what was to be a series of short-term subleases, under which the Academy leased the campus from the Mission School for each succeeding school year from 1982–83 to 1986–87. (In 1983–84 there was a direct lease between the Women's Division and the Academy.) Neither the subleases nor the 1983–84 direct lease required that any rent, other than a token amount, be paid. The only consideration for these leases was performance by the Academy of its commitment to provide a quality educational program for Navajo youth and to carry out ordinary maintenance of the facilities. The trial court found that the sub-leases were not intended to replace the understanding between the Academy and the Mission School relating to the Academy's continued, indefinite occupancy of the campus.

The Mission School's promise to provide a long-term lease was not kept. For one thing, the Women's Division had a strict policy against leasing its property for periods longer than four years, and despite the efforts of the Academy and the Mission School that policy could not be changed. However, according to the trial court's findings, the Women's Division condoned the relationship between the Academy and the Mission School and placed representatives of the Mission School in positions of apparent authority to act for and bind the Women's Division. As the years went on, the Academy and the Mission School explored alternative ways of accomplishing their mutual objective of a long-term relationship, including a possible merger between the two corporations, a joint venture and, toward the end, development of a master plan to accommodate both organizations.

In 1987 the relationship between the two organizations began quickly to deteriorate. The Mission School requested that, for the next ensuing school year (1987–88), substantial rent ($220,000.00) be paid by the Academy. The Mission School proposed other changes in the sublease relationship and eventually delivered an ultimatum to the Academy requiring it to vacate the property if the Mission School's new sublease was not signed by a stipulated date. At that time the Mission School's new superintendent, Dr. Hartzog, in consultation with representatives of the National Division of the Board of Global Ministries of the United Methodist Church, had already decided that the relationship between the Mission School and the Academy would have to end. The Academy, for its part, sent a letter to the National Division and the Women's Division repudiating the concept of a cooperative relationship with the Mission School with respect to the educational program carried out by the Academy. It had become clear that the relationship had broken down and that the Acade-

my's occupancy of the campus would have to end.

The Mission School thereupon brought an action in magistrate court for forcible entry and detainer, seeking to evict the Academy. The Academy responded by bringing this action in the District Court for San Juan County to prohibit the magistrate court from entertaining the eviction action and to obtain various other forms of relief. Among the items of relief sought in the Academy's complaint were a declaration that it was entitled to continued occupancy of the property under a "constructive" long-term lease, damages of $1,800,000 for conversion as a result of its expenditures in improving the campus, declaratory and injunctive relief on behalf of the students and compensatory and punitive damages for interference with contractual relations. After a five-day bench trial, the court entered findings of fact and conclusions of law generally favorable to the Academy but awarding none of the relief requested except for the order permitting the Academy to remain on the campus for three years after the date of the trial court's judgment.

II.

On appeal, the Mission School and the Women's Division raise essentially two issues. First, they assert that the trial court's critical findings of fact (some of which have been referred to above; others of which will be mentioned below) are not supported by substantial evidence. Second, they argue that those findings, and the resultant conclusions, conflict with various principles of contract law: The trial court's reliance on an oral agreement conflicts with an unambiguous written agreement and therefore violates the parol evidence rule; the trial court's conclusion that the oral agreement created a lease for more than three years contravenes the statute of frauds; and, since under the trial court's own findings the Academy was only a tenant at will, the tenancy could be terminated by either party, which the Mission School did in 1987. A third issue asserted by the Mission School is a variation on the substantial evidence point; it claims that an integral and inseparable part of the understanding between the Academy and the Mission School was that the educational program would be a cooperative venture and that the Academy's repudiation of this understanding justified the Mission School in terminating the agreement looking toward a long-term lease.

The first and third issues mentioned above can be disposed of quickly. The appellants, Mission School and Women's Division, appear to recognize, as they must, that this Court is bound by the trial court's findings of fact if those findings are supported by substantial evidence in the record. *Getz v. Equitable Life Assurance Soc'y of the United States,* 90 N.M. 195, 561 P.2d 468, *cert. denied,* 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95 (1977). As in *Register v. Roberson Construction Co.,* 106 N.M. 243, 245, 741 P.2d 1364, 1366 (1987), "our conclusions concerning the facts of this case are not based on an original and independent analysis of the record. Rather, we take the trial court's findings of fact as binding because that is our duty on appeal." This is not to say that we have not attempted to assay the record to determine whether substantial evidence does support the findings; we have indeed conducted such a review and have found that the findings are adequately supported under the governing standard: "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.,* 106 N.M. at 245, 741 P.2d at 1366.

Similarly, the Mission School's third issue—that the Academy's repudiation of the Mission School's continued involvement in the Academy's education program prevents it from relying on any understanding as to a long-term lease relationship—fails, for two reasons. First, the trial court made no finding as to such an "integral" feature of the agreement. It found, on the contrary, that the agreement under which the Mission School would provide the Academy with a long-term lease was a *unilateral* agreement: A promise by the Mission School to provide the lease in exchange for

the Academy's making various expenditures for repairs, renovations and improvements on the campus. Unilateral contracts are defined in the first Restatement of Contracts:

> A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee.

Restatement of Contracts § 12 (1932). *See also id.*, comment a: "In a unilateral contract the exchange for the promise is something other than a promise." As we have indicated, the trial court's findings in this regard are supported by substantial evidence.

The second reason why the Mission School's additional argument fails is that it misapprehends the significance of the unilateral contract found by the trial court and relies on the existence of an executory, bilateral agreement as the basis for its assertion that the Academy's repudiation of its commitment under this type of agreement excused the Mission School from complying with *its* obligations. Again, the trial court did not find that any such bilateral agreement, contemplating a promise by the Academy to engage in a cooperative relationship in exchange for the Mission School's promise to give a long-term lease, existed. *See Farrar v. Hood,* 56 N.M. 724, 729, 249 P.2d 759, 762 (1952) (findings of fact supported by substantial evidence are the facts upon which case is to be decided on appeal); *Gibbons & . Reed Co. v. Bureau of Revenue,* 80 N.M. 462, 464, 457 P.2d 710, 712 (1969) (failure to make specific finding of fact regarded as finding against the party having the burden of establishing the fact). The trial court found that the Mission School promised to give a twenty-five-year lease in exchange for the making of certain expenditures by the Academy. It is undisputed that the Academy did make those expenditures (even though the funds for the expenditures were derived from the BIA), and our review of the evidence convinces us that the Mission School did indeed promise to enter into a long-term lease in exchange for these expenditures. It is similarly undisputed that the Mission School never tendered a long-term lease. Therefore, it breached the agreement which the trial court found, and that breach had nothing to do with the Academy's own disavowal of any future involvement by the Mission School in its educational program.

The appellants' arguments that enforcement of a promise to give a long-term lease would violate the parol evidence rule, the statute of frauds, and principles of the landlord-tenant relationship in a tenancy at will have greater substance. We find, however, that they are all bottomed on another misapprehension similar to that mentioned above, namely, a misunderstanding of the nature of the agreement actually found by the trial court and the relief actually afforded by its order. All three of the sub-arguments are predicated on the same erroneous proposition—that the trial court in effect specifically enforced the promise to give a long-term lease, when in actuality it recognized that the tenancy between the parties was terminated and, in order to reach an equitable result, permitted the Academy to remain on the premises for a period of time.

As noted earlier in this opinion, the Academy's complaint sought a declaration that it was entitled to a "constructive" long-term lease. In this respect, its request for relief was similar to that of the tenant in *Ammerman v. City Stores Co.,* 394 F.2d 950 (D.C.Cir.1968). In that case a developer's promise to give a prospective tenant a lease in a shopping center was specifically enforced on the basis of a trial court's finding that the promise was given in exchange for a letter from the prospective tenant to a municipal zoning authority supporting the developer's proposed rezoning of the tract on which the shopping center was to be built. For similar cases *see Annotation, Specific Performance of Lease of, or Binding Option to Lease, Building or Part of Building to be Constructed,* 38 A.L.R.3d 1052 (1971).

Here, despite the assumption underlying most or all of the appellants' arguments, the trial court did *not* specifically enforce the Mission School's promise to give a twenty-five-year lease. Rather, the trial court determined, in effect, that the Academy's leasehold interest had terminated—or was, as appellants argue, "terminable at will"—but nevertheless considered the practical effect of an order evicting the Academy from the premises. The trial court further considered the equities in the case before it and found that the Academy had come before the court with clean hands. Under the circumstances, therefore, the trial court decided that the most equitable remedy, while making clear that the Academy would be required to vacate the premises at the end of three years at most, would be to grant it that long a period in which to locate a new campus and move its 250 students to another location. As indicated previously, we do not believe that the fashioning of this equitable remedy, in a suit invoking the equitable powers of the court, was an abuse of discretion.

III.

At bottom, this suit was originated by the Mission School when it applied to the magistrate for relief from forcible entry and detainer. When the Academy sought to prohibit the magistrate court from entertaining this action, it requested equitable relief in the form of a declaration that it held under a "constructive" long-term lease. Though the original action was to prevent relief by way of forcible entry and detainer, which has its origins at law, and to enforce a long-term lease, it is anything but new for this Court to validate an equitable solution to a problem such as the one before us when a party asks for justice and a "legal" remedy is inadequate; "equity frequently interferes." *Romero v. Muños,* 1 N.M. 314, 316 (1859). In *Romero* the Court was asked to reverse a trial court ruling denying the request of a woman who sought injunctive relief. She had been awarded a judgment in an action for ejectment of a tenant from her land. The ejected tenant reentered the land, took possession and tore up her crops. When she sued the tenant, the tenant argued that there was an existing legal remedy which would preclude equitable jurisdiction, and the trial court agreed. The Court did not, saying:

> Equity obtains jurisdiction where the remedy at law is not plain, adequate, and complete. It is not enough to exclude its jurisdiction that there is a remedy at law. The remedy should be equal to give complete redress. If it fails in some essential quality, the equity may be invoked.

Id., 1 N.M. at 315. *See also Hilburn v. Brodhead,* 79 N.M. 460, 464, 444 P.2d 971, 975 (1968) ("[A] court of equity has power to meet the problem presented, and to fashion a proper remedy to accomplish a just and proper result."); 1 J. Pomeroy, Equity Jurisprudence Sec. 109 (5th ed. 1941):

> Equitable remedies ... are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.

In the case at bar, the trial court devised a remedy that permits the Academy to continue functioning as a school as it searches for a new home. In somewhat similar circumstances, courts of equity have relieved the tenant from the requirement that he vacate the leased premises immediately upon expiration of the lease. *See In re Weinberg's Estate,* 177 Misc. 587, 31 N.Y.S.2d 445, (1941) (year-to-year tenant, too ill to be removed from apartment when lease ended, permitted to remain for six months, after which tenant died; estate of tenant held not liable for rent for balance of year since tenant was not "holdover" tenant in wrongful possession of apartment); *Eden v. Southern Colorado Midget Racing, Inc.,* 153 Colo. 58, 384 P.2d 732 (1963) (lease of race track for as long as used as a particular kind of track; tenant allowed to stay where tenant used track for different type of racing, improved property and continued to pay rent). *Cf. Politelli v. Gianfrancesco,* 98 R.I. 252, 201

A.2d 129 (1964) (tenant improved building relying on promises from landlord that written lease would be provided; court ordered specific performance of promise to lease for three years).

The applicable standard of review of a trial court's order affording the tenant equitable relief of the type granted by the trial court in this case is that set forth in *Wolf & Klar Cos. v. Garner*, 101 N.M. 116, 118, 679 P.2d 258, 260 (1984), in which this Court said:

> The application of doctrines of "clean hands" or other such equitable defenses rests in the sound discretion of the trial court. *Home Savings & Loan Ass'n v. Bates*, 76 N.M. 660, 417 P.2d 798 (1966). Absent a clear abuse of discretion, the trial court's exercise thereof will not be disturbed on appeal. *Flinchum Const. Co. v. Central Glass & Mirror Co.*, 94 N.M. 398, 611 P.2d 221 (1980). Since it cannot be said that the court exceeded the bounds of reason, all circumstances before it being considered, *Independent Steel & Wire Co. v. New Mexico Cent. R.R. Co.*, 25 N.M. 160, 178 P. 842 (1919), we do not find an abuse of discretion....

In this case, the trial court found that, because of the Academy's reasonable reliance on the Mission School's promise of a long-term relationship, the Academy refrained from searching for new facilities or applying for federal funds to construct a new facility as other Navajo schools had done in recent years. Instead, the court found, the Academy spent substantial sums of money (obtained from the BIA) on major repairs, renovations and improvements of the Mission School's campus and that those improvements were accepted by the owner of the property, the Women's Division. As a result, the court further found, when the dispute arose the Academy had no alternative facilities to which to move its education program, and the Mission School and the Women's Division had obtained the benefit of a quality program plus renovated and repaired school facilities. During the pendency of the action, the Academy commenced efforts to search for a new home; but it was unlikely, according to the trial court, that a new home would be found and made available in less than three years.

The trial court went on to find that, were the Academy to be evicted from the campus before alternative facilities became available, its education program would be destroyed. The Academy had built up a quality program for college-bound Navajo students and enjoyed a high reputation for the excellence of that program. This program, if lost, would constitute a major setback for Navajo education.

As noted, the trial court also held that, because of the Academy's substantial compliance with the terms of the parties' understanding and subleases, it came before the court with clean hands. At the same time, the Mission School had not complied with those terms, particularly in the respect that it had failed to tender to the Academy any form of the long-term lease as it had promised. Instead, it had accepted the benefits of the substantial expenditures made by the Academy to improve the Mission School and Women's Division property. Similarly, the Women's Division had accepted the fruits of the Academy's expenditures and approved the long-term presence of the Academy on its premises.

Under all of these circumstances, the trial court found it would be inequitable to evict the Academy without at least giving it a reasonable opportunity to find a new home. We believe that this remedy did not "exceed the bounds of reason," since, in addition to all the other factors, the numerous and costly improvements the Academy bestowed upon the Mission School campus can be viewed as the equivalent of several years' rent. We conclude that the trial court's order permitting the Academy to remain on the campus for a period of time not to exceed three years from the date of the judgment was not an abuse of discretion, and the judgment is affirmed.

IT IS SO ORDERED.

RANSOM and BACA, JJ., concur.

785 P.2d 242

James M. FURGASON,
Plaintiff–Appellant,

v.

Christopher CLAUSEN and Donrey, Inc., a Nevada Corporation, authorized to do business in New Mexico as Donrey Outdoor Advertising Company, also dba Donrey Media Group dba and/or publishing the Alamogordo Daily News, Defendants–Appellees.

No. 10841.

Court of Appeals of New Mexico.

Oct. 10, 1989.

Certiorari Denied Dec. 5, 1989.

Lisa K. Durrett, Charles W. Durrett, Durrett, Jordan & Durrett, P.C., Alamogordo, for plaintiff-appellant.

Frank K. Wilson, Rory L. Rank, Wilson & Rank, Alamogordo, for defendants-appellees.

OPINION

DONNELLY, Judge.

Appellant James M. Furgason appeals from an order granting summary judgment and dismissing his complaint for libel against defendants Christopher Clausen, Donrey, Inc., and the Alamogordo Daily News for publishing a false report of his arrest. We discuss: (1) whether the court erred in determining that the publication in question was protected by the fair-report privilege; (2) whether the district court erred in determining the status of appellant; and (3) propriety of summary judgment. We reverse.

Appellant is the owner and proprietor of "Furgi's Pub" in Alamogordo. He also was appointed to serve on an advisory committee chosen by the mayor to deal with issues involving alcoholism and driving while intoxicated (Mayor's Committee). On January 9, 1987, appellant's home was burglarized, and among the items stolen were his wallet and a pistol. Several weeks later, on January 22, 1987, a man identifying himself as James M. Furgason was arrested by a city police officer on charges of paint sniffing and carrying a pistol as a concealed weapon. The individual arrested was carrying a driver's license showing his picture but bearing the name, address, and other personal data of appellant. At the time of the arrest the man told police that he was 32 years of age, that he was unemployed, and that he had no vehicle.

The next morning defendant Clausen, a reporter employed by the Alamogordo Daily News, reviewed the arrest reports prepared by the city police. The newspaper customarily published reports of the names of persons arrested by the local police. On learning that the name James M. Furgason appearing on the arrest report was the same as that of appellant, Clausen discussed the arrest report with Detective Ray Bailey and Captain Truman Nix of the Alamogordo Police Department. Both officers confirmed that the person arrested had been identified as James M. Furgason.

Clausen also received a typed copy of a Crime Stoppers' news release from the city police soliciting information from the public concerning the burglary of appellant's home and describing the burglary as the crime of the week. The Crime Stoppers' news release stated that among the items stolen were appellant's wallet and a .357 magnum revolver.

Clausen prepared a news story for publication concerning the facts of the Furgason arrest, which was published in the January 23, 1987 noon edition of the Alamogordo Daily News. The headline and lead paragraphs of the article reported,

Bar owner accused of sniffing paint

A prominent local bar owner who serves on the Mayor's Committee for Driving While Intoxicated and Alcoholism was arrested Thursday night for abuse of chemical substance and negligent use of a deadly weapon.

James M. Furgason, 41, 1407 Rockwood, who owns the popular bar and package store, Furgi's, 817 Scenic Dr., was arrested at 9:45 p.m. Thursday night after allegedly being observed sniffing paint.

The news story also reported, among other things, that "[a]ccording to the report by Department of Public Safety officer Greg Cavelli, Furgason was sniffing paint in the covered restroom entrance of the 10th Street Conoco Service Station," that a search of Furgason revealed that he was carrying a .357 caliber revolver tucked into his waistband, and that following his arrest "Furgason was booked into the Otero County Jail under a $3,500 bond and is scheduled to be arrainged [sic] before [a magistrate judge] Friday afternoon."

Several hours after the newspaper was published, the city police, while attending the magistrate court arraignment, discovered that the person arrested and identified as James M. Furgason was an imposter, that he had falsely informed Officer Cavelli that he was James M. Furgason, and that the driver's license he had shown police was the driver's license which had been stolen earlier from appellant's home. The individual arrested was subsequently identified as Garland Erven and was charged with having burglarized appellant's residence. Subsequent investigation revealed that Erven had altered appellant's driver's license and placed his own photograph over the picture of appellant on the license.

Thereafter, in its January 25, 1987 edition the newspaper printed a front page story reporting that Erven had impersonated appellant by using a driver's license taken from appellant's wallet, which had been stolen during the burglary of appellant's home on January 9, 1987.

Appellant filed suit against defendants for defamation, alleging that the January 23 newspaper article was libelous and seeking actual and punitive damages.

On February 27, 1987, defendants filed a motion to dismiss the complaint for failure to state a claim or, alternatively, seeking summary judgment. After a hearing, the district court entered an order granting summary judgment. The order recited in part that the newspaper article which gave rise to this lawsuit was privileged under the fair and accurate report privilege, that the privilege was not abused, that appellant was a "limited public figure," that defendants did not act with malice, that defendants did not know the content of the news article was false or did not negligently fail to recognize that the article was false, and that defendants were entitled to summary judgment as a matter of law.

I. FAIR AND ACCURATE REPORT PRIVILEGE

The news article which is the subject of this suit was written by Clausen using information obtained from the police arrest report, conversations with city police officials, information independently obtained by Clausen after inquiries posited to the city clerk, and information contained in the local telephone directory.

The first two paragraphs of the news article identified the person arrested as "James M. Furgason, 41, 1407 Rockwood, who owns the popular bar and package store, Furgi's, 817 Scenic Drive * * * after allegedly being observed sniffing paint." The headline together with the lead paragraph also identified the person arrested as a prominent local bar owner who served on the Mayor's Committee.

Appellant argues that the district court erred in determining his complaint was not actionable based on a finding that the news article was privileged under the fair and accurate report privilege. *Stover v. Journal Publishing Co.*, 105 N.M. 291, 731 P.2d 1335 (Ct.App.1985), *cert. denied*, 484 U.S. 897, 108 S.Ct. 230, 98 L.Ed.2d 189 (1987), reaffirmed the fair report privilege as a defense in an action for defamation. As observed in *Stover*,

> 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.

Id. at 294, 731 P.2d at 1338.

Determination of whether a privilege applies to material alleged to be defamatory is a question of law to be decided by the court. *Coronado Credit Union v. KOAT Television, Inc.*, 99 N.M. 233, 656 P.2d 896 (Ct.App.1982).

The fair report privilege protects against liability even though the publisher may not believe the material reported. *Id.* However, the privilege may be abused where the published account is discolored or garbled from that of the proceedings which are reported, or where the publisher draws conclusions or adds comments or insinuations of his own which are defamatory of the character of appellant. *See Henderson v. Dreyfus*, 26 N.M. 541, 191 P. 442 (1919); *Stover v. Journal Pub. Co.; see also Moritz v. Kansas City Star Co.*, 364 Mo. 32, 258 S.W.2d 583 (1953); *Haynik v. Zimlich*, 30 Ohio Misc.2d 16, 508 N.E.2d 195 (1986). In order to qualify for the fair report privilege a newspaper is not required to reprint an official report verbatim; it may instead summarize or abridge its contents. *Lavin v. New York News, Inc.*, 757 F.2d 1416 (3d Cir.1985); *Appleby v. Dailey Hampshire Gazette*, 395 Mass. 32, 478 N.E.2d 721 (1985).

In *Bufalino v. Associated Press*, 692 F.2d 266, 272 (2d Cir.1982), the court considered the breadth of the rule contained in Restatement (Second) of Torts Section 611 (1977), holding: "[o]nly reports of *official* statements or records made or released by a public agency are protected by the § 611 privilege. Statements made by lower-level employees that do not reflect official agen-

cy action cannot support the privilege." (Emphasis in original.)

As observed in Restatement (Second) of Torts, *supra,* Section 611, comment h:

> An arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this Section. On the other hand statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section.

In a defamation action the plaintiff bears the burden of proving abuse of a conditional privilege. *Haynik v. Zimlich; Mathis v. Philadelphia Newspapers, Inc.,* 455 F.Supp. 406 (E.D.Pa.1978).

In the instant case, with the exception of the name of the person arrested, the headline and first two paragraphs of the January 23, 1987 news article alleged by appellant to be defamatory consisted of matters which did not appear in the arrest report prepared by the city police. Instead, the headline and two lead paragraphs contained information concerning the appellant, his occupation and official position, and erroneously identifying appellant to be the same individual as the person arrested and charged by the police with the commission of two criminal offenses. Specifically the headline and first two paragraphs of the article stated factually that the arrestee was a "prominent local bar owner" who "serves on the Mayor's Committee for Driving While Intoxicated and Alcoholism" and that he was arrested on two criminal charges. The headline and article also stated as a fact that appellant, age "41," "who owns the popular bar and package store, Furgi's, 817 Scenic Drive, was arrested * * * after allegedly being observed sniffing paint." The material added by Clausen did not appear in the arrest report. The additionally added facts which were not contained in the arrest report conclusively identified the person arrested as being the appellant. Because most of the material contained in the first two paragraphs of the article was not drawn from the arrest report, the additional material and conclusions drawn by defendants affirmatively identifying appellant as the same person arrested and charged, are outside the permieters of the fair and accurate report privilege. *See* Restatement (Second) of Torts, *supra,* § 611, comment h. The remainder of the article, however, was either protected by the fair and accurate report privilege or is not challenged by appellant as being factually inaccurate or defamatory.[1]

Defendants also assert that the material contained in the headline and first two paragraphs of the article were within the scope of the privilege because the information was drawn from facts provided to Clausen by city police officers and from employees in the office of the mayor. We disagree. Not all information released by city or state officials to the media falls within the ambit of the fair and accurate report privilege. *See Bender v. City of Seattle,* 99 Wash.2d 582, 664 P.2d 492 (1983) (en banc). *See generally* Annotation, *Reliance on Facts Not Stated or Referred to in Publication, as Support for Defense of Fair Comment in Defamation Case,* 90 A.L.R.2d 1279 (1963). *See also* Annotation, *Defamation: Privilege Attaching To News Report of Criminal Activities Based on Information Supplied by Public Safety Officers—Modern Status,* 47 A.L.R.4th 718 (1986). As observed in *Bender,*

> Some courts have afforded police officers an absolute privilege as to statements or communications made in the performance of official duties. *See, e.g., Hauser v. Urchisin,* 231 So.2d 6, 8 (Fla. 1970); *Catron v. Jasper,* 303 Ky. 598, 198 S.W.2d 322 (1946). Most courts,

1. The amended complaint of appellant only set out verbatim the headline and content of the first two paragraphs of the article.

> however, hold that only a qualified privilege attaches. *See, e.g., Carr v. Watkins,* 227 Md. 578, 177 A.2d 841 (1961); *Krebs v. McNeal,* 222 Miss. 560, 76 So.2d 693 (1955); *Mullens v. Davidson,* 133 W.Va. 557, 57 S.E.2d 1, 13 A.L.R.2d 887 (1949). Statements of police officers in releasing information to the public and press serve the important functions of informing and educating the public about law enforcement practices. The right to inform the public, however, does not include a license to make gratuitous statements concerning the facts of a case or disparaging the character of other parties to an action.

Id. at 600–601, 664 P.2d at 504.

Except where a report of an arrest is privileged, as observed in the Annotation, *Actionability of False Newspaper Report That Plaintiff Has Been Arrested,* 93 A.L.R.3d 625, 626 (1979), newspaper reports which falsely state that the plaintiff has been arrested have generally been held by the courts to state a cause of action for libel because they tend to injure the reputation of the person who is the subject of the report, and tend to expose that person to disgrace, ridicule, or contempt. *See Dillard v. Shattuck,* 36 N.M. 202, 11 P.2d 543 (1932); *see also Roscoe v. Schoolitz,* 105 Ariz. 310, 464 P.2d 333 (1970); *Walker v. Associated Press,* 160 Colo. 361, 417 P.2d 486 (1966); *Rimmer v. Chadron Printing Co.,* 156 Neb. 533, 56 N.W.2d 806 (1953); *Luper v. Black Dispatch Pub. Co.,* 675 P.2d 1028 (Okla.Ct.App.1983); *Auto West, Inc. v. Baggs,* 678 P.2d 286 (Utah 1984).

Although the text of the article, excepting the two initial paragraphs, was drawn largely from information contained in the arrest report, the headline and two lead paragraphs consisted of information and conclusions obtained or reached by defendants extraneous to matters contained in the arrest report and did not consist of information in the form of a press release or other data generally disseminated to the public. Such material affirmatively indicated that appellant was in fact the same person arrested and charged with criminal conduct. We hold that, with the exception of the name of the individual arrested, the conclusionary material contained in the headline and two lead paragraphs of the article indicating that appellant was in fact the same person as the individual arrested, was not within the scope of the fair and accurate report privilege.

II. STATUS OF APPELLANT

Our determination that the headline and portions of the article in question were outside the fair and accurate report privilege is not dispositive of whether the district court erred in granting defendants' motion for summary judgment. Defendants argue that even if a portion of the article falls outside the scope of the privilege, appellant is a limited public figure necessitating proof that the content of the article not covered by the privilege was false and that defendants published the material in question with actual malice. Defendants assert that their publication of the material alleged by appellant to be defamatory was the result of a mistaken identification and a misrepresentation by Erven. Defendants further contend that appellant has failed to come forward with any evidence in opposition to their motion for summary judgment indicating that a material factual issue exists as to whether they published such article maliciously.

■ The fact that a writer or publisher mistakenly or incorrectly identifies a party in published material is generally not a defense to an action for defamation. *See Mathis v. Philadelphia Newspapers, Inc.; Washington Post Co. v. Kennedy,* 3 F.2d 207 (D.C.Cir.1925); *Hatfield v. Gazette Printing Co.,* 103 Kan. 593, 175 P. 382 (1918). *See generally* Annotation, *Libel and Slander: Sufficiency of Identification of Plaintiff by Matter Complained of as Defamatory,* 100 A.L.R.2d 218 (1965). The focus instead turns in part on whether the published material was privileged, whether the material was false, whether its publication injured appellant, and the status of appellant. *See Kutz v. Independent Pub. Co.,* 97 N.M. 243, 638 P.2d 1088 (Ct. App.1981). *See also* Restatement (Second) of Torts § 580(A) & (B) (1977); Annotation,

Actionability of False Newspaper Report That Plaintiff Has Been Arrested, supra.

In *Marchiondo v. Brown,* 98 N.M. 394, 649 P.2d 462 (1982), our supreme court articulated the standard of proof required to establish a defamation action wherein the plaintiff is a public official or public figure. Determination of whether or not a person is a public figure is relevant in determining the required standard of proof, and the status of an individual as either a public figure, public official, or private person constitutes a question of law to be determined by the court. *Marchiondo v. Brown. See also Goodrick v. Gannett Co.,* 500 F.Supp. 125 (D.Del.1980); *Coronado Credit Union v. KOAT Television, Inc.*

Following *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the court in *Marchiondo* held that where a plaintiff in a defamation action is either a public official or a public figure, or where an allegedly defamatory statement involved a matter of public concern, it is "incumbent upon the plaintiff to prove that the defendant acted with actual malice (with knowledge of falsity or in reckless disregard of the truth)." *Id.* 98 N.M. at 402, 649 P.2d at 470. Reckless disregard of the truth is not measured by whether a reasonably prudent person would have published or would have investigated before publishing; there must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of the communication. SCRA 1986, Civ. UJI 13–1009. In a defamation action where malice is required to be proven, malice must be established by clear and convincing evidence. *Sands v. American G.I. Forum of New Mexico, Inc.,* 97 N.M. 625, 642 P.2d 611 (Ct.App. 1982); UJI Civ. 13–1009. *See also* Annotation *Libel and Slander: What Constitutes Actual Malice Within Federal Constitutional Rule Requiring Public Officials and Public Figures to Show Actual Malice,* 20 A.L.R.3d 998 (1968).

Where plaintiff in a defamation action is neither a public figure nor a public official, he need only prove that the material published by defendants was a defamatory statement of fact and false, the information was not privileged, and that defendants negligently failed to recognize that the statement was false and proximately injured the plaintiff. *See* SCRA 1986, Civ.UJI 13–1002.

As shown by appellant's affidavit filed in support of his motion for summary judgment, he was named by the mayor on April 8, 1986, to serve on the Mayor's Committee. Appellant contends that his appointment to the committee did not result in his attaining the status of a public official or public figure and that, at the time the article in question was published, no meetings of the committee had ever been held, he was never given an oath, he never communicated with the mayor or other committee members concerning the committee, and that to his knowledge the committee was "otherwise non-existent until approximately one month ago [April 19, 1988]."

The terms "public figures" and "public officials" have not been precisely defined. In *Gertz* the Court stated that the standard enunciated in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), which bars media liability for defamation of a public official absent malice, applies to both public officials and public figures. The Court then characterized *New York Times* as having defined public figures accorded constitutional protections as those "who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures." *Id.* 418 U.S. at 342, 94 S.Ct. at 3008. *Gertz* observes that "public figures" for the most part consist of two types: those who occupy positions of such persuasive power and influence that they are deemed public figures for all purposes, and [limited public figures, consisting of] those who have thrust themselves to the forefront of particular public controversy in order to influence the resolution of the issues involved. *See also* Restatement (Second) of Torts, *supra,* § 580(A), comment c; *Antwerp Diamond Exch. of Am., Inc. v. Better Business Bureau of Marico-*

pa County, Inc., 130 Ariz. 523, 637 P.2d 733 (1981).

Was appellant a limited public figure or public official by virtue of his ownership of a local business or his appointment to the Mayor's Committee? We conclude that he was not.

In *Gertz* the Court stated the basis for determining who constitutes a "public figure" or "limited public figure" as follows:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.
>
> * * * Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

Id. 418 U.S. at 351–352, 94 S.Ct. at 3012–13. *See also Bell v. Associated Press*, 584 F.Supp. 128 (D.D.C.1984). A person is not considered a "public figure" solely because he has been charged as a criminal defendant, *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979), has sought relief in the courts, *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), or is involved in a controversy reported by the media. Courts which have considered this issue have also recognized that an individual's prominence as a businessman, without more, does not relegate such person to the status of a public figure. *See Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.1981); *Rancho La Costa, Inc. v. Superior Court*, 106 Cal.App.3d 646, 165 Cal.Rptr. 347 (1980).

Gertz sets out the test for determining whether an individual is a "public figure." The test includes determination of whether a public controversy exists and, if so, the nature and extent of the individual's participation in that controversy. Whether the nature and extent of a person's participation in a controversy subjects him to the status of a public figure is gauged by ascertaining the extent to which participation in the controversy is voluntary, the extent to which the individual has access to the channels of effective communication, and the prominence of his role in the controversy. *See also Curtis Pub. Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

In determining whether appellant is a limited public figure for defamation purposes, examination focuses on whether the defamatory material concerns a public controversy or topic of legitimate public concern, together with the nature and extent of appellant's participation in the controversy. *Vassallo v. Bell*, 221 N.J.Super. 347, 534 A.2d 724 (App.Div.1987).

Tested by the criteria above, we conclude that the trial court erred in determining that appellant was a "public figure" or "limited public figure." Here, neither the fact that appellant's home was burglarized, the fact that appellant had been appointed to the Mayor's Committee, the fact that he was the owner of a liquor establishment, nor the fact that an individual was arrested who claimed to be him, elevated him to the status of a "public figure" or "limited public figure." Similarly, we determine that appellant was not a "public official" as defined by *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966).

In *Rosenblatt* the United States Supreme Court discussed the parameters of who constitutes a public official, observing,

> It is clear * * * that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsi-

bility for or control over the conduct of governmental affairs.

* * * Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply. [Footnotes omitted.]

Id. at 85–86, 86 S.Ct. at 675–76.

As discussed in *Rosenblatt,* public officials generally encompass those government employees who have, or appear to the public to possess substantial responsibility for or control over the conduct of governmental affairs. Here, there was no showing that members of the Mayor's Committee had any official status. Under the above criteria, appellant cannot be deemed a "public official."

In order to relegate an individual to the status of a "public official" within the context of *Rosenblatt, New York Times,* and *Gertz,* the individual's position must be one which elevates him beyond that of a mere private individual. The Court in *Gertz* discussed this requirement, noting,

Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater. [Footnote omitted.]

Id. at 344, 94 S.Ct. at 3009.

Defendants' answer brief points out that this is a case of mistaken identity and that there is no New Mexico precedent involving this kind of factual situation. Defendants urge that *Bell v. Associated Press,* 584 F.Supp. 128 (D.D.C.1984), be applied herein. In *Bell,* plaintiff, a professional football player and member of the 1979 National Football League Champion Pittsburg Steelers, was reported in a news story as "being sought on a bench warrant for alleged lewdness." In fact the person subsequently arrested was not the plaintiff Theo Bell, but another individual. The court dismissed plaintiff's complaint, finding, among other things, that plaintiff was a "public figure" and could not establish that defendant acted with malice in publishing this report. The instant case differs from *Bell* in that appellant is a private person and not a public figure.

Under UJI Civ. 13–1009, in order to support a claim of defamation, appellant must prove that defendants negligently published the communication and:

The defendant[s] * * * negligently failed to check on the truth or falsity of the communication prior to publication.

The term "negligent" may relate either to an act or a failure to act.

An act, to be "negligent," must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to the reputation of another and which such a person, in the exercise of ordinary care, would not do.

A motion for summary judgment in a defamation action necessarily involves determination of the substantive evidentiary standard of proof that would apply at a trial on the merits. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Applying the above authorities to the record herein, we determine that appellant at the time of the publication in issue was not a limited public figure nor a public official. Thus, for purposes of determining the standard of proof required to establish appellant's claim of defamation and the ruling on defendants' motion for summary judgment the factual inquiry turns upon the issue of whether defendants *negligently* published the article in question. *See* UJI Civ. 13–1003.

III. PROPRIETY OF SUMMARY JUDGMENT

Based upon our determination as a matter of law that, because appellant was not a public figure, a limited public figure, or a public official, the constitutional standard of proof of actual malice is not appli-

cable to the publication in issue. *See Antwerp Diamond Exch. of Am., Inc. v. Better Business Bureau of Maricopa County, Inc.* Instead, the standard of proof required of appellant is that of negligence. UJI Civ. 13-1009. *See generally* Annotation, *State Constitutional Protection of Allegedly Defamatory Statements Regarding Private Individual,* 33 A.L.R.4th 212 (1984).

Defendants do not dispute that the article reporting the fact of appellant's arrest was erroneous. Defendants do deny that they acted negligently.

Questions of negligence are generally issues of fact for the fact finder. *Roscoe v. U.S. Life Title Ins. Co.,* 105 N.M. 589, 734 P.2d 1272 (1987); *Schear v. Board of County Comm'rs,* 101 N.M. 671, 687 P.2d 728 (1984). In *Mahona-Jojanto, Inc., N.S.L. v. Bank of New Mexico,* 79 N.M. 293, 442 P.2d 783 (1968), the supreme court succinctly stated the rules applicable to motions for summary judgment in defamation actions, observing that:

> all doubts as to the existence of a genuine issue of fact must be resolved against the movant, and * * * affidavits and depositions on file must be appraised in the aspect most favorable to the respondent. Also, all permissible inferences favorable to the respondent from the facts established must be considered in determining whether an issue of fact requiring trial exists.

Moreover, where reasonable minds may differ on the issue of whether defendants were negligent summary judgment is not proper and the matter must be resolved by the finder of fact. *See Trujillo v. Treat,* 107 N.M. 58, 752 P.2d 250 (Ct.App.1988); *see also Mathis v. Philadelphia Newspapers, Inc.*

Summary judgment being an extreme remedy, is to be employed with caution and cannot be substituted for trial on the merits where issues of material fact are found to exist. *Jelso v. World Balloon Corp.,* 97 N.M. 164, 637 P.2d 846 (Ct.App.1981); *Mahona-Jojanto, Inc., N.S.L. v. Bank of New Mexico.* Similarly, where affidavits or depositions are used to resist summary judgment and statements in the deposition give rise to conflicting inferences concerning factual issues, summary judgment should not be granted. *Mahona-Jojanto, Inc., N.S.L. v. Bank of New Mexico. See also National Excess Ins. Co. v. Bingham,* 106 N.M. 325, 742 P.2d 537 (Ct.App.1987).

Here, appellant in response to the motion for summary judgment, relied in part upon the depositions of the defendant Clausen. Clausen testified, among other things, that at the time he wrote the article in question he had a copy of the Crime Stoppers' report detailing facts concerning the prior burglary of appellant's home. The Crime Stoppers report also indicated that among the items taken from appellant's home were a pistol and his wallet. The police arrest report indicated that the person arrested had in his possession a pistol similar to that taken from appellant's home in the prior burglary. Clausen additionally stated in his deposition that when he read the arrest report he "noticed that [the age of the individual arrested], if you use date of birth, would be 41, but the officer had written 32 in the space that says what his age actually was." Clausen indicated he concluded this discrepancy was "probably" merely a math error. Clausen also testified that at the time he wrote the initial article he did "not have knowledge that [the person who was arrested] ever represented himself as being the owner of Furgi's."

A review of the record before us indicates that appellant's response to the motion for summary judgment reveals the existence of conflicting material issues of fact concerning whether defendants negligently reported that appellant was in fact the same person arrested for substance abuse and negligent use of a deadly weapon, so as to preclude summary judgment. In considering a motion for summary judgment, the court must view all matters presented and considered by it in a light most favorable to the party opposing summary judgment so as to support the right to a trial on the issues. *Gonzalez v. Gonzalez,* 103 N.M. 157, 703 P.2d 934 (Ct.App.1985). Summary judgment is not appropriate to

determine an issue of fact, but to determine if one exists. *Pharmaseal Laboratories, Inc. v. Goffe,* 90 N.M. 753, 568 P.2d 589 (1977). The fact that contradictory inferences may be drawn from the testimony of Clausen concerning whether defendants negligently identified appellant as the same person who was arrested and criminally charged by the police renders summary judgment improper. *See Knapp v. Fraternal Order of Eagles,* 106 N.M. 11, 738 P.2d 129 (Ct.App.1987). The issue of defendants alleged negligence cannot properly be resolved as a matter of law but is a matter to be determined by the trier of fact.

The order of summary judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

APODACA, J., concurs.

HARTZ, J., dissents.

HARTZ, Judge (dissenting).

I respectfully dissent. I would affirm the district court.

Although I question the majority's conclusion that plaintiff was not a limited public figure,[1] I would rest affirmance on other grounds. I believe that defendants are not liable for two independent reasons: (1) their article was protected by the common law privilege to publish a fair report of an official public record, and (2) they did not act with the degree of fault required for liability to be imposed.

Both the fair-report privilege and the requirement of fault derive from constitutional principles and public policy of the utmost importance to a free society. A wooden application of these legal rules can significantly diminish the protection they provide to a vigilant press. Because I believe that the majority opinion imposes an excessive burden on the news media, I respectfully dissent.

A. THE FAIR-REPORT PRIVILEGE

As this court recently stated, "The essence of the fair report privilege is that no liability will attach for the republication of * * * defamatory statements so long as

1. The record on this point is not as developed as it might be. The matter was first raised by defendants in their rebuttal at oral argument on their summary judgment motion. Nevertheless, it appears that plaintiff was a limited public figure with respect to the issue of substance abuse. As the majority states, whether a person is a limited public figure with respect to a controversy is determined by the extent to which that person's participation in the controversy is voluntary and the extent to which that person has access to channels of effective communication. *See Hutchinson v. Proxmire,* 443 U.S. 111, 133-36, 99 S.Ct. 2675, 2687-88, 61 L.Ed.2d 411 (1979). Plaintiff seems to have met both tests. He voluntarily involved himself in the issue in two respects. First, as stated in his affidavit, he called the mayor of Alamogordo to ask to serve on the Mayor's Committee for Driving While Intoxicated and Alcoholism. He was appointed to the committee on April 8, 1986, and reappointed on October 14, 1986. Although there had been no meetings of the committee from the time of his appointment until the time of the article on January 23, 1987, the committee was not a total non-entity. It had met on April 2, 1986, the week before his original appointment. Also, it received enough attention from the media that when reporter Clausen saw the arrest record, he recognized Mr. Furgason as a member of the mayor's committee. Second, plaintiff was not merely the owner of a local business. He injected his name into the public eye with respect to his liquor establishment by naming the business "Furgi's" and, apparently, by spending substantial sums on advertising, including $1,000 a month on newspaper ads. Plaintiff thus intentionally injected his name and personality into the public consciousness as both a purveyor of liquor and as a public-spirited citizen working to control the abuse of that substance. (I do not in any way mean to criticize these actions by plaintiff. Such conduct may be not only good marketing but also good citizenship. Yet most persons who, because of their status, have the burden of proving actual malice in order to recover for libel could be termed good citizens.) With respect to plaintiff's access to the media, although the record is inadequate on this issue, one would expect that plaintiff had the access necessary to rebut any misrepresentations against him. Not only was he a substantial advertiser, he was also apparently a well-known local personality. In this regard, it is of some interest that a retraction appeared on the front page of the next edition of the paper (the Sunday paper) after the inaccurate story about plaintiff appeared on the back page of the newspaper. *Cf. Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264 (3d Cir.1980) (meat market that advertises a great deal is limited public figure with respect to story attacking wholesomeness of the meat it sells).

the republication is a fair and accurate report of an official or public proceeding." *Stover v. Journal Publishing Co.,* 105 N.M. 291, 294, 731 P.2d 1335, 1338 (Ct.App. 1985), *cert. denied,* 484 U.S. 897, 108 S.Ct. 230, 98 L.Ed.2d 189 (1987). We adopted the formulation of the Restatement (Second) of Torts Section 611 (1977), that an article concerning an official action or proceeding is privileged if the article "is accurate and complete or a fair abridgement of the occurrence reported." The majority agrees that articles based on official reports of arrests may come within the privilege. *See Mathis v. Philadelphia Newspapers, Inc.,* 455 F.Supp. 406 (E.D.Pa.1978); *Steer v. Lexleon, Inc.,* 58 Md.App. 199, 472 A.2d 1021 (1984); *Biermann v. Pulitzer Publishing Co.,* 627 S.W.2d 87 (Mo.App. 1981); Restatement, *supra,* § 611 comment h. *Cf. Short v. News-Journal Co.,* 58 Del. 107, 205 A.2d 6, *aff'd,* 58 Del. 592, 212 A.2d 718 (1965) (IRS report of assets seized).

1. *Constitutional and Public Policy Underpinnings*

According to some commentators, the Constitution mandates the fair-report privilege. *See* Hill, *Defamation and Privacy Under the First Amendment,* 76 Colum.L. Rev. 1205, 1219–20 (1976); Restatement, *supra,* § 611 comment b ("If the report of a public official proceeding is accurate or a fair abridgment, an action cannot constitutionally be maintained, either for defamation or for invasion of the right of privacy."). *See generally Medico v. Time, Inc.,* 643 F.2d 134, 143–46 (3d Cir.1981) (discussing, without adopting, view that there is a constitutional fair-report privilege). Although the United States Supreme Court has not reached the question of whether the Constitution requires adoption of the privilege in its totality, it has adopted the core of the privilege, using language that recognizes the values supporting the privilege as a whole. In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the Court held that the first and fourteenth amendments to the Constitution prohibit imposition of liability upon a television station for accurately reporting a statement in an official public record. The parents of a deceased rape victim sued for invasion of privacy when the victim's name was reported by the station. The Court wrote: "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.* at 496, 95 S.Ct. at 1047. In explaining this result, the Court wrote:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally * * * * * * The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions ... are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

Id. at 491–92, 95 S.Ct. at 1044–45. *See The Florida Star v. B.J.F.,* — U.S. —, 109 S.Ct. 2603, 2612, 105 L.Ed.2d 443, 458–59 (1989) (reproduction of police news release that named plaintiff as rape victim is constitutionally protected, despite state statute barring media publication of names of victims of sexual offenses).

To be sure, the information broadcast in *Cox* was not only an accurate report of official information, it was also true. In any case, *Cox* does not suggest that the Constitution protects every report, however inaccurate, regarding an official record or proceeding. The quoted passages do, however, reflect the value that our society and

our Constitution place on news reports of official business, particularly the business of law enforcement.

Three important components of the common law privilege are corollaries to the propositions stated in *Cox*. First, because of the public's need to evaluate the administration of government, reporting official government statements is important even when the government is wrong. This corollary is one of the reasons justifying the rule that "[t]he 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." *Stover v. Journal Publishing Co.*, 105 N.M. at 294, 731 P.2d at 1338. *Accord* Restatement, *supra*, § 611 comment a.

Second, for the press to assist the public in evaluating government action, it must enjoy a privilege to supplement its report of an official proceeding or record with accurate background information. *See El Greco Leather Prods. Co. v. Shoe World, Inc.*, 623 F.Supp. 1038, 1043 (E.D.N.Y.1985) (addition of background material did not remove article from protection of statutory fair-report privilege), *aff'd on other grounds*, 806 F.2d 392 (2d Cir.1986). Certainly it is in the public interest for the press to scrutinize who it is that the police are arresting. "Where there is no such scrutiny—as is true in some totalitarian countries—individuals sometimes disappear without a trace and without public knowledge or accountability." *Bell v. Associated Press*, 584 F.Supp. 128, 130 (D.C.Cir. 1984). Under the common law, a conditional privilege is abused by publishing additional defamatory matter only if the additional defamatory matter is unprivileged. Restatement, *supra*, § 605A. True statements are privileged, *id.* at Section 581A, so they can always be added without jeopardizing a conditional privilege. Although the fair-report privilege is not generally considered a conditional privilege, *see id.* at Section 599 comments a and c, the same rule should apply with respect to supplementing a fair report with truthful matter. *Cf. id.*, § 611 comment a (fair-report privilege is broader in scope than the conditional privileges).

Third, the privilege should not be limited to verbatim reproductions of a public proceeding or record. *Cox* spoke of the role of the press to present the facts of government operations "in convenient form." 420 U.S. at 491, 95 S.Ct. at 1044. The press must be permitted to abridge the record and to convey the record with literary style that can capture the reader's attention. So long as the press preserves the gist or "sting" of the official record, the privilege should apply. Because the concept of the "sting" of an official record is central to my disagreement with the majority, I discuss it at some length.

2. *Sting*

As already noted, *Stover* adopted the Restatement view that the fair-report privilege applies if a news article "is accurate and complete or a fair abridgement of the occurrence reported." Restatement, *supra*, § 611. "It is not necessary that [the article] be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting." *Id.* at comment f. The privilege fails only if the article "convey[s] an erroneous impression." *Id.* A shorthand expression for this doctrine is that the privilege applies if the article preserves the "sting" of the official record. *See Ricci v. Venture Magazine, Inc.*, 574 F.Supp. 1563, 1570 (D.Mass.1983); *Haynik v. Zimlich*, 30 Ohio Misc.2d 16, 21, 508 N.E.2d 195, 200 (Ohio Com.Pl.1986).

A few examples of errors or omissions that did not defeat the fair-report privilege may be instructive. In *Crittendon v. Combined Communications Corp.*, 714 P.2d 1026 (Okla.1985), a television station reported on a malpractice trial in which a gynecologist was accused of performing an unnecessary hysterectomy. The station reported that the plaintiff contended that the removed uterus was "perfectly healthy," whereas plaintiff's expert witness admitted that the uterus actually had a minor cervical irritation. But the expert testified that the abnormality occurs in over ninety percent of women and that nothing in the

pathologist's report justified a hysterectomy. The court stated that the sting of the broadcast was accurate. In *Dudley v. Farmers Branch Daily Times,* 550 S.W.2d 99 (Tex.Civ.App.1977), the privilege protected an article reporting that plaintiff had been charged with the theft of property worth $168,000, when the official record showed that the charge was only for theft of property worth more than $50 and plaintiff claimed that the property was worth less than $7,000. An accurate report would have had the same sting.

Two other cases illustrate the protection of the privilege despite omission of "exculpatory" matter. The plaintiff in *Sciandra v. Lynett,* 409 Pa. 595, 187 A.2d 586 (1963) was stopped by New York State Police during the famous Apalachin meeting of alleged organized crime figures. The plaintiff complained about a news story taken from an official state report of the meeting. The story omitted information in the report, such as (1) plaintiff's having been released by the state police without charges being filed and (2) his birth date. (The birth date would have revealed that he was too young to have been the person convicted of a rape attributed to him in both the official report and the news story.) Yet the court held that the summary was fair and substantially correct. In *Ricci v. Venture Magazine, Inc.,* the defendant published an article stating that the plaintiff had threatened a witness at a trial; the article did not report that the plaintiff's attorney had objected at trial to the characterization of the plaintiff's gesture as a threat and had disputed the accusation. Judge Robert Keeton, a noted authority on tort law, held that the article need not contain such contrary assertions. He explained:

> [T]he requirement of fairness and accuracy extends only to matter relevant to a claimed defamatory sting—that is, to matter bearing upon whether the communication is reasonably susceptible of interpretation in a derogatory sense....
>
> * * * * * *
>
> * * * [A] "fair and accurate" report need be neither exhaustive in detail nor perfectly precise in language.... Media reports [of trials] may permissibly focus on the more dramatic occurrences, to the exclusion of the less interesting.

Id. at 1567. The test is whether an ordinary reader could reasonably draw a more derogatory conclusion from the abridgement than could reasonably be drawn from the complete report:

> [A]pplying a common sense standard of expected lay interpretation of the report, I conclude that it could not be found that the abridgement was an unfair one * * * * The critical question is whether a report of a trial occurrence can reasonably be interpreted as describing the occurrence in a way that conveys a materially greater defamatory sting than would be conveyed by a technically correct and less abridged report. If not, the report has not offended the fairness requirement. A full report of all the details of this incident, including the two eyewitness reports, the claims that the gesture was a threat, and the judge's decision to sever, as well as Ricci's attorney's version, would be no less susceptible of being read as conveying a sting derogatory to plaintiff than was the abridged report actually made.

Id. at 1568.

3. *The Fair-Report Privilege Protects Defendants in This Case*

Whether an allegedly libelous statement is privileged is a question of law for the court to determine. *See Marchiondo v. Brown,* 98 N.M. 394, 400, 649 P.2d 462, 468 (1982). Applying the principles discussed above to the facts of this case, I would find the article in question to be privileged as a matter of law. Comparison of the article with the arrest record reveals that the article was in substance nothing more than a combination of (1) an abridgement of the official arrest report, and (2) accurate information concerning plaintiff. Because the abridgement preserved the sting of the arrest report, the article is protected by the fair-report privilege.

The arrest record states that the arrestee was James M. Furgason, residing at 1407 Rockwood, Alamogordo, New Mexico, and

born on June 4, 1945. Assume that the arrest record contained no further description of the arrestee. Then the article unquestionably would be privileged. The portion of the article on which plaintiff bases his claim is as follows:

> A prominent local bar owner who serves on the Mayor's Committee for Driving While Intoxicated and Alcoholism was arrested Thursday night for abuse of chemical substance and negligent use of a deadly weapon.
>
> James M. Furgason, 41, 1407 Rockwood, who owns the popular bar and package store, Furgi's, 817 Scenic Dr., was arrested at 9:45 p.m. Thursday night after allegedly being observed sniffing paint.

A second version of the same two paragraphs might read:

> Official police records report that a James M. Furgason, born June 4, 1945, of 1407 Rockwood, was arrested Thursday night for abuse of chemical substance and negligent use of a deadly weapon. He was arrested after allegedly being observed sniffing paint.
>
> James M. Furgason, 41, of 1407 Rockwood owns the popular bar and package store, Furgi's, and serves on the Mayor's Committee for Driving While Intoxicated and Alcoholism.

Everything in the second version is either an accurate and *complete* report of the hypothesized arrest record (at least with respect to the identity of the arrestee) or is unchallenged as being true. No one could doubt its being privileged. Juxtaposing a complete report of an official record and true information cannot subject a journalist to liability. Yet if the second version is privileged, so must be the published paragraphs. Although in retrospect one can see differences between the two paragraphs from the published article and the second version, the differences would escape the ordinary reader. The sting of the two versions is identical. Nor does adding the headline, "Bar owner accused of sniffing paint," change the sting. The chief difference between the two versions is that the one appearing in the newspaper is better written. That should not be the source of liability. *Cf. Read v. News-Journal Co.*, 474 A.2d 119, 121 (Del.1984) ("An action for defamation cannot be premised solely on defendant's style or utilization of vivid words in reporting a judicial proceeding.") If we require news articles to be written with meticulous precision, the resulting soporific style would hinder the dissemination of information to the public more than if *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) were overruled. In particular, I would not require the lead paragraph to say that the information comes from an official police report. Not only does the third paragraph of the story explicitly state, "According to the report by Department of Public Safety Officer Greg Cavelli," but also the reader would naturally infer that the source of the information was the police, rather than personal observation by the reporter. *See Medico v. Time, Inc.*, 643 F.2d at 139 n. 17; *Ricci v. Venture Magazine, Inc.*, 574 F.Supp. at 1570; *Foley v. Lowell Sun Publishing Co.*, 25 Mass.App.Ct. 416, 519 N.E.2d 601 (1988), *aff'd*, 404 Mass. 9, 533 N.E.2d 196 (1989).

The difficulty in this case, however, is that the public records available to defendant Clausen when he wrote the article included more than the name, address, and date of birth of the arrested person. The arrest record stated that the arrestee was unemployed, thirty-two years old, six feet six inches tall, one hundred sixty-five pounds in weight, with brown hair, blue eyes and a fair complexion. It listed among the property on the arrestee a brown wallet and thirty-four cents in change. In addition, that same morning the Public Safety Department gave Clausen, apparently coincidentally, a Crime Stopper news release reporting a burglary a month earlier at Furgason's home. Reported stolen in the burglary were, among other items, a revolver and a wallet. The article omitted this information; it "abridged" the public record. An astute observer who knew of the omitted information might have surmized that the arrestee was not the prominent bar owner, but was

the individual who stole the bar owner's wallet and drivers' license. Thus, one could claim that the abridgement was unfair because it omitted "exculpatory" information that might have directed suspicion away from plaintiff.

Nevertheless, the fair-report privilege protects defendants. The article was a fair abridgement of the official record because it conveyed the sting of the police report. The sting of the official arrest report in this case was that "James M. Furgason" was arrested for sniffing paint and other crimes. That sting is not altered by the inclusion of other information in the arrest record. On the contrary, the information describing the arrested person confirms more than it undermines his identification as plaintiff. The identifying information that was most precise—and presumably most reliable—pointed to plaintiff: the full name (with the unusual spelling of the last name), home address, birth date and social security number were all those of plaintiff. Although there were some discrepancies (such as an incorrect age and employment status), these could be explained as a consequence of the arrested person's intoxication, his desire to avoid—or at least delay—publicity injuring his business, or error by the arresting officer. In any event, an article can be privileged without including every detail from the official report that might lead a reader to question the sting. *See Ricci v. Venture Magazine, Inc.* What is important is that inclusion in the article of a verbatim copy of the arrest record would not materially change what the ordinary reader would conclude from the article. *See Biermann v. Pulitzer Publishing Co.* (privilege applies to report of arrest, even though some official documents might cast doubt on identity of plaintiff as the person arrested).

My view is not affected by the existence of the Crime Stopper news release. That release and the arrest report are sufficiently distinct that reference to the release was not required in the article concerning the public record of the arrest. To be protected by the fair-report privilege in reporting on an official action, a publisher should not have to include a fair abridgement of every related occurrence. Imposition of such a requirement would inevitably burden the free flow of important information to the public. Moreover, even if it were necessary to measure the published article against both the arrest report and the Crime Stopper release, a "full report * * * would be no less susceptible of being read as conveying a sting derogatory to plaintiff than was the abridged report actually made." *Ricci v. Venture Magazine, Inc.*, 574 F.Supp. at 1568. A "full report" would still imply that plaintiff was the person arrested.

If I am correct in my characterization of the sting of the arrest record, then the entire article must be privileged. Everything in the article not taken from the arrest record was accurate information about James M. Furgason, 41, of 1407 Rockwood or was otherwise unchallenged in this lawsuit. As already stated, adding truthful information to a fair summary of an official report should not subject the publisher to liability. News media frequently provide the useful service of putting official statements or proceedings in context. Background information on a person who is the subject of an official accusation is generally newsworthy. The fair-report privilege should not be construed so as to discourage the reporting of such information.

B. FAULT OF DEFENDANTS

1. *Constitutional Basis of the Fault Requirement*

Defendants are not liable also because they acted without the required fault in publishing the article. In New Mexico the plaintiff must prove negligence to recover for defamation. *Marchiondo v. Brown*, 98 N.M. at 402, 649 P.2d at 470. The negligence standard follows from the constitutional requirement of fault. *See id.; The Florida Star v. B.J.F.*, —— U.S. at ——, 109 S.Ct. at 2612, 105 L.Ed.2d at 459 (liability for defamation of private figures is evaluated under a standard of "ordinary negligence"). The United States Supreme Court explained the rationale behind that

requirement in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974):

> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate * * * * [P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in *New York Times Co. v. Sullivan, supra,* [376 U.S.] at 279: [84 S.Ct. at 710] "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred." The First Amendment requires that we protect some falsehood in order to protect speech that matters.

2. *The Need for Judicial Scrutiny of the Standard of Care Applied by the Trier of Fact*

Because the purpose of the fault requirement is to minimize undesirable self-censorship, courts must closely scrutinize claims of negligence to prevent triers of fact from setting standards that could excessively chill press coverage. Negligence is an imprecise concept. An instruction to the jury on the meaning of negligence in a defamation case can probably achieve no greater precision than such an instruction in any other tort case. *See* SCRA 1986, Civ.UJI 13–1009 (uniform jury instruction for defamation, which adopts traditional language used to define negligence in ordinary tort context). Such imprecision ordinarily does not pose a significant problem. In the usual tort case no public policy is violated by giving the jury wide rein to determine what constitutes ordinary care for a reasonably prudent person. The requirement of negligence in defamation cases, however, has the purpose of advancing the first amendment interest in promoting the flow of information and ideas. We cannot expect juries to weigh first amendment principles adequately when determining the standard of care. Even specific jury instructions on the importance of the first amendment would surely be insufficient for the task. Indeed, perhaps the chief function of the first amendment is to protect against attitudes toward speech which are likely to be reflected by a jury. "[W]here first amendment rights are at stake, * * * jury flexibility is dangerous inasmuch as jurors are likely to represent majoritarian attitudes toward unpopular speakers and ideas." L. Tribe, *American Constitutional Law* § 12–13, at 882 (2d ed.1988). Therefore, in defamation litigation the judiciary must shoulder responsibility for the protection of first amendment values. This responsibility includes careful appellate review of findings of fault in defamation cases, even after non-jury trials. Appellate courts should conduct "an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505, 104 S.Ct. 1949, 1962, 80 L.Ed.2d 502 (1984) (reversing trial court's finding of actual malice). *Accord Harte-Hanks Communications, Inc. v. Connaughton,* — U.S. —, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (affirming jury's verdict of actual malice). *See* Restatement, § 580B comment k (advocating appellate review of finding of negligence in defamation cases). *Cf. Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. at 518 n. 2, 104 S.Ct. at 1969 n. 2 (Rehnquist, J., dissenting) (factual review is more justified when finding was by jury).

Judicial oversight is not necessary solely to set minimum requirements for the standard of fault. Uncertainty as to the legal standard can itself cause undesirable self-censorship. *See Harte-Hanks Communi-*

cations, Inc. v. Connaughton, — U.S. at —, 109 S.Ct. at 2695, 105 L.Ed.2d at 588. By reviewing facts carefully and articulating why a defamation defendant has satisfied or failed to satisfy the requirements of the law, courts encourage adherence to sound reporting practices and minimize inappropriate self-censorship. *See* Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.,* 54 Tex.L.Rev. 199, 256–57 (1976). In the words of Professor Tribe, "[T]he first amendment should be understood to require the states to develop bodies of law markedly clearer and more coherent than is customary in the common law of negligence." L. Tribe, *supra,* at 882–83 (footnote omitted).

Moreover, even when a jury ultimately vindicates the defendant in a defamation case, the burden of the litigation itself may have a substantial deleterious impact. Fear of the costs of trial, despite the probability of ultimate success, may deter publication of an important news item. *See* Anderson, *Libel and Press Self-Censorship,* 53 Tex.L.Rev. 422, 435–36 (1975). Summary judgment, therefore, serves an essential function in protecting first amendment interests. In defamation cases "courts cannot justifiably resolve all doubts against use of summary procedures because the important interests are not all on the side of preserving jury trial." *Id.* at 469.

3. *The Meaning of Fault in the Context of This Case*

Leading authorities have articulated the meaning of negligence in the defamation context as publishing an article "with negligent disregard for the truth," *Ricci v. Venture Magazine, Inc.,* 574 F.Supp. at 1571, or "with lack of reasonable grounds to believe in its truth." Restatement, *supra,* § 580B comment *1,* at 230–31. *Accord* W. Keeton, *Defamation and Freedom of the Press,* 54 Tex.L.Rev. 1221, 1227–28 (1976). The fault of defendants in this case could be viewed as arising in one of two ways: First, defendants may have been negligent in omitting from the article certain items that might have cast doubt on plaintiff's identity as the arrestee. *See* Restatement, *supra,* § 611 comment b. Second, defendants may have been negligent simply for believing that plaintiff was the person who had been arrested.

With respect to the first theory of liability, Judge Keeton has concluded that the fault must be more than merely the omission of evidence from which a reasonable person might draw an inference contrary to that appearing in the article. He wrote:

> It may be argued that Supreme Court decisions recognizing the constitutional requirement of fault with respect to accuracy of a derogatory statement of fact necessarily so modify earlier precedents regarding reports of public proceedings as to compel summary judgment for media defendants as to any challenge for incompleteness of a report in failing to disclose contentions or evidence contradictory to that correctly reported. I do not conclude that such an invariable rule is implicit in the constitutional requirement of fault. Nevertheless, it is clear that merely showing contradictory evidence upon which reasonable persons might come to different findings is insufficient to show that defendant displayed an unreasonable disregard for the accuracy or fairness of the report.

Ricci v. Venture Magazine, Inc., 574 F.Supp. at 1571.

The second theory—that defendants were negligent in concluding that the arrested person was plaintiff—raises the question of how far a reporter must go in second-guessing an official arrest record. The above formulations of the meaning of negligence suggest that a publisher of a defamatory statement is not negligent if he has checked out the statement sufficiently to have a reasonable basis for believing it. Thus, liability would not result from failing to make an inquiry that might be reasonable if one wanted to "nail down" the statement, so long as the information already available makes belief in the statement reasonable. A situation similar to the one before us arose in *Bell v. Associated Press.* Police officers arrested an imposter claiming to be a football star; defendant report-

ed that the athlete had been arrested. The court denied liability, explaining:

> If the Associated Press were to be held liable, * * * it would have to be on the theory that, even with respect to what appeared to be a public figure involved in an official proceeding, it had a duty not to report on the proceeding as it was reflected in the official police and court records without first conducting a painstaking investigation into the accuracy of the official reports and the identity of the person charged. Such a rule would have the consequence of delaying significantly the publication of news concerning public figures who are charged with criminal offenses, or of halting the publication of such reports altogether. Because such consequences are inconsistent with the values embodied in the First Amendment, the law does not impose such burdens on the press. [Footnote omitted.]

Id. at 132. *See Wilson v. Capital City Press,* 315 So.2d 393 (La.Ct.App.3d Cir. 1975) (no negligence in relying on police press release of arrest); *Horvath v. Ashtabula Telegraph,* 8 Med.L.Rptr. 1657, 1982 WL 5841 (Ohio App.1982) (no negligence in identifying person arrested; no duty to interview the accused person); B. Sanford, *Libel and Privacy: The Prevention and Defense of Litigation* § 8.4.3.3 (1985) (discusses whether it is negligence to rely on an official source). *But see Melon v. Capital City Press,* 407 So.2d 85 (La.Ct.App.1st Cir.1981). Although the court in *Bell* found that the plaintiff was a public figure and therefore was considering only whether the defendant acted with actual malice, the concern expressed about the functioning of the press applies equally to our case. In Alamogordo there would be greater legitimate public interest in the arrest of plaintiff than in the out-of-state arrest of a nationally prominent football player.

4. *Application of the Legal Standard to the Facts in this Case*

The essential facts are not in dispute. To be sure, even when the parties agree on the facts, the jury in a typical negligence case still bears responsibility for determining whether the defendant's conduct was within the standard of care. Thus, if this were a typical negligence case, I would agree that summary judgment was improper on the issue of negligence. As explained above, however, the first amendment values at stake in a defamation action require judicial scrutiny beyond what would otherwise be appropriate. Courts must consider the implications for first amendment interests in permitting a finding of liability and restrict jury discretion accordingly. In light of that mandate, a review of the events of the day on which the article was published convinces me that reversal would impose too burdensome a standard of care on the everyday operation of our news media.

On the day of the article Clausen conformed to his usual morning schedule. That schedule would begin at the Daily News at about 7:30 a.m. Sometime before 8:30 a.m. he would go to the Department of Public Safety (DPS), then to the State Police office and on to City Hall to visit the municipal court, magistrate court, and other departments. He would also stop by the funeral home to see if there were any obituaries to publish. Usually he would return to his office between 10:00 and 10:30 a.m. and prepare his stories for an 11:00 a.m. deadline. The deadline occasionally could be delayed a bit, although layout of the paper needed to be completed by noon for the press run, so that distribution of the paper could begin about 12:30 p.m.

On January 23, 1987, Clausen received from the DPS Records Office a copy of the arrest record and the officer's handwritten report relating to James M. Furgason. He was not permitted to copy the documents, but he took notes. After reading the arrest record and the officer's report, Clausen, in accordance with his customary practice, went upstairs to talk to detectives to see if they could add anything more with respect to the case. He spoke with Detective Ray Bailey and Captain Richard Nix. Although there are discrepancies between the accounts of Clausen and the police officers concerning their discussions that morning, they agree that they spoke about the bizarre nature of the offense (undoubt-

edly referring not to the conduct itself but to its being committed by a prominent bar owner). After this discussion Clausen went back to the DPS Records Office to pick up the Crime Stopper report, which had not been typed when he first arrived. The report related to the burglary of plaintiff's home three weeks earlier. Clausen then returned to Bailey's office to ask if the gun involved in the arrest was the same one reported stolen by plaintiff. He inquired whether insurance fraud might be involved. Clausen testified that Bailey told him that he did not know if it was the same gun; Bailey testified that there was a discrepancy between the description of the gun in the arrest report and the description of the gun that had been provided by plaintiff after the burglary. Clausen noted that the Crime Stopper report mentioned that plaintiff reported a stolen wallet.

At about 9:30 a.m. Clausen left the DPS and spent five to ten minutes at the State Police office reviewing the log. From there he went to City Hall, where he asked the clerk for the list of the members of the Mayor's Committee on Alcoholism and Driving While Intoxicated. He had recognized the name "Furgason" on the arrest record as being the name of a member of the committee. He confirmed that "Jim Furgason" of "1407 Rockwood" belonged to the committee. He then continued with his usual routine, checking with the magistrate court, other offices at City Hall, the funeral home and then municipal court. While waiting for municipal court to finish, he, as was his custom, called the newspaper to let the city editor know what stories he had picked up. Clausen testified that he planned to attend the arraignment of Furgason at 10:00 a.m.; but the arraignment was moved to 11:00 a.m. Clausen returned to his office about 10:30 a.m. Between 10:30 and 11:00 a.m., or 11:20 a.m., he wrote the Furgason story and typed in the obituaries. Shortly before 11:00 a.m. he called the magistrate court to check on the arraignment of Furgason and was informed that the arraignment would be that afternoon.

Given the requirements of Clausen's routine and the newspaper deadline, Clausen took reasonable steps to check out his story. Besides discussing the matter with Detective Bailey, Clausen obtained from City Hall a list of the members of the mayor's committee and checked that the Furgason on the mayor's list had the same address as in the police report and the same work telephone number as that listed to Furgi's in both the city directory and the telephone directory. He noticed the discrepancy between the age and birth date on the arrest record and asked a DPS Records office employee about the matter. The employee responded that it was probably just an arithmetic error (which would be a reason not to be overly concerned about the specific height and weight reported on the arrest record). At the newspaper office Clausen called DPS to confirm his recollection of the essential facts stated on the arrest record. He also checked with another member of the newspaper staff to see if the description of Furgason's build seemed to fit. (It is not clear whether Clausen asked the staff member whether Furgason was "tall and thin" or specifically asked whether he appeared to be six feet six inches tall and 165 pounds.)

Although Clausen certainly had questions about the reported arrest, he pursued those questions with a variety of sources. The responses he received confirmed the identity of the person arrested. Nothing in the record suggests that anyone responsible for the article's publication maintained substantial doubts as to its truth before it was published. *See Moloney v. Tribune Publishing Co.*, 26 Wash.App. 357, 613 P.2d 1179 (1980).

To assist in evaluating the conduct of the newspaper, it is helpful to review the thoughts and acts of the police department, particularly those of Detective Bailey. Bailey testified that he thought the person arrested was plaintiff. When asked what he talked about with Clausen in the morning, he answered:

> I believe I told him I thought there was something wrong, it didn't make sense. Like I say, it was just a casual conversation. And said it just didn't make sense, a man of his caliber being arrested for

chemical abuse. I made the statement, I believe that he only had 43¢ or something on him, which didn't make sense, either.

And he was just talking about the case in particular. And I told him I was still going to run the Crime of the Week, even though he was arrested for chemical abuse.

Bailey testified that the arrest bothered him the whole day. He had discussed it with the other detectives. Then, "just like a bolt of lightning, it hit us." Around 2:30 or 3:00 in the afternoon, while the detectives were having coffee, he realized that the person arrested might have obtained plaintiff's identification in the burglary of plaintiff's residence.

In my view, defendants did not act with negligent disregard for the truth in reporting that plaintiff had been arrested. Defendants' actions were reasonable under the circumstances. Arrests in general are matters of public concern. *See Cox Broadcasting Corp. v. Cohn,* 420 U.S. at 491–92, 95 S.Ct. at 1044–45. The apparent arrest in this case would be of particular importance because of the status of plaintiff. Therefore, publishing the story in the earliest possible edition was appropriate. Yet time constraints presented Clausen with very little opportunity for a full investigation. *See Holy Spirit Ass'n for Unification of World Christianity v. New York Times Co.,* 49 N.Y.2d 63, 68, 424 N.Y.S.2d 165, 168, 399 N.E.2d 1185, 1187 (Ct.App.1979) (court takes into account that article was "composed * * * under the exigencies of a publication deadline."); B. Sanford, *supra,* at § 8.4.7 (discusses negligence in the context of "hot" news). To be sure, a newspaper story that one has been arrested for a crime can cause serious damage to one's reputation; but Clausen had reasonable grounds to believe that the story was true. The name and address checked out. No apparent discrepancy was of such weight as to cast substantial doubt on the accuracy of the official report. Moreover, unlike in many defamation cases, a proper retraction could remedy virtually all the damage to plaintiff's reputation. Although an arrest followed by dismissal of the charges can leave a permanent stain, misidentification of the person arrested is remediable. A prompt and prominent correction to the effect that one was never in fact arrested should erase the blot. *See* Restatement, *supra,* § 580B comment h (factors to be considered in assessing negligence are the time element, the interest promoted by the publication, and the potential damage to the plaintiff).

In weighing the public's need for prompt, informative reporting concerning the conduct of its government, particularly the operation of the criminal justice system, against the potential injury to individual members of society resulting from the media's failure to delay publication while all leads are followed, I believe that the balance must be struck in favor of the public interest, as expressed in the first and fourteenth amendments to the Constitution. When, as here, the press has an objectively reasonable basis to credit the accuracy of an official report of breaking news, publication need not be delayed to double check the accuracy of the official report. To impose liability on defendants on the record in this case would create unrealistic burdens on our news media, particularly the small-town daily newspaper. I respectfully dissent.

785 P.2d 262

STATE of New Mexico,
Plaintiff-Appellee,

v.

Patrice CRISLIP, Defendant-Appellant.

No. 10480.

Court of Appeals of New Mexico.

Nov. 7, 1989.

Certiorari Denied Dec. 21, 1989.

Hal Stratton, Atty. Gen., Charles H. Rennick, Asst. Atty. Gen., Santa Fe, N.M., for plaintiff-appellee.

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

OPINION

CHAVEZ, Judge.

Defendant appeals her conviction for child abuse resulting in death contrary to NMSA 1978, Section 30-6-1(C) (Repl.Pamp. 1984). She raises five issues on appeal: 1) ineffective assistance of counsel; 2) failure to excuse a juror for cause; 3) improper questioning of witnesses by the court; 4) prosecutorial misconduct; and 5) cumulative error. In sum, defendant contends she was deprived of her fundamental right to a fair trial. U.S. Const. amend. VI, XIV; N.M. Const. art. II, § 14. We agree. We reverse and remand.

FACTS

On the afternoon of March 27, 1987, Stephen Cody Comeau (Cody), the defendant's fourteen-month-old son, was admitted to the emergency room of St. Mary's Hospital in Roswell. The child was transported by his stepfather (defendant's husband) and a neighbor. He was unconscious and not breathing. Though Cody showed some brief improvement in response to medical treatment, his condition subsequently worsened and he died on March 31, 1987. At trial, the state presented testimony of medical witnesses that Cody was the victim of "battered child syndrome." The cause of death was later determined to be child abuse involving multiple blunt injuries to the head causing fractures of the skull, blood on the surface of the brain, and swelling of the brain. Defendant and her husband, Robert Crislip, were each charged with child abuse resulting in death.

Defendant and her husband were scheduled for separate trials and appointed separate counsel. Counsel for defendant and for Robert Crislip opposed joinder on the grounds that the defendants would be presenting antagonistic defenses and that each defendant had made statements to the police which would implicate the other. In his statement to the police, Robert Crislip claimed he saw defendant beating Cody about the head on March 24, 1987, three days before Cody was taken to the hospital. Robert Crislip's trial was scheduled to begin on November 10, 1987, and defendant's trial was set for December 8, 1987. Robert Crislip disappeared shortly before his trial date and was still missing at the time of defendant's trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's main contention on appeal is that she was denied effective assistance of counsel. She claims numerous instances of deficient performance by her court-appointed trial attorney. Defendant's appellate attorneys did not represent her at trial. We only address those instances we find most troublesome.

An accused is entitled to effective assistance 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 standard for ineffective assistance of counsel is whether defense counsel exercised the skill, judgment, and diligence of a reasonably competent attorney. *State v. Orona,* 97 N.M. 232, 638 P.2d 1077 (1982); *State v. Dean,* 105 N.M. 5, 727 P.2d 944 (Ct.App.1986). In order to prevail on an ineffective assistance claim, the defendant must show her counsel's performance fell below the standard of a reasonably competent attorney and, due to the deficient performance, the defense was prejudiced.

State v. Talley, 103 N.M. 33, 702 P.2d 353 (Ct.App.1985). Prejudice is measured by "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland v. Washington,* 466 U.S. 668, 695, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). The test for judging any claim of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. In reviewing an ineffectiveness claim, the entire proceedings must be considered as a whole. *Id.; State v. Talley.*

1. Admission of Codefendant's Statement

Defendant testified on her own behalf and denied having abused her child. During cross-examination, the prosecutor repeatedly referred to the statement her husband had given to the police. Specifically, the prosecutor asked, "isn't it a fact, Mrs. Crislip, that you did not state, that you did not claim amnesia or memory loss, until after May 29th, when your husband gave a statement to the police in which he said he saw you beating Cody on the 24th of March?" The prosecutor also questioned defendant concerning her recollection of the events of March 24, 1987, inquiring, "So your only source of information about what happened that day is what other people have told you and that's one of the things that Robert has said, is it not, that you struck Cody in the face and the head that day?" The prosecutor cross-examined defendant about a "blackout claim" never made at trial. He repeated the content of Robert Crislip's statement at least four times.

Defense counsel remained silent during this line of questioning by the prosecutor. In fact, no protective action whatsoever was taken regarding this statement. Defense counsel did not move to suppress Robert Crislip's statement, did not object, did not move to strike the state's reference to the statement, did not move for a mistrial, and did not even seek a limiting instruction. After the close of the evidence, the trial court inquired concerning defense counsel's failure to object to the introduction of this evidence and on its own motion gave a limiting instruction concerning the statement made by defendant's husband. The court instructed the jury to consider the statement only in relation to the alleged blackouts brought in through Dr. Daugherty's testimony. Defendant's trial counsel agreed to the limiting instruction, suggested by the court, but did not request that the court further instruct the jury not to consider the statement as substantive evidence against the defendant.

After conviction, the court on its own motion summoned defense counsel and the defendant to an in camera hearing to determine, among other things, why defense counsel failed to seek suppression of the statement. The trial judge indicated he was seriously concerned about the introduction of this evidence and its "very damaging" nature. In response to the court's inquiry, the following colloquy occurred:

> Defense counsel: I do not recall [the statement] coming in ... I don't recall....
>
> Defendant: You did, because you told me you were going to object to it and I was surprised when you didn't.
>
> Defense counsel also indicated: "I do not recall that particular thing now, I'll have to look through my file notes on that particular thing."

Following further questioning by the court, defense counsel was unable to explain why he did not object or attempt to suppress this evidence.

Defendant contends her counsel's failure to protect her from the out-of-court statement violated her constitutional rights to confrontation and cross-examination. She relies on *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and *Douglas v. Alabama,* 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). We agree. Counsel's failure to protect defendant from the unsworn, out-of-court accusation by codefendant fell below the standard of a reasonably

competent attorney. Moreover, the admission of Robert Crislip's statement was prejudicial to the defense.

Confrontation concerns arise when an out-of-court statement is offered against an accused in a criminal case. *State v. Austin,* 104 N.M. 573, 725 P.2d 252 (Ct.App. 1985); *State v. Martinez,* 99 N.M. 48, 653 P.2d 879 (Ct.App.1982). These concerns are especially acute when a codefendant implicates a defendant in such a statement. In *Lee,* the United States Supreme Court held that a trial court's reliance on a codefendant's confession as substantive evidence against the defendant violates defendant's sixth amendment confrontation rights. The Court ruled that an accomplice's out-of-court statement implicating a defendant is presumptively unreliable. Not only is it subject to all the dangers characteristic of hearsay generally, but it is less credible than ordinary hearsay due to the motivation to exonerate oneself and implicate another. Thus, the Court found that a codefendant's statement inculpating an accused must contain sufficient indicia of reliability to overcome the weighty presumption against its admission. *Id. See also State v. Earnest,* 106 N.M. 411, 744 P.2d 539, *cert. denied,* 484 U.S. 924, 108 S.Ct. 284, 98 L.Ed.2d 245 (1987).

Robert Crislip's statement bore none of the necessary indicia of reliability. First, Robert Crislip was attempting to shift the blame to defendant. Second, the statement was not against Robert Crislip's penal interest. Third, there was no direct independent evidence at trial which corroborated his claim that defendant beat her child on that day or on any other day. *Cf. State v. Earnest* (codefendant's statement was reliable where he received no leniency in exchange, did not attempt to shift responsibility, was strongly against his penal interest, and was corroborated by independent evidence). Also, Robert Crislip was not free from the motive to mitigate the appearance of his own culpability by implicating defendant. *Lee v. Illinois.* In fact, as noted earlier, the attorneys requested separate trials precisely because the defenses were antagonistic. Therefore, we conclude that had defense counsel interposed a timely objection the statement would have been inadmissible because it violated defendant's confrontation rights. Moreover, we agree with defendant that the normal assumption that a jury will be able to follow its instructions is inapplicable in this case. *See Bruton v. United States.* The trial court's limiting instruction to the jury at the close of the evidence was insufficient to cure the prejudicial impact of the statement. *See State v. Martinez,* 102 N.M. 94, 691 P.2d 887 (Ct.App. 1984) (limiting instruction will not cure prejudice where statement unerringly and devastatingly refers to defendant).

The state argues the statement was not used for the substantive purpose of proving that defendant beat Cody, but that it was introduced to impeach defendant's claim of blackouts and memory loss, and to show collusion between defendant and her husband. The state relies on *Tennessee v. Street,* 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) for the rule that a defendant's confrontation rights are not violated when an accomplice's out-of-court statement is used for non-substantive purposes.

In *Street,* defendant testified that his confession was a coerced imitation of a codefendant's confession and that he had been directed by the sheriff to adopt the codefendant's confession as his own. In rebuttal, the prosecutor called the sheriff who denied that Street was pressured to repeat his accomplice's statement. To corroborate this testimony and rebut Street's claim of coercion, the sheriff read the codefendant's confession to the jury. Before the statement was received, the trial judge twice informed the jury to consider it only for the limited purpose of proving the truthfulness of Street's claim of coercion. The Supreme Court held the confession admissible for this limited purpose. The Court noted that defendant created the need to admit the statement and "there were no alternatives that would have ... assured the integrity of the trial's truth-seeking function." *Id.* at 415, 105 S.Ct. at 2082.

We do not find *Street* applicable to the facts of this case. Here, defendant did not make blackouts a part of her defense. She did not create a need to bring in codefendant's statement. The state argues that the statement was used for impeachment purposes and to show collusion. We disagree.

The only evidence concerning blackouts was introduced by the state, through Dr. Daugherty, during its case-in-chief. During direct examination of defendant, no reference was made to any lack of recollection or to any statement given by her husband. The state attempted to impeach defendant by asking about the omission of any mention of blackouts in defendant's earlier statement to the police. Defendant did not testify as to blackouts until cross-examination by the state. She testified that "the business about the 24th of March came up after my husband informed me in a letter that that had happened." Defendant had consistently maintained she could remember nothing unusual about that day and, if in fact she had blacked out, all she knew was what other people told her.

Robert Crislip's out-of-court accusation that defendant had beaten her child was not admissible to impeach anything defendant testified to at the trial. Furthermore, we do not see how his accusation would tend to establish collusion. The state contends that defendant colluded with codefendant to flee the jurisdiction. This argument, however, is unpersuasive. If it were acceptable, then almost any accusation by an unavailable, living declarant would be admissible.

The state has not demonstrated a legitimate purpose for the introduction of the statement, nor are we persuaded that the statement was not prejudicial to defendant. The state's case against defendant was primarily based on testimony that Cody was a victim of the "battered child syndrome," and that defendant and her husband were in charge of his care. Except for Robert Crislip's statement, there was no other evidence that defendant had ever beaten the child. This evidence was subject to being stricken if defense counsel had properly moved for its exclusion. Defendant's case was prejudiced by the failure of her attorney to protect her from this highly unreliable accusation. *Strickland v. Washington.*

2. Attorney–Client Privilege

Defendant claims that trial counsel was ineffective in failing to protect her attorney-client privilege in regard to the defense-requested mental examinations. Defendant claims her counsel's failure to oppose disclosure of the evaluation to the state, as well as his failure to object to the state's use of Dr. Daugherty at trial, denied her effective assistance of counsel.

Pursuant to a defense motion, the trial court ordered a psychological evaluation of defendant. Subsequently, defense counsel requested the court to authorize a neuropsychological evaluation of defendant because the first evaluation identified a need for further testing. Defense counsel arranged for the testing through the Public Defender Department. However, before he saw the report, defense counsel agreed to provide the state with a copy. The defense witness list indicated a neuro-psychiatrist might be called to testify. But Dr. Daugherty, who performed the evaluation, was not subpoenaed by the defense. Instead, she was called by the state.

On direct examination, Dr. Daugherty testified that the purpose of her evaluation was to determine the physical cause for blackouts and memory lapses defendant reported experiencing. She testified that defendant had reported occasionally experiencing blackouts, usually for a few seconds or minutes, including a memory loss for the entire day of March 24th. She also testified there was no evidence of brain damage in defendant, but although the blackouts were not due to brain damage, they could have other causes such as trauma or stress.

We find counsel's failure to exclude this testimony fell below the standard of a reasonably competent attorney. *State v. Orona.* Defendant did not rely upon memory loss or blackouts as part of her defense. Evidence on these matters was elicited by

the prosecution without any objection by defendant's trial counsel. It put defendant's mental stability at issue. While it is improper for a prosecutor to comment on the character of the accused if defendant has not placed her character in issue, *State v. Diaz,* 100 N.M. 210, 668 P.2d 326 (Ct. App.1983), defense counsel allowed such a comment by providing the state with the neuro-psychologist's report and allowing the state to call the doctor as a prosecution witness.

We agree with the state that Dr. Daugherty's testimony was not damaging to defendant in and of itself, and thus does not provide the requisite prejudice for defendant's claim of ineffective assistance of counsel. Defense counsel's decision not to oppose the state's use of the doctor's testimony and report, however, was cumulatively an aspect of ineffective assistance of counsel. *State v. Talley.*

3. Counsel's failure to prepare for trial and interview experts regarding their testimony

Defendant contends her trial counsel failed to properly investigate the case in preparation for trial and failed to develop any trial strategy other than relying on codefendant being tried first and found guilty, thus giving defendant some basis for leniency.

At the *in camera* hearing convened by the trial court, the judge expressed a strong concern about defense counsel's strategy and preparation for trial. The judge was specifically concerned about counsel's preparation for the expert medical testimony offered by the state. Defense counsel indicated he never interviewed one of the state's primary witnesses who testified as to the cause of death, nor did he verify the statements made in the medical reports and the trial. Defense counsel stated that his trial strategy was to obtain a conviction on a lesser included offense or to somehow get leniency based on codefendant's conviction. However, he did not even submit a lesser included offense instruction. The court did so on its own motion.

We will not attempt to second-guess the strategy of trial counsel on appeal. "Bad tactics and improvident strategy do not necessarily amount to ineffective assistance of counsel." *State v. Orona,* 97 N.M. at 234, 638 P.2d at 1079. The failure of defendant's court-appointed trial counsel to interview the witness prior to her being called to testify concerning the cause of death of the child raises a serious question concerning the adequacy of defense counsel's preparation for trial, whether defendant's attorney was in a position to properly evaluate the case against defendant, to adequately question witnesses, or to consider possible defenses.

CONCLUSION

We hold that defense counsel's representation fell below the requisite standard required in *Orona,* in allowing the state to use the psychologist's report on the defense requested mental examinations, in allowing the state to call Dr. Daugherty as a witness, and in not protecting defendant from the codefendant's out-of-court statement. These errors permitted the prosecution to use a "blackout defense" defendant never contemplated. The prosecution then proceeded to knock down this "defense" by the introduction of codefendant's highly prejudicial out-of-court statement. We find a reasonable probability that, absent these errors, the fact finder would have a reasonable doubt respecting guilt. *State v. Taylor,* 107 N.M. 66, 752 P.2d 781 (1988). We also note that the trial court's concern regarding defense counsel's preparation and zealousness, and our review of the other alleged errors, indicate the likelihood that counsel was incompetent in his preparation for the trial. *State v. Talley.*

As shown by the record, defense counsel's representation failed to measure up to the standard required of a reasonably competent attorney. *See State v. Orona; State v. Taylor.* The failure to interview key witnesses prior to trial, to file appropriate motions, interpose timely and proper objections, submit appropriate instructions, and failure to move to exclude the hearsay

statement of defendant's husband, all combined to deprive defendant of a fair trial.

We find the cumulative impact of the instances of ineffective assistance of counsel was so prejudicial as to deprive defendant of a fair trial. *State v. Martin,* 101 N.M. 595, 686 P.2d 937 (1984); *State v. Talley.* While defendant is not entitled to a trial free from errors, she is entitled to a fair trial with her defenses fairly presented. *State v. Talley; State v. Vallejos,* 86 N.M. 39, 519 P.2d 135 (Ct.App.1974).

Because we have determined that defendant was deprived of a fair trial because of ineffective assistance of trial counsel, we need not address the other issues raised by defendant on appeal.

Reversed and remanded.

HARTZ, J., concurs specially.

DONNELLY, J., concurs.

HARTZ, Judge (specially concurring).

I concur in the result and concur in the majority's discussion regarding the inadmissibility of the statement by Mr. Crislip accusing defendant of beating the child. Rather than basing reversal on ineffective assistance of counsel, however, I would reverse because of plain error.

Perhaps as a practical matter every reversal predicated on plain error is a consequence of ineffective assistance of counsel. One could rely on either doctrine here. Nevertheless, ordinarily it is unwise to reverse a conviction on the basis of ineffective assistance of counsel when, as in this case, there has been no adversary proceeding to explore what reasons there may have been for the action or inaction of defense counsel. Deciding nonfrivolous claims of ineffective assistance of counsel without the record of such a hearing can be a quite inefficient process. Appellate courts can spend considerable time and effort attempting to determine why an attorney acted in a particular manner, when an adversary proceeding below could have resolved the question conclusively. Moreover, decisions made without a record of such a hearing are prone to error. Appellate courts must resort to speculation; they may hypothesize tactical reasons for conduct which in fact constituted ineffective assistance of counsel, or they may fail to consider a justification for conduct that might appear to constitute ineffective assistance. To avoid such inefficiency and error, when substantial claims of ineffective assistance of counsel are raised on direct appeal from a judgment of conviction, we should either remand for a hearing on the matter or require defendant to resort to post-conviction remedies under SCRA 1986, 5-802.

The California Supreme Court, in an opinion by Chief Justice Bird, adopted essentially the same view in *People v. Pope,* 23 Cal.3d 412, 426, 590 P.2d 859, 867, 152 Cal.Rptr. 732, 740 (1979). She wrote:

> In some cases, ... the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal. Otherwise, appellate courts would become engaged "in the perilous process of second-guessing." Reversals would be ordered unnecessarily in cases where there were, in fact, good reasons for the aspect of counsel's representation under attack. Indeed, such reasons might lead a new defense counsel on retrial to do exactly what the original counsel did, making manifest the waste of judicial resources caused by reversal on an incomplete record.

Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus. In habeas proceedings, there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of. For example, counsel may explain why certain defenses were or were not presented. Having afforded the trial attorney an opportunity to explain, courts are in a position to intelligently evaluate

> whether counsel's acts or omissions were within the range of reasonable competence. [Citations and footnotes omitted.]

Thus, I cannot join in the majority's criticisms of those aspects of defense counsel's performance which he has never been provided an opportunity to explain, and I am concerned about the precedent set in holding an ex parte hearing two weeks after trial at which trial counsel was asked to explain his representation of defendant without any prior notice of the specific conduct in question.

Still, another doctrine—the plain-error rule—can be fairly invoked in this case and compels reversal. In general, a party cannot claim error predicated upon the admission of evidence unless the record shows a timely objection or motion to strike. SCRA 1986, 11–103(A)(1). The plain-error rule states, however, that "nothing in [Rule 11–103] precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." R. 11–103(D). As a result, evidentiary matters can be reviewed on appeal despite failure of trial counsel to bring them to the attention of the trial court. *See State v. Wall,* 94 N.M. 169, 608 P.2d 145 (1980); *State v. Lara,* 88 N.M. 233, 539 P.2d 623 (Ct.App.1975); *State v. Sanchez,* 86 N.M. 713, 526 P.2d 1306 (Ct.App.1974); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 103[07] (1989). Plain error can even be noticed by an appellate court on its own motion, *see State v. Ogle,* 666 S.W.2d 58 (Tenn.1984), although I would be very reluctant to decide the issue without full briefing of the parties. Defendant has not explicitly claimed plain error; but both parties have briefed and argued the admissibility of the evidence of Mr. Crislip's statement and whether it caused prejudice to defendant. Therefore, there is no unfairness in deciding this case under the plain-error rule.

Courts apply the rule to reverse convictions only when the evidentiary error is very damaging:

> "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 proceedings." *United States v. Campbell,* 419 F.2d 1144 (5th Cir.1969). "It is settled law that the plain error rule should be applied with caution, and invoked only to avoid a miscarriage of justice." *United States v. Robinson,* 419 F.2d 1109 (8th Cir.1969).

State v. Marquez, 87 N.M. 57, 61, 529 P.2d 283, 287 (Ct.App.1974). The error in admitting Mr. Crislip's statement was such an error. At least five jurisdictions have ruled that admission of an accusation against a defendant by a non-testifying co-defendant can constitute plain error. *United States v. Key,* 725 F.2d 1123 (7th Cir. 1984); *United States v. Longee,* 603 F.2d 1342 (9th Cir.1979); *United States v. Morales,* 477 F.2d 1309 (5th Cir.1973); *People v. Hopkins,* 124 Ill.App.2d 415, 259 N.E.2d 577 (1970); *State v. Ogle.* Perhaps defense counsel's failure to object would bar reversal if there had been a tactical reason not to object. But there could not have been such a reason in the circumstances presented here.

Finally, it is worth noting that the trial court's observations during the ex parte hearing conducted after trial support the conclusion that the error here deserves to be labelled plain error. First, the trial judge stated that he was surprised that Mr. Crislip's statement came in without objection, because defense counsel had previously advised the court that he would be objecting to the statement. Defense counsel indicated that he did not believe that the statement in fact had come in. Something may have distracted counsel during the trial. In any case, the trial judge apparently thought that admissibility of the statement was plainly erroneous, but perhaps did not act on his own initiative because of surprise at defense counsel's failure to act. Second, the trial judge referred to Mr. Crislip's statement as "very damaging." Thus, the trial judge apparently believed that the admission of the statement by Mr. Crislip

was both plainly wrong and of critical importance.

785 P.2d 271

Gilbert BARELA, Claimant–Appellee,

v.

MIDCON OF NEW MEXICO, INC., and Safeco Insurance Company, Respondents–Appellants.

No. 10828.

Court of Appeals of New Mexico.

Nov. 7, 1989.

Certiorari Denied Dec. 21, 1989.

Frank P. Dickson, Jr., Dubois, Caffrey, Cooksey, Bischoff & Dickson, P.A., Albuquerque, for claimant-appellee.

Gail Stewart, Gallagher & Casados, P.C., Albuquerque, for respondents-appellants.

OPINION

DONNELLY, Judge.

On the motion of respondents for rehearing, the prior opinion of the court is withdrawn and the following is substituted.

Respondents Midcon of New Mexico, Inc. (Midcon), and Safeco Insurance Company appeal from a decision of the Workers' Compensation Division (WCD) hearing officer finding that claimant was disabled as a result of a work-related accident and awarded compensation and related benefits. They challenge the sufficiency of the evidence to establish (a) causal connection between any disability and a work-related accident; (b) permanent total disability; and (c) certain outstanding medical bills, vocational rehabilitation expenses, and reimbursement for travel expenses. Because we hold that claimant failed to establish the requisite proof to receive permanent total disability, we need not reach the causation issue except as related to the issue of claimant's medical bills. We also hold substantial evidence supports payment of medical and related expenses, except for one item as to which there was no proof. We also disallow vocational rehabilitation benefits, since there was no disability established. Accordingly, we reverse on the issue of permanent total disability and affirm as to the medical and related expenses, except as otherwise noted.

The issues raised come under the transient provisions of the Workmen's Compensation Act, NMSA 1978, Sections 52–1–1 through –68 (Orig.Pamp. & Cum.Supp. 1986) (Interim Act).

Claimant was employed by Midcon as a construction laborer. In June 1986, he began to experience pain in his left foot, and on July 31, 1986, he quit work because of continued problems involving that foot. During August and September, 1986, claimant began to experience pain in his right foot, and subsequently in November, he also began to experience low back pain. Claimant underwent surgery on his left foot in April 1987.

Respondents paid workers' compensation benefits to claimant from August 2, 1986 to December 24, 1986, and from April 5, 1987 to November 1, 1987. After respondents terminated payment of benefits, claimant filed a claim seeking an award of permanent disability. Following a formal hearing before a WCD hearing officer, claimant was determined to have been temporarily totally disabled from December 24, 1986 to April 5, 1987, and permanently totally disabled beginning November 2, 1987. The hearing officer also found that in June 1986, claimant sustained accidental injuries to his feet which resulted in (1) plantar fasciitis, predominantly in his left foot; and (2) aggravation of a preexisting condition of spinal stenosis in his lower back. The hearing officer ordered payment of compensation for claimant's disability, together with an award for medical expenses, voca-

tional rehabilitation and reimbursement for unpaid travel expenses.

Following the entry of the final order of disposition on June 20, 1988, respondents filed this appeal.

PERMANENT TOTAL DISABILITY

At the hearing before the administrative hearing officer, claimant presented the deposition testimony of Dr. Barry Maron, an orthopaedic surgeon. Respondents did not present any medical evidence. Respondents argue that claimant failed to present any expert medical evidence that his disability resulting from injuries to his feet and back was medically or scientifically demonstrable as shown in the American Medical Association (AMA) guides or publications pertaining to the evaluation of permanent impairment.

Dr. Maron testified by deposition on March 7, 1988, that claimant suffered from plantar fasciitis, affecting his feet to some degree, but that he could not quantify such condition or assign a percentage of impairment to the disability as recognized by AMA guidelines. Dr. Maron testified in applicable part:

Q: How is [plantar fasciitis in association with adhesions, scar tissue] related to an impairment for [claimant]?

A: By the book?

Q: Yes, or by your own judgment.

A: Yes, it does imply an impairment, but it's not labeled in numbers on the basis of the AMA guidelines. So you can't label it. All you can say is the man hurts. You can quantitate it by saying he is at the 1, 2, 3, 4, 5 level of pain. That's all I can say. But I can't say it on impairment.[1]

Q: You mean because there is no book that you can make reference to [on the impairment]?

A: Right.

Dr. Maron testified he had not determined claimant's impairment rating or functional capacity evaluation and had not filled out the impairment rating form as provided by the WCD for determining medical impairment, and that without conducting such assessment, it would be "like taking a number out of the blue, unless you have AMA guidelines that [apply] to the problem." Dr. Maron also stated that he was uncertain why claimant's condition of spinal stenosis had become symptomatic over recent months.

Claimant did not elicit testimony concerning any permanent physical impairment ratings as recognized by AMA guidelines or other scientific source, which would relate to his back condition.

It is undisputed that the applicable statutory provisions governing claimant's claims are governed by the Interim Act. In 1986 the legislature materially revised the Workmen's Compensation Act. *See* 1986 N.M. Laws, ch. 22. The Interim Act, 1986 N.M. Laws, Chapter 22, Section 101, provides that the provisions of the Act relating to the definitions of total and partial disability "shall apply to injuries and deaths occurring * * * on or after the effective date of those sections." This provision of the Interim Act became effective May 21, 1986. *Strickland v. Coca-Cola Bottling Co.*, 107 N.M. 500, 760 P.2d 793 (Ct.App.1988). Among the substantive changes set in place under the Interim Act, the legislature modified the definition of permanent total disability, partial disability and temporary total disability. *See* §§ 52-1-24, -25, -26 (Cum.Supp.1986).[2]

Under the Interim Act the legislature changed the test for determining disability from "capacity to perform work" for which a worker is fitted by age, education, training, general physical and mental capacity and previous work experience, to a determination of whether the worker's wage earning ability has been affected. *See Strickland v. Coca-Cola Bottling Co. Compare Quintana v. Trotz Constr. Co.*, 79 N.M. 109, 440 P.2d 301 (1968) (observing that

1. See, however, A. Engelberg, *Guides to the Evaluation of Permanent Impairment*, at 56 (3d ed. 1988), published by the AMA, indicating the method for determining the percentage of impairment to an individual's foot or feet.

2. The 1986 Interim Act has subsequently been amended by 1987 N.M.Laws, Chapter 235.

1963 amendments to the Workmen's Compensation Act enacted by a prior legislature, changed the primary test of disability from "wage earning ability" to "capacity to perform work" as delineated in the statute).

Under Section 52-1-24 of the Interim Act, permanent total disability was defined in part as follows:

> A. As used in the Workmen's Compensation Act * * * "permanent total disability" means a *permanent physical impairment* to a workman resulting by reason of an accidental injury arising out of and in the course of employment whereby a workman is wholly unable to earn comparable wages or salary. *In determining whether a workman is able to earn comparable wages and salary, the hearing officer shall consider the benefits the worker is entitled to receive under Section 52-1-43 NMSA 1978.* If the benefits to which the workman is entitled under Section 52-1-43 * * * and the wage he is able to earn after the date of maximum medical improvement and vocational rehabilitation as provided in this act is comparable to the wage the worker was earning when he was injured, he shall be deemed to be able to earn comparable wages or salary. "Physical impairment" does not include impairment of function due solely to psychological or emotional conditions, including mental stress. [Emphasis added.]

Section 52-1-25 of the Interim Act defined partial disability:

> As used in the Workmen's Compensation Act * * * *"partial disability" means a permanent physical impairment to a workman* resulting from an accidental injury arising out of and in the course of employment, whereby a workman has any anatomic or functional abnormality existing after the date of maximum medical improvement *as determined by a medically or scientifically demonstrable finding as presented in the American medical association's guides to the evaluation of permanent impairment, copyrighted 1984, 1977 or 1971, or comparable publications by the American medical association.* [Emphasis added.]

Sections 52-1-24 (permanent total disability) and -25 (partial disability) were enacted at the same time and were integral provisions of the Interim Act. The Interim Act specifically provided that the definitions of total and partial disability apply to injuries manifesting themselves on or after the effective date of those sections. *See* 1986 N.M.Laws, ch. 22, § 101.

Although conceding that Dr. Maron did not testify concerning disability according to guidelines promulgated by the AMA, claimant nevertheless contends that the legislature did not intend such evidence to constitute an essential element of proof for claims of permanent total disability. Claimant reasons that since the Interim Act Section 52-1-24, defining permanent disability, does not contain language similar to that embodied in Section 52-1-25, relating to partial disability (requiring proof of disability as shown by a medically or scientifically demonstrable finding in the AMA guides to impairment or comparable publications), the legislature did not intend such a requirement for claims of total disability.

Claimant is correct that Section 52-1-24 does not explicitly state that proof of a permanent physical impairment requires reference to AMA publications in order to establish permanent *total* disability. In contrast, Section 52-1-25 of the Interim Act specifically requires reference to AMA guidelines to prove permanent physical impairment in order to establish *partial* disability. Ordinarily, if two statutory provisions enacted at the same time establish different requirements to prove a fact, one would think that the choice of language was intentional and one statutory provision should not be interpreted to incorporate a requirement found only in the other provision.

In this case, however, we believe that it is appropriate to read Section 52-1-24 as incorporating the Section 52-1-25 requirement of reference to AMA guidelines to prove "permanent physical impairment." First, this court's experience with the In-

terim Act convinces us that the legislature that enacted the Act was not concerned with the detailed interrelationships among the provisions of the Act and how the Act would be applied to various recurring, although unusual, circumstances. The apparent legislative intent was to establish certain benchmarks and to leave to the courts the task of "rationalizing" the provisions of the statute. Thus, in interpreting the Interim Act one should not necessarily infer that a requirement imposed explicitly in Section 52–1–25 and omitted from Section 52–1–24 was therefore intended not to apply to Section 52–1–24.

Second, we know of no logical reason to require reference to AMA guidelines in proving permanent physical impairment when one is attempting to establish partial disability but not when one is attempting to establish total disability.

Third, because of the statutory interrelationship between findings of partial and total disability, interpreting Section 52–1–24 as not requiring reference to AMA guidelines could lead to results that we doubt were intended by the legislature. Explanation of this point requires some background discussion. The definition of total disability relates back to the definition of partial disability through the definition of "comparable wages or salary." Under Section 52–1–24, a worker is permanently totally disabled only if he or she "is wholly unable to earn comparable wages or salary." "In determining whether a workman is able to earn comparable wages and salary, the hearing officer shall consider the benefits the worker is entitled to receive under Section 52–1–43 NMSA 1978." *Id.*

■ We conclude that an award of benefits received under Section 52–1–43 include those for partial disability as defined in Section 52–1–25. In other words, a worker is entitled to total disability benefits if the sum of (1) what the worker can now earn, plus (2) the worker's partial disability benefits is not comparable to the worker's predisability wages or salary. Therefore, a worker's partial disability benefits could make the difference as to whether or not he or she is deemed totally disabled. It could happen that adding the partial disability benefits to the worker's current income would produce a total that is comparable to the worker's former income; whereas without adding in the partial disability benefits, the worker's current income would not be comparable to what it had been before the disability. In that circumstance the worker would receive greater benefits if he failed to prove partial disability than if he established partial disability. If, therefore, we were to interpret Section 52–1–24 as not requiring proof with reference to AMA guidelines in order to establish total disability, then it would be to the worker's benefit not to establish that his or her permanent physical impairment met AMA guidelines. The worker could then prove permanent physical impairment under Section 52–1–24 but not under Section 52–1–25. By failing to establish the application of the guidelines to his or her injuries, the worker would not receive partial disability benefits and would therefore receive total disability benefits. Although we realize that the employer might seek to prevent that result by producing evidence that the worker's impairment met AMA guidelines, we doubt that the legislature intended such a convoluted result.

Once the causal connection between a worker's injury and disability has been established by expert medical testimony, under the former act the extent of plaintiff's disability could be established by non-medical witnesses. *Smith v. City of Albuquerque,* 105 N.M. 125, 729 P.2d 1379 (Ct.App. 1986). Under the provisions of the Interim Act, however, where a worker is claiming either permanent total disability or permanent partial disability, in addition to other proofs required, we conclude that the worker must also establish a permanent physical impairment as required under Section 52–1–25. *See Strickland v. Coca-Cola Bottling Co.* (holding that in order to establish permanent partial disability, a worker must prove the existence of an anatomic or functional abnormality "as determined by a medically or scientifically demonstrable finding as presented in the American medical association's guides" or comparable publications).

■ Our review of the record indicates that claimant did not present evidence by a

qualified health care provider that claimant suffered partial or total disability resulting from an anatomic or functional abnormality "as determined by a medically or scientifically demonstrable finding as presented in the American medical association's guides to the evaluation of permanent impairment ... or comparable publications by the American medical association." *Cf. Strickland v. Coca-Cola Bottling Co.* Proof of such disability is a prerequisite to recovery of partial or total disability under the Interim Act. Therefore, the award must be set aside.

MEDICAL AND VOCATIONAL REHABILITATION EXPENSES

Respondents also challenge on appeal the hearing officer's order directing payment of certain outstanding medical bills, vocational rehabilitation expenses, and reimbursement for claimant's travel to receive medical treatment.

Recovery of medical expenses is not contingent upon recovery of permanent total or permanent partial disability where there has been proof that the medical bills were otherwise reasonable and necessary, and claimant has presented proof of a causal link between the work-related accident and his medical bills. *Bowles v. Los Lunas Schools,* 109 N.M. 100, 781 P.2d 1178 (Ct. App.1989). The hearing officer's order directing payment of claimant's medical bills is supported by substantial evidence, including evidence of a causal connection between claimant's work-related accident and his medical bills, except the payment of the $439.99 bill from Buckland Pharmacy. *See Hernandez v. Mead Foods, Inc.,* 104 N.M. 67, 716 P.2d 645 (Ct.App.1986); *DiMatteo v. County of Dona Ana,* 104 N.M. 599, 725 P.2d 575 (Ct.App.1985); *see also Baca v. Bueno Foods,* 108 N.M. 98, 766 P.2d 1332 (Ct.App.1988). The bill from Buckland Pharmacy was not received into evidence, nor was evidence presented that this bill was reasonable or necessary or was incurred as a result of a work-related accident.

The hearing officer also found that claimant was entitled to the sum of $335.00 for unpaid mileage for travel to and from medical service providers. The record supports the hearing officer's award of outstanding unpaid reasonable travel expenses necessarily incurred in claimant's receipt of medical treatment resulting from a work-related injury. *See Gonzales v. Bates Lumber Co.,* 96 N.M. 422, 631 P.2d 328 (Ct.App.1981).

Finally, respondents also challenge the sufficiency of the evidence to support the hearing officer's award of vocational rehabilitation benefits. An award of vocational rehabilitation benefits is dependent upon proof that the workman is either partially or totally disabled. *See Hernandez v. Mead Foods, Inc.* Since claimant has failed to establish proof of disability as required under the Interim Act, the award of vocational rehabilitation benefits was not supported by requisite substantial evidence.

CONCLUSION

The dispositional order appealed from is reversed and remanded for entry of an amended dispositional order in accordance with this opinion.

IT IS SO ORDERED.

BIVINS, C.J., and HARTZ, J., concur.

785 P.2d 276

Ismael G. GONZALES, Claimant-Appellant,

v.

LOVINGTON PUBLIC SCHOOLS and The New Mexico Public School Insurance Authority, Respondents-Appellees.

No. 11241.

Court of Appeals of New Mexico.

Nov. 21, 1989.

Certiorari Denied Jan. 4, 1990.

Lowell Stout, Stout & Stout, Hobbs, for claimant-appellant.

Kevin M. Brown, Christopher W. Nickels, Beall, Pelton, O'Brien & Brown, Albuquerque, for respondents-appellees.

OPINION

BIVINS, Chief Judge.

Worker appeals the part of the compensation order of the Workers' Compensation Division that reduces his benefits from temporary total disability to 10% permanent partial disability after December 20, 1989. Worker's sole contention on appeal is that the hearing officer did not have authority to determine partial disability before worker completed vocational rehabilitation, even though worker had failed to make a reasonable effort to rehabilitate himself. In resolving the issue, we examine the transient provisions of the Workmen's Compensation Act, NMSA 1978, §§ 52–1–1 through –69 (Orig.Pamp. & Cum. Supp.1986) (Interim Act), effective from May 21, 1986 through June 19, 1987. We affirm.

Background

The unchallenged findings of fact made by the hearing officer reflect that worker, age thirty-five with a ninth-grade education, suffered an injury to his back on December 11, 1986, while working as a custodian for the Lovington Public Schools. At the time of the accidental injury, worker was earning $311.07 per week. From the date of the injury until October 24, 1988, worker was unable to perform his duties, which included cleaning and maintenance of the school buildings and grounds. During that period he was temporarily totally disabled. Worker reached maximum medical improvement on October 25, 1988, and was found to have a permanent partial disability of 10%.

The hearing officer also found that worker's background included employment as a farm laborer, tractor driver, and gasoline service station attendant. He found worker unable to return to his former job as a custodian and in need of vocational rehabilitation to restore him to suitable employment. The hearing officer found that worker could complete rehabilitation in one year. He also found worker was not making a reasonable effort toward rehabilitation. (The briefs seem to indicate worker never attempted the program recommended.) He found that, after vocational rehabilitation and taking into account the 10% partial disability, worker "will be earning a comparable wage."

The compensation order provides that temporary total disability benefits continue from December 22, 1988, through December 20, 1989, after which benefits shall automatically decrease to the 10% permanent partial. Neither party challenges the award of temporary total disability benefits through December 20, 1989. It is from the reduction of compensation benefits after December 20, 1989, that worker appeals.

Discussion

Worker contends that, once he reached maximum medical improvement, the hearing officer had no authority to postpone determination of permanent total disability. He also argues that his failure to attempt rehabilitation had no bearing, since Section 52–1–50 precludes forfeiture or diminution of any award on account of refusal to undertake rehabilitation. Worker states that it was incumbent on the hearing officer to award him permanent total disability, since he cannot return to his employment as a custodian and cannot earn comparable wages or salary. Employer would not be without a remedy, according to worker, since it has the right to seek termination or diminution of the award every six months. See § 52–1–56.

Employer counters, arguing that the hearing officer could consider the wages or salary worker would be able to earn after vocational rehabilitation, and properly exercised his discretion in setting a time limit for worker to complete rehabilitation. We agree.

This case brings into play the interaction between Sections 52–1–24, –25, and –26, and other provisions of the Interim Act

relating thereto. As we said in *Barela v. Midcon of N.M., Inc.*, 109 N.M. 360, 785 P.2d 271 (Ct.App.1989), the legislature, in enacting the Interim Act, was not concerned with detailed interrelationships between its provisions, the apparent purpose being to establish certain benchmarks and to leave to the courts the task of " 'rationalizing' the provisions of the statute." *Id.*, at 364, 785 P.2d at 275. We attempt to do that now in addressing the question before us.

Section 52–1–26 provides that temporary total disability benefits will be paid during the period a worker is unable, by reason of accidental injury arising out of and in the course of his employment, to perform his duties prior to the date of maximum medical improvement. Section 52–1–27 defines maximum medical improvement as "the date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated based upon reasonable medical probability." *See Baca v. Bueno Foods*, 108 N.M. 98, 766 P.2d 1332 (Ct.App.1988). Once maximum medical improvement has been achieved, a determination would ordinarily be made as to permanent disability, either total or partial, if worker has a permanent physical impairment.

Determinations of permanent disability are made by first deciding the extent of partial disability. If the injury is to a scheduled member, Section 52–1–43(B) applies. If the injury is to a body member or function not listed in subsection B, then subsection C of Section 52–1–43 refers the fact finder to the partial disability section of the Interim Act, Section 52–1–25. That would be the case here, since we are concerned with an injury to the back.

Permanent partial disability under Section 52–1–25 means a permanent physical impairment whereby a worker has an anatomic or functional abnormality existing after the date of maximum medical improvement, as determined by the American Medical Association's guidelines or comparable publications. Here the hearing officer made appropriate findings under that section and determined worker has a 10% partial disability.

The next step is to determine if the worker is permanently totally disabled. Section 52–1–24 provides a worker is permanently totally disabled if he suffers a permanent physical impairment whereby he is "wholly unable to earn comparable wages or salary." Comparable wages or salary are determined by a formula. The hearing officer considers the benefits the worker is entitled to receive for his partial disability under Section 52–1–43 (either scheduled member or partial disability). Here that entitlement was calculated at 10%. The hearing officer then adds that benefit to what the worker is able to earn "after the date of maximum medical improvement *and vocational rehabilitation.*" § 52–1–24 (emphasis added). If the sum of those two amounts is comparable to the wage the worker was earning when injured, the worker is deemed to be able to earn comparable wages or salary, and is therefore not entitled to permanent total disability. If not comparable, worker is entitled to permanent total disability.

Up to this point, the several provisions of the Interim Act dovetail and achieve the legislative intent of providing for temporary total disability until maximum medical improvement is achieved and then providing for payment of scheduled member, permanent partial, or permanent total disability if the worker retains a permanent physical impairment. The problem arises with an ambiguous phrase contained in Section 52–1–24. We set forth that section and highlight the language in question.

> A. As used in the Workmen's Compensation Act [Chapter 52, Article 1 NMSA 1978], "permanent total disability" means a permanent physical impairment to a workman resulting by reason of an accidental injury arising out of and in the course of employment whereby a workman is wholly unable to earn comparable wages or salary. In determining whether a workman is able to earn comparable wages and salary, the hearing officer shall consider the benefits the worker is entitled to receive under Section 52–1–43 NMSA 1978. If the bene-

> fits to which the workman is entitled under Section 52–1–43 NMSA 1978 and the wage he is able to earn *after the date of maximum medical improvement and vocational rehabilitation as provided in this act* is comparable to the wage the worker was earning when he was injured, he shall be deemed to be able to earn comparable wages or salary. "Physical impairment" does not include impairment of function due solely to psychological or emotional conditions, including mental stress.

Section 52–1–24(A) (emphasis added).

The first question is whether the highlighted language means that determination of permanent total disability should be delayed until the worker not only achieves maximum medical improvement but also completes vocational rehabilitation. The difficulties encountered in reading this provision in that manner can be illustrated by considering three situations that could occur if, at the time the worker achieves maximum medical improvement, the worker is unable to earn comparable wages: (1) the worker is not a candidate for vocational rehabilitation; (2) the worker is a candidate but rehabilitation may be prolonged; or (3) as in the case before us, worker, although a candidate, refuses or fails to avail himself of rehabilitation.

One could hardly argue in the first instance that permanent total disability determination should be delayed. The answers for the second and third examples are less clear. Because the language in question relates only to *how* to make the comparable-wage calculation, and not to *when* the calculation should be made, we interpret the phrase "the wage he is able to earn after ... vocational rehabilitation" to mean the wages a worker could reasonably be expected to earn if he avails himself of rehabilitation. By interpreting the language in this manner, we give effect to the legislative intent. *See Miller v. New Mexico Dep't of Transp.*, 106 N.M. 253, 741 P.2d 1374 (1987).

Worker argues that, even though he has achieved maximum medical improvement, his benefits should not be reduced "until it can be shown at some future date that he is in fact capable of earning a comparable wage." He contends it would be mere "speculation and conjecture" to presume that worker can be suitably retrained at some future date to earn a comparable wage. If we were to adopt this argument, a worker could force payment of total disability benefits by simply refusing to undertake vocational rehabilitation. We do not believe this is what the legislature intended. Of course, where a determination is made as to the ability to earn after maximum medical improvement and vocational rehabilitation, it must not be based on speculation or conjecture. *See Regenold v. Rutherford*, 101 N.M. 165, 679 P.2d 833 (Ct.App.1984) ("probable," as used with reference to future medical expense, is that which can reasonably and fairly convincingly be accepted as true, without being undeniably so). Worker has not shown why the testimony of the vocational rehabilitation specialist in this case was speculative. While it is true the assessment of worker's ability to earn was predicated on his completing his GED, there was no indication he could not do that. He apparently did not try.

The approach we take allows for payment of permanent disability benefits, either partial or total, to commence at the point when temporary total disability benefits terminate. How does the interpretation we give to Section 52–1–24 operate in the second example above—that is, the worker who, although having reached maximum medical improvement, is undergoing vocational rehabilitation, but has not completed it when the determination of disability is made? We believe in that instance the hearing officer should be allowed to make the same determination as in the case before us, if evidence is available as to what the worker can reasonably be expected to earn after rehabilitation. The worker would also be entitled to the benefits allowed under Section 52–1–50 (additional compensation necessary for his board, lodging, travel, and other expenses, and for maintenance of his family during rehabilitation up to $3,000). We do not believe the

legislature intended to penalize the worker who tries to go back to work. To the contrary, the purpose of this legislation is to assist workers in returning to gainful employment. *See Garcia v. Schneider, Inc.*, 105 N.M. 234, 731 P.2d 377 (Ct.App. 1986).

Therefore, we also hold that in the situation just described, the hearing officer must make a two-part determination. First, the hearing officer should calculate whether the worker is totally permanently disabled during the rehabilitation period; that is, is the sum of the worker's partial disability benefits plus what the worker is able to earn during the rehabilitation period (taking into account, of course, that the worker's earning capacity may be greatly diminished or eliminated by the need to undertake rehabilitation) comparable to the worker's prior earnings? Second, the hearing officer should calculate whether the worker will be totally permanently disabled after the rehabilitation period. The hearing officer's determination may even have to include additional calculations; for example, the worker's earning capacity may change during the course of rehabilitation. We do not read Section 52–1–24 as requiring the hearing officer to fix only one status—either totally permanently disabled or not totally permanently disabled—from the date of maximum medical recovery; the hearing officer's determination can provide for a change, or even multiple changes, in status. We recently held in an unpublished opinion that a worker receiving scheduled injury benefits may acquire the status of being totally permanently disabled at the end of the statutory period provided for scheduled benefits. In that case, the sum of (1) the scheduled benefits and (2) the worker's post-recovery earning capacity was comparable to the worker's pre-injury earnings, whereas the post-recovery earning capacity alone was not comparable to pre-injury earnings.

Next we must consider what happens when the worker fails or refuses to undertake rehabilitation. Section 52–1–50 provides, "The refusal of the employee to avail himself for rehabilitation under the provisions of 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." As we have seen, Section 52–1–24 refers to vocational rehabilitation "as provided in this act." Worker concludes from these provisions that the hearing officer cannot consider his post-rehabilitation earning capacity until he actually completes rehabilitation. Thus, if he decided against undergoing rehabilitation, the hearing officer would have to determine whether or not he is totally permanently disabled without reference to possible rehabilitation. We disagree.

By enacting Section 52–1–24 to include a formula for determining comparable wages or salary, one essential ingredient of which is the ability to earn after maximum medical improvement and vocational rehabilitation, the legislature could not have intended the result worker here urges. By simply refusing vocational rehabilitation, a worker in need of rehabilitation could be guaranteed permanent total disability. We will not interpret statutes in such a manner that produces absurd results. *In re Martinez' Will*, 47 N.M. 6, 132 P.2d 422 (1942).

In *Barela*, we dealt with a somewhat analogous situation. There we considered the need to prove permanent physical impairment as required by Section 52–1–25 in order to recover permanent total disability under Section 52–1–24. We said that, unless Section 52–1–24 was read to require that proof, a worker, by failing to establish the application of the American Medical Association's guidelines or comparable publication, could be assured of receiving permanent total disability. The same applies here. By refusing rehabilitation without risk of forfeiture or diminution, worker might be assured of permanent total disability benefits.

Moreover, as we interpret Section 52–1–24, there is no conflict with Section 52–1–50. The worker's award is not forfeited or diminished by his refusal to avail himself for rehabilitation. The determination of the worker's status is made without

reference to whether or not the worker actually will decide to undertake rehabilitation. The hearing officer, in keeping with the Act's purpose of encouraging and assisting workers to return to gainful employment, assumes that the worker will undertake reasonable rehabilitation. If the worker refuses rehabilitation, his disability benefits are not altered. (On the other hand, if the worker tries rehabilitation and it is not as successful as predicted, he could seek a redetermination of whether he is totally permanently disabled.)

We affirm the compensation order.

IT IS SO ORDERED.

APODACA and HARTZ, JJ., concur.

785 P.2d 282

STATE of New Mexico,
Plaintiff–Appellee,

v.

Robert TSETHLIKAI,
Defendant–Appellant.

No. 11095.

Court of Appeals of New Mexico.

Dec. 12, 1989.

Certiorari Denied Jan. 4, 1990.

Jacquelyn Robins, Chief Public Defender and Peter Rames, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen. and Charles H. Rennick, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HARTZ, Judge.

Defendant pleaded guilty to kidnaping with intent to hold for service, a second-degree felony, and criminal sexual penetration during the commission of kidnaping, also a second-degree felony. The district court sentenced defendant to a term of imprisonment of nine years on each count, the sentences to run consecutively, with three years of the kidnaping sentence suspended. Defendant appeals his sentence, claiming (1) the two charges merged, so consecutive sentences were impermissible, and (2) he received ineffective assistance of counsel with respect to his decision not to disqualify the sentencing judge. We affirm defendant's sentence.

1. MERGER

The pertinent events were reported in an exhibit tendered by defendant at the sentencing hearing and admitted by the district court. The victim awoke in her bedroom to find defendant attempting to remove her clothes. She ran to the bedroom door, but he intercepted her before she could open it. He pulled her to the floor by her hair and they struggled. He penetrated her digitally. The victim then told defendant that she needed to go to the bathroom, and he let her up. Trying to flee, she managed to open the front door, but he pushed it shut and forced her back inside. They fought, with defendant hitting her, choking her, and sitting on her. When she tried to get up and run, he knocked her down again. He walked out the front door but came in when she tried to close him out. He forced her down and penetrated her with his penis. They struggled some more, until he threw her onto the couch in a headlock with her face in the couch so that she could not breathe. After she began reciting the Lord's Prayer, he let her go and left.

The counts to which defendant pleaded guilty stated as follows:

> COUNT II: That on or about the 2nd day of December, 1987, in Bernalillo County, New Mexico, the above-named defendant caused [victim] to engage in sexual intercourse, while during the commission of kidnapping, a felony, and [victim] was not the spouse of the defendant, contrary to § 30–9–11(B), NMSA 1978.
>
> COUNT III: That on or about the 2nd day of December, 1987, in Bernalillo County, New Mexico, the above-named defendant took, restrained, or confined [victim] by force or deception, intending to hold [victim] for service against her will, contrary to § 30–4–1, NMSA 1978.

The statute upon which Count II was based reads, in pertinent part: "Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated: ... in the commission of any other felony[.]" NMSA 1978, § 30–9–11(B)(4) (Cum.Supp.1989). The statute upon which Count III was based reads, in pertinent part: "Kidnaping is the unlawful taking, restraining or confining of a person, by force or deception, with intent that the victim: ... be held to service against the victim's will." NMSA 1978, § 30–4–1(A) (Repl.Pamp.1984).

We assume that defendant committed only one kidnaping. *See State v. Hutchinson,* 99 N.M. 616, 624, 661 P.2d 1315, 1323 (1983) (kidnaping is a continuous offense). Therefore, convicting defendant for violation of Section 30–9–11(B), as charged in Count II, required proving that defendant committed the same kidnaping charged in

Count III. In these circumstances can consecutive sentences be imposed, or do the two offenses merge?

To avoid possible confusion, we note at the outset two questions that we are not answering. We are not deciding (1) whether it would be permissible to try defendant on Counts II and III in separate, successive trials, *see Harris v. Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), or (2) whether it would be permissible to instruct the jury on kidnaping or false imprisonment as a "lesser included offense" if defendant had been indicted only on the Count II charge of CSP II. *See State v. DeMary,* 99 N.M. 177, 655 P.2d 1021 (1982). Those two questions also require an analysis of the interrelationship between Counts II and III, and judicial opinions addressing such questions often refer to criteria containing language similar, or even identical, to language used in determining issues of merger. Nevertheless, the principles underlying decision in the areas of merger, successive prosecution, and lesser-included-offense instructions are distinct from one another. *See People v. Robideau,* 419 Mich. 458, 355 N.W.2d 592 (1984). We focus, therefore, on the doctrine governing whether a defendant can be sentenced consecutively for violation of two different statutory provisions.

The Double Jeopardy Clause of the United States Constitution prohibits a court from imposing sentence twice on a defendant for violation of the same offense. *See Ex parte Lange,* 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873) (statute provided for imposition of fine *or* imprisonment; court cannot sentence for fine and then sentence for imprisonment). At the same time, however, the Clause imposes few, if any, limitations on the legislative power to define offenses. *See State v. Edwards,* 102 N.M. 413, 696 P.2d 1006 (Ct. App.1984). The legislature may define two distinct offenses and permit multiple punishment when both are violated. When conduct by a defendant violates two statutory provisions, the role of the constitutional guaranty is limited to assuring that the sentencing court has not exceeded its legislative authority. *See id.* In other words, whether imposition of consecutive sentences offends the Double Jeopardy Clause in that context is determined simply by whether the legislature authorized multiple punishment. *See State v. Ellenberger,* 96 N.M. 287, 629 P.2d 1216 (1981).

State v. Stephens, 93 N.M. 458, 601 P.2d 428 (1979) held that two charges merge for purposes of sentencing if one "necessarily involves" the other. Although the *Stephens* court looked only to the statutory elements of the two offenses in deciding that they did not merge, on other occasions we have applied the "necessarily involved" test in light of the specific evidence presented to decide whether two offenses must merge for sentencing purposes. *See State v. Jacobs,* 102 N.M. 801, 701 P.2d 400 (Ct.App.1985). We need not decide here the extent to which such fact-specific analysis may be appropriate in merger cases. Because the ultimate question is always legislative intent with respect to sentencing, the various forms of the "necessarily involved" test and similar tests appearing in opinions regarding merger "are merely aids for determining legislative intent." *State v. Ellenberger,* 96 N.M. at 290, 629 P.2d at 1219.

Turning to this case, we begin the analysis by noting that Count II charges a compound crime—CSP in the commission of another felony. The legislature necessarily considered that one who commits the compound crime is always also guilty of another crime, the predicate felony. The New Mexico Supreme Court faced a similar statutory scheme in *Stephens.* The compound crime in that case was felony murder. *Stephens* affirmed consecutive sentences for the murder and the predicate felony. That decision compels the conclusion that the legislature intended to permit multiple punishments for one who commits the compound crime and the predicate felony charged in this case. Although the *Stephens* opinion did not explicitly address legislative intent, its comparison of the statutory elements of the crimes of felony murder and of robbery (the predicate felony) can be understood as an application of

a useful assumption in merger cases: "Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments." *People v. Robideau*, 419 Mich. at 487, 355 N.W.2d at 604 (upholding consecutive sentences for (1) the compound crime of criminal sexual penetration in circumstances involving a felony and (2) the predicate felony of kidnaping). Because CSP II and kidnaping address different social norms, consecutive sentences for those two crimes is, in general, permissible. *See id.*

Even though ordinarily consecutive sentences are permissible for a compound crime and a predicate crime that violate distinct social norms, special circumstances in a particular case may require merger. Such a possibility in this case remains to be addressed. The kidnaping alleged in Count III requires proof that defendant intended to hold the victim "for service." To prove that offense in the present case required establishing that defendant intended to hold the victim for sexual services. Thus, one could argue that the kidnaping was used to enhance the charge of criminal sexual penetration while evidence of the criminal sexual penetration was used to prove the intent necessary to enhance the false imprisonment into kidnaping. In *State v. Srader*, 103 N.M. 205, 206, 704 P.2d 459, 460 (Ct.App.1985) the defendant argued that " 'enhancing each crime by the other violates double jeopardy' "; but the court did not need to address that point because the defendant received concurrent sentences. We, too, leave to another day the question of whether we should presume that the legislature would not have intended to permit "enhancing each crime by the other." Proof of the intent necessary to establish kidnaping did not require proof of the criminal sexual penetration forming the basis of Count II. Defendant's intent to hold the victim for services could have been established by his original assault on the victim while she was asleep. The criminal sexual penetration occurred later.

Finally, we distinguish *State v. Gammil*, 108 N.M. 208, 769 P.2d 1299 (Ct.App.1989) because there the identical act constituted the basis of convictions for two offenses, one of which was inherent in the other. *See also State v. Corneau*, 109 N.M. 81, 781 P.2d 1159 (Ct.App.1989).

2. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that his counsel did not advise him that he had the right to disqualify the trial judge. Because defendant's claim of ineffective assistance of counsel was not made in district court, we have no record upon which to review this matter. *See State v. Lujan*, 79 N.M. 200, 441 P.2d 497 (1968). Therefore, we deny defendant relief on this claim on direct appeal.

CONCLUSION

We affirm defendant's convictions and sentences.

IT IS SO ORDERED.

ALARID and MINZNER, JJ., concur.

785 P.2d 285

Edward DiMATTEO, Plaintiff-Appellant,

v.

The COUNTY OF DONA ANA, state of New Mexico, By and Through its governing BOARD OF COUNTY COMMISSIONERS, Fireman's Fund Insurance Company, and Rockwood Insurance Company, Defendants-Appellees.

No. 10962.

Court of Appeals of New Mexico.

Dec. 19, 1989.

Gordon Berman, Pickett & Holmes, Las Cruces, for plaintiff-appellant.

Larry Ramirez and Manuel I. Arrieta, Weinbrenner, Richards, Paulowsky & Sandenaw, P.A., Las Cruces, for defendant-appellee, Fireman's Fund Ins. Co.

Daniel G. Acosta, Campbell, Reeves, Chavez & Acosta, P.A., Las Cruces, for defendants-appellees.

Hal Stratton, Atty. Gen. and MaryAnn Lunderman, Sp. Asst. Atty. Gen., Albuquerque, for Gerald B. Stuyvesant, Director Workers' Compensation Div.

OPINION

MINZNER, Judge.

Plaintiff appeals from the trial court's order denying his motion for increased

workers' compensation benefits. In a prior appeal, *see DiMatteo v. County of Dona Ana,* 104 N.M. 599, 725 P.2d 575 (Ct.App. 1985) (*DiMatteo I*), this court affirmed defendants' liability for medical benefits. In this case, plaintiff seeks benefits for total disability arising out of the accidents involved in *DiMatteo I.* We reverse.

BACKGROUND

While employed as the Dona Ana County Sheriff, plaintiff was injured on February 22 and July 19, 1973, in June 1974, and on April 14, 1982. Plaintiff sought disability and medical benefits only after the April 1982 accident. During the 1983 trial, however, plaintiff orally withdrew his claim for disability benefits. After trial, plaintiff was awarded medical benefits, and defendant Rockwood Insurance Company (Rockwood) appealed.

Although this court affirmed defendants' liability for medical benefits, we limited plaintiff to recovery for only those medical bills introduced into evidence. *See DiMatteo I.* On April 9, 1987, plaintiff filed a supplemental complaint for workers' compensation benefits, claiming he became disabled on January 1, 1987, as a result of (a) the 1982 accident, (b) the 1973 and 1974 accidents, or (c) the combination of all these accidents. Defendants filed motions to dismiss the supplemental complaint. At the July 13, 1987 hearing on the motions, plaintiff's supplemental complaint was challenged as not being the appropriate method by which to bring his claim. Plaintiff agreed with defendants and the district court, and plaintiff was given an opportunity to file a motion for increase of benefits.

Plaintiff's motion to increase benefits alternatively alleges that plaintiff became disabled on either January 1, 1987, when the pain and discomfort forced him to quit his job, or some time after the April 1982 accidental injury. The motion reiterates that disability resulted from the 1973 and 1974 accidental injuries, the 1982 accidental injury, or both. After plaintiff filed his motion to increase, defendants filed motions to strike. Defendants filed motions to strike because they did not believe a motion to dismiss was the proper way to have plaintiff's motion to increase his benefits dismissed. After a March 22, 1988 hearing on the motions, the district court granted defendants' motions and dismissed plaintiff's claim.

Two preliminary considerations in this case are jurisdiction and the standard of review. We first address the jurisdictional issue.

JURISDICTION IN THE DISTRICT COURT

Chapter 22, Section 102 of the 1986 Laws repealed sections of the then-existing Workmen's Compensation Act that required filing of claims in the district court, court approval of pretrial settlements, application of the rules of civil procedure in compensation proceedings, and trial of cases in district court. *Wylie Corp. v. Mowrer,* 104 N.M. 751, 726 P.2d 1381 (1986). Section 103 provided that the Workmen's Compensation Administration (the Administration), the agency charged with administering the Interim Act, NMSA 1978, Sections 52–1–1 to –69 (Orig.Pamp. & Cum.Supp.1986), would begin operating on December 1, 1986. Section 101 provided that all claims filed after December 1, 1986 should be filed with the director of the Administration.

In 1987, the legislature created the Labor Department to administer all functions formerly administered and exercised by the Administration, the labor commissioner, and the office of the Human Rights Commission. 1987 N.M. Laws ch. 342, § 3. The legislature abolished the Administration, established the Division, and provided that the Division would have all of the powers and duties conferred upon the former Administration. 1987 N.M. Laws ch. 342, §§ 4, 5, 14(B)(2).

In this case, the parties viewed the claim as an attempt to reopen the prior award. No one raised the issue of the district court's jurisdiction after the 1986 amendments. We requested supplemental briefing, invited participation from the Workers' Compensation Division, and scheduled oral argument.

The jurisdictional issue is whether plaintiff's motion to increase benefits is a claim filed after December 1, 1986. If so, he should have filed his claim with the Workers' Compensation Division (the Division). *See Wylie Corp. v. Mowrer;* 1986 N.M. Laws ch. 22, §§ 101–03; 1987 N.M.Laws ch. 342, §§ 5, 14(B)(2). For the following reasons, we conclude that plaintiff's claim is not a claim filed after December 1, 1986, for purposes of deciding the proper forum, and that jurisdiction lies with the district court.

In all states, legislatures have made some kind of provision for reopening and modifying awards. *See generally* 3 A. Larson, *The Law of Workmen's Compensation* § 81.10 (1989). The purpose of such provisions is to permit a revision of the typical periodic payment award to correspond to a claimant's changed condition. *Id.* Because of the administrative and practical difficulties involved in recognizing unlimited jurisdiction to open cases, most states limit the period in which a case may be reopened. *See generally id.,* § 81.21 (some states set a fixed period running from the injury or from the award; others limit jurisdiction to the duration of the original award; others extend the period to a specified number of months or years after the last payment of compensation or the expiration of the award).

Under the Workmen's Compensation Act as it read prior to amendment in 1986, the district court retained jurisdiction to reopen its award for disability to meet changes in a claimant's condition. *See Martinez v. Earth Resources Co.,* 90 N.M. 590, 566 P.2d 838 (Ct.App.), *overruled on other grounds, Garza v. W.A. Jourdan, Inc.,* 91 N.M. 268, 572 P.2d 1276 (Ct.App.1977); *see also* § 52–1–56(A) (Orig.Pamp.) (amended effective December 1, 1986 by 1986 N.M. Laws ch. 22, §§ 19, 103). Under Section 52–1–56(A), there is no express time limit within which applications for an increase may be filed. *Id.* However, under the supreme court's decision in *Norvell v. Barnsdall Oil Co.,* 41 N.M. 421, 70 P.2d 150 (1937), an application may be presented at any time within the period for which compensation is allowable. Plaintiff's application appears to have been timely under Section 52–1–56(A). At the time of the 1982 accident, the maximum duration of benefits was 600 weeks. *See* § 52–1–47(A) (Orig.Pamp.) (amended effective June 19, 1987 by 1987 N.M.Laws ch. 235, § 20).

In this case, the dispositive question is whether the legislature intended to include applications to increase, decrease, or terminate benefits in the term "claim," when it provided that claims filed after December 1, 1986 were to be filed with the new administrative agency. For the following reasons, we conclude that the legislature intended to refer to claims filed for the first time after December 1, 1986.

Under the state constitution, "[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." N.M. Const. art. IV, § 34. The term "pending case" ordinarily refers to a suit pending on some court's docket and does not include a suit filed after the statute became effective on a cause of action arising prior to enactment of the statute. *Gray v. Armijo,* 70 N.M. 245, 372 P.2d 821 (1962).

As our supreme court noted in *Stockard v. Hamilton,* 25 N.M. 240, 244–45, 180 P. 294, 295 (1919), "[t]he authorities as to what is a 'pending case' are by no means uniform, and are of no great aid to the court in determining the meaning of the language in question." The court noted that "[t]he definitions of a pending case vary with the construction of each particular statute" and held that the word "pending" should be interpreted as meaning " 'depending,' 'remaining undecided,' [and] 'not terminated.' " *Id.* at 245, 180 P. at 295. Thus, the court appeared to equate a "pending case" with a case that is in the process or course of litigation and which has not been concluded, finished, or determined by a final judgment.

In this case, plaintiff obtained a final judgment for purposes of appeal after the 1983 trial. *See DiMatteo I; see also Johnson v. C & H Constr. Co.,* 78 N.M. 423, 432 P.2d 267 (Ct.App.1967) (judgment

or order in compensation proceedings is not final unless all issues of law and of fact necessary to be determined are determined and the case completely disposed of so far as court has power to dispose of it). However, our supreme court cases suggest that a compensation award is not final for other purposes until the period has passed during which it may be increased, decreased, or terminated. *See Segura v. Jack Adams Gen. Contractor,* 64 N.M. 413, 329 P.2d 432 (1958); *Churchill v. City of Albuquerque,* 66 N.M. 325, 347 P.2d 752 (1959); *but compare Phelps v. Phelps,* 85 N.M. 62, 509 P.2d 254 (1973) (divorce decree with custody provisions not a "pending case"). Thus, we think it is unclear under the relevant statutes and cases whether a compensation award is a pending case within the meaning of the constitution as long as it remains subject to modification.

We doubt the legislature intended to raise a constitutional issue as to the jurisdiction of the new administrative agency. We assume, to the contrary, that the legislature intended to establish a "bright line" principle that would separate the work of the new agency from that of the district courts. The purpose of the new agency is to provide a system that assures "the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to" the new legislation. NMSA 1978, § 52-5-1 (Repl. Pamp.1987). Based on the supplemental briefs and the contentions advanced at oral argument, we are persuaded that the most reasonable "bright line" rule would exclude applications to increase, decrease, or terminate benefits from the term "claim," as that term is used in Section 101.

Under such a rule, a district court will be able to complete a case with which it is familiar. We think that result is more consistent with the legislative intent in establishing the new agency, because it reserves to the district courts cases they are more likely to be able to process expeditiously. This is certainly such a case.

We recognize that by distinguishing between wholly new claims and plaintiff's claim for increased compensation, we perpetuate for a longer period of time a dual system. Nevertheless, we believe the purpose of the new legislation is served best by construing the term "claim" so as to exclude applications to increase, decrease, or terminate benefits. Thus, we hold that the trial court did not lack jurisdiction over plaintiff's motion.

STANDARD OF REVIEW

The dismissal of plaintiff's claim was prompted by a hearing on defendants' motions to strike. These motions, however, did not seek to strike an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter from plaintiff's motion. *See* SCRA 1986, 1-012(F) (motion to strike). Rather, they sought dismissal of plaintiff's claim.

Generally, the entire complaint will not be stricken under Rule 1-012; only those matters improperly pleaded, or which have no bearing on the lawsuit, should be stricken by a motion to strike. *See Peoples v. Peoples,* 72 N.M. 64, 380 P.2d 513 (1963); *see generally* R. 1-012(F) (the district court may strike from the pleading). Since plaintiff's claim was dismissed in its entirety and not for any of the reasons in Rule 1-012, the motions to strike must be analyzed either as motions to dismiss or as motions for summary judgment.

The general rule is that where matters outside of the pleadings are considered, a motion to dismiss is treated as a motion for summary judgment. *See Transamerica Ins. Co. v. Sydow,* 97 N.M. 51, 636 P.2d 322 (Ct.App.1981). At the March 22 hearing, defendants submitted to the district court their earlier findings and conclusions in *DiMatteo I* and this court's opinion in *DiMatteo I,* and the parties and district court repeatedly referred to matters from the earlier proceedings. Although the affirmative defense of res judicata may be raised in a motion to dismiss, in this case defendants have relied on matters outside of plaintiff's motion in asserting the defense. Thus, even as to this defense, defendants in effect sought summary judgment. *Cf. Universal Life Church v. Coxon,* 105 N.M. 57, 728 P.2d 467 (1986), *cert. denied sub*

nom. Lyne v. Coxon, 482 U.S. 905, 107 S.Ct. 2482, 96 L.Ed.2d 374 (1987) (motion to dismiss proper procedure where complaint clearly shows relief is barred by an affirmative defense).

Since the district court considered matters outside of the pleadings, we have treated defendants' motions as motions for summary judgment. *See Richardson Ford Sales v. Cummins,* 74 N.M. 271, 393 P.2d 11 (1964). The standard of review is whether defendants made a prima facie case that no genuine issue of material fact existed and, if so, whether plaintiff rebutted the prima facie case. *See Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972).

Resolving the summary judgment question on appeal is made difficult by the status of the evidentiary matters before the district court at the March 22 hearing. None of the evidence from the prior proceeding was presented at the March 22 hearing, and no new evidence was taken. The record proper and tapes on appeal, however, include the prior proceedings.

A district court is required to take judicial notice of its prior proceedings in the same cause. *See In re Landers' Estate,* 34 N.M. 431, 283 P. 49 (1929). Notice will uniformly be taken by a court of its own records in the case at bar and of all matters patent on the face of such records, including all prior proceedings. *Baca v. Catron,* 24 N.M. 242, 173 P. 862 (1917). We conclude that the parties' reference to the prior proceedings was a request that the trial court take judicial notice of them and that the court's repeated reference to the earlier proceedings indicates it granted the request. Under these circumstances, those portions of the prior proceedings on which the parties relied in argument before the district judge were relevant in resolving the questions on appeal.

LAW OF THE CASE

The district judge believed that plaintiff's claim was precluded by the law of the case. The doctrine of "law of the case" means that a prior appellate decision is binding. *See Demers v. Gerety,* 92 N.M. 749, 595 P.2d 387 (Ct.App.), *rev'd on other grounds,* 92 N.M. 396, 589 P.2d 180 (1978). Under the doctrine, the law applied on the first appeal of a case is binding on the trial court on remand and on the appellate court if there are further appeals. *See Farmers' State Bank of Texhoma v. Clayton Nat'l Bank,* 31 N.M. 344, 245 P. 543 (1925). It has been said that the doctrine extends not only to questions raised upon the former appeal but also to those that could have been raised. *Id.* The district court viewed this court's decision in *DiMatteo I* as a determination that the claim had been waived. Plaintiff argues that the disability issue was withdrawn in the prior proceeding, and thus it is being presented for the first time in the present proceeding.

In our prior opinion, we noted that Rockwood appeared to contend plaintiff was precluded from an award of medical expenses because there was no evidence or finding of disability. We said that there was no finding because "disability was not at issue ... because of plaintiff's relinquishment of that claim." *DiMatteo I* 104 N.M. at 602, 725 P.2d at 578. We went on to say that an award of medical expenses may be made without a finding as to disability.

The prior appeal did not decide the question of plaintiff's right to disability benefits, nor was such a determination necessarily involved in the appeal. The prior appeal only resolved plaintiff's right to medical benefits.

Defendant has suggested that the district court made a finding of disability at the end of the trial when he found that "[p]laintiff suffered an accidental injury with resulting disability to his lower back while in the course and scope of his employment on February 22, 1973." Since plaintiff had withdrawn his claim for disability benefits, this finding was neither necessary to the prior decision nor a determination of a fact in issue. We also did not decide in *DiMatteo I* that plaintiff had waived his claim to disability. In order to resolve that question, an evidentiary hearing would be required.

In this case, plaintiff's right to disability has never been litigated. Whether he re-

served his claim for subsequent determination is a different issue. We conclude summary judgment cannot be supported on the ground that the law of the case controls. *See Demers v. Gerety.*

RES JUDICATA

For res judicata to apply, the traditional rule requires, among other things, that the two causes of action are substantially the same. *Nosker v. Trinity Land Co.,* 107 N.M. 333, 757 P.2d 803 (Ct.App. 1988). If res judicata applies, the first judgment is a conclusive bar upon the parties and their privies as to every issue that either was or properly could have been litigated in the previous case. *Silva v. State,* 106 N.M. 472, 745 P.2d 380 (1987). If the causes of action are different, res judicata has no application. *See City of Santa Fe v. Velarde,* 90 N.M. 444, 564 P.2d 1326 (1977).

As a result of plaintiff's decision to withdraw his claim for disability benefits, the first lawsuit only determined his right to medical benefits. *See DiMatteo I.* Consequently, the facts necessary for the resolution of the two suits differ, and the issues dispositive in the prior cause are different from those in this one. *See Silva v. State.* The ultimate question, however, is whether the two actions arose out of the same transaction. *See generally* M. Occhialino, *Walden's Civil Procedure in New Mexico,* ch. 12, at 12–30 to –34 (2d ed.1988) (discussing the "transaction" test adopted by *Three Rivers Land Co. v. Maddoux,* 98 N.M. 690, 652 P.2d 240 (1982), *overruled on other grounds, Universal Life Church v. Coxon,* from the *Restatement (Second) of Judgments*).

When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rule of merger, see *Restatement (Second) of Judgments* § 18 (1982), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transactions, or series of connected transactions, out of which the action arose. *Id.,* § 24. What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically. *Id.* This is a rule against "splitting" a cause of action.

While plaintiff's claim for medical benefits in one sense arose out of the same series of transactions as his present claim for disability, we are not persuaded that the general rule against "splitting" a cause of action applies. That is because plaintiff's claim appears to be based on a factual argument that his disability was latent until recently. Under these circumstances, the general rule concerning "splitting" could not be applied without unfairness. *Id.,* comment f.

This court held in *Glover v. Sherman Power Tongs,* 94 N.M. 587, 613 P.2d 729 (Ct.App.1980), that a plaintiff could move for increased benefits as long as a causal connection between the injury and non-disabling pain was determined in the prior proceeding. In *Glover,* the plaintiff had injuries to his head, neck, and upper and lower back, with resulting pain, but the pain was non-disabling. He also had a 25% disability to a scheduled member, for which judgment had been satisfied prior to the time he filed his motion for increase of benefits.

This case is very similar. The prior proceeding determined that plaintiff suffered a compensable injury in 1982, for which medical benefits were due, and it determined that plaintiff suffered pain from the 1982 aggravation of his earlier accidents. *See DiMatteo I.* However, because plaintiff withdrew his claim for disability benefits, none were awarded. Under these circumstances, it is not clear whether plaintiff was entitled to move for increased benefits or should have filed an amended or supplemental complaint. *See Brooks v. Hobbs Mun. Schools,* 101 N.M. 707, 688 P.2d 25 (Ct.App.1984). We need not decide that question at this time. Neither party has raised this issue, and it is not jurisdictional.

In *Glover,* the precise issue on appeal was whether the prior judgment was binding. This court decided it was not. Thus, the prior judgment in this case does not bar plaintiff from seeking to show a latent disability arising out of the same injuries.

Absent the same causes of action, the parties are precluded under the doctrine of collateral estoppel from relitigating only

those ultimate issues and facts shown to have been actually and necessarily determined in the previous litigation. *Silva v. State; City of Santa Fe v. Velarde.* Accordingly, the doctrine of collateral estoppel does not provide support for summary judgment.

STATUTE OF LIMITATIONS

Plaintiff presents alternative arguments. He claims that, since he is alleging his disability did not occur until 1987, the statute of limitations could not begin to run until then. Since the claim was filed in 1987, plaintiff asserts that his claim is timely filed. *See Cordova v. City of Albuquerque,* 71 N.M. 491, 379 P.2d 781 (1962); *Zengerle v. City of Socorro,* 105 N.M. 797, 737 P.2d 1174 (Ct.App.1986). Alternatively, plaintiff asserts that, even if he was partially disabled after the 1982 accidental injury, he continued to receive his full salary and did so in lieu of workers' compensation benefits. *See generally Crane v. San Juan County,* 100 N.M. 600, 673 P.2d 1333 (Ct.App.1983) (payment of full wages in lieu of benefits may result in a credit for the employer). He cites *Rollins v. Albuquerque Public Schools,* 92 N.M. 795, 595 P.2d 765 (Ct.App.1979), for the proposition that, where maximum disability benefits are being paid, it would be premature to file a claim. Thus, argues plaintiff, his employer never failed or refused to make a payment, and regardless of when he knew or should have known of his disability, the statute of limitations did not begin to run until 1987, when he resigned and his salary was terminated.

Defendants rely on the testimony of plaintiff and his treating physician at the 1983 trial in asserting that plaintiff suffered a compensable injury resulting in disability in 1973, and that this fact should have been reasonably apparent to plaintiff as early as 1973. They argue the statute of limitations may not be delayed where a partial disability exists or until a more serious disability is ascertainable. *See ABF Freight Sys. v. Montano,* 99 N.M. 259, 657 P.2d 115 (1982); *Letteau v. Reynolds Elec. & Eng'g Co.,* 60 N.M. 234, 290 P.2d 1072 (1955).

The only specific claim that plaintiff was disabled after recuperation from surgery is that Dr. Nelson testified about 5% and 10% physical impairments and that he placed some restrictions on plaintiff's movement. Impairment does not necessarily equate with disability, and defendants have not shown how any restrictions affected plaintiff's ability to perform his job.

We agree with plaintiff that the resolution of this issue requires the determination of the factual question of when plaintiff knew or should have known that he was disabled. *See ABF Freight Sys. v. Montano; cf. Romero v. American Furniture Co.,* 86 N.M. 661, 526 P.2d 803 (Ct. App.1974) (claim for scheduled injury properly dismissed where limitation of motion in plaintiff's elbows was known for over two years). Defendants have attempted to make a prima facie case that there is no genuine issue of material fact on this question by relying on evidence from the prior proceeding. *See Goodman v. Brock.* However, the prior evidence supports an inference that plaintiff was not disabled after he recuperated from his injuries. Before the statute of limitations issue can be resolved, findings as to plaintiff's disability and when it arose are necessary. Further, plaintiff's alternative argument raises a factual question of whether he received some of his wages in lieu of disability. We do not reach the merits of either argument.

CONCLUSION

We conclude that plaintiff's claim for disability benefits was not precluded by *DiMatteo I* on the basis of the law of the case, res judicata, or the doctrine of collateral estoppel, and that plaintiff's response to defendants' defense based on the statute of limitations has raised a genuine issue of material fact. Thus, we reverse the trial court's order from which plaintiff appeals and remand for further proceedings not inconsistent with this opinion.

IT IS SO ORDERED.

ALARID and CHAVEZ, JJ., concur.

785 P.2d 722

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff-Appellant,

v.

Jacent MORENO, Cable Repair Service of Hobbs, Inc., and Zurich Insurance Company, Defendants-Appellees.

No. 18200.

Supreme Court of New Mexico.

Nov. 29, 1989.

Atwood, Malone, Mann & Turner, P.A., William P. Lynch. Roswell, for plaintiff-appellant.

R.E. Richards, P.A., Samuel M. Laughlin, Jr., Hobbs, for defendants-appellees.

OPINION

SOSA, Chief Justice.

State Farm Mutual Automobile Insurance Co. brought an action for declaratory judgment against its insured Jacent Moreno, his employer, Cable Repair Service of Hobbs, Inc. (Cable Repair), and Cable Repair's liability insurance carrier, Zurich Insurance Co., asserting nonliability with regard to claims arising out of an accident involving an automobile driven but not owned by the insured. On the night of the accident, September 6, 1986, Moreno was driving from Lubbock to Levelland, Texas, in a Mercury Marquis owned by his employer. The State Farm policy in effect on Moreno's personal car provided coverage for nonowned automobiles, defined in the policy as an automobile not available or furnished for the regular or frequent use of the insured. After a bench trial, the district court concluded the State Farm policy provided coverage under the nonowned car clause. Based upon the following discussion, we reverse.

The pertinent facts are undisputed. Moreno was employed in Hobbs by Cable Repair, an oil field service company, and was responsible for client contact and development with respect to sales. He was required to be on call 24-hours a day, seven days per week with alternating weekends off. The company car assigned to Moreno in November 1985 was equipped with a mobile telephone in order for the main office to contact Moreno while he was on the road. Moreno took the car home every night and drove it every week day and many weekends as part of his job duties which included making weekly sales calls in the Levelland, Texas area. During his stays in Levelland, and also while at home in Hobbs, Moreno drove the company car to obtain meals and for other personal use. Moreno's supervisor, Marty Chambless, testified he had no objections to this practice "just as long as * * * he didn't abuse a privilege."

The weekend of September 6 was to be Moreno's weekend off. He planned to drive his personal car to Levelland on Friday, stay at his girlfriend's, and, on Saturday, drive to Lubbock for personal shopping. Moreno testified his usual practice, if he was in Levelland on a Friday prior to an "off" weekend, was to either drive the company car to Hobbs and return to Levelland in his personal car, or have his girlfriend follow him in her car to spend the weekend in Hobbs. However, with regard to this particular "off" weekend, the district court found the supervisor told Moreno on Thursday or Friday to take the company car to Levelland because he wanted some equipment delivered that was too large to fit into Moreno's personal car. The court also found Moreno's use of the company car when the accident occurred was within the scope of consent of his employer.

State Farm contends the district court erred in ruling, as a matter of law, that coverage was provided under the nonowned car clause. We agree with State Farm's claim that the basis upon which this conclusion rests, i.e., the finding that on the night of the accident the company car was not furnished or available for Moreno's regular or frequent use, is unsupported by the evidence. A judgment cannot be sustained on appeal unless the conclusion upon which it is based finds support in the findings of fact. *Watson Land Co. v. Lucero,* 85 N.M. 776, 517 P.2d 1302 (1974).

In question is the application of the following policy provision:

Non-Owned Car—means a *car* not:

1. owned by,
2. registered in the name of, or
3. furnished or available for the regular or frequent use of:

you, your spouse, or any *relatives.* The use has to be within the scope of consent of the owner or *person* in lawful possession of it.

(Emphasis in original.)

The nonowned car clause extends coverage beyond the automobile scheduled in the policy with the purpose "to protect an insurer against a situation where an insured purchases a policy covering one car and could then be covered as to all automobiles he frequently uses." *State Farm Fire &*

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); *see also Keplinger v. Mid-Century Ins. Co.,* 115 Ariz. 387, 565 P.2d 893 (Ct.App.1977) (purpose to cover occasional or incidental use of other vehicles without payment of additional premium but, concomitantly, to exclude habitual use of other vehicles which would increase insurer's risk without corresponding increase in premium).

The issue presented requires analysis and application of the terms "regular and frequent use" as found in the nonowned automobile provision. Our application of the terms as used within the purview of the exclusionary clause for nonowned automobiles is controlled by the particular facts of each case and is susceptible to no hard and fast rule. *See Farmers Ins. Co. of Ariz. v. Zumstein,* 138 Ariz. 469, 675 P.2d 729 (Ct.App.1983); *Central Sec. Mut. Ins. Co. v. DePinto,* 235 Kan. 331, 681 P.2d 15 (1984); *Kunze v. State Farm Mut. Auto. Ins. Co.,* 197 N.W.2d 685 (N.D.1972). Furthermore, our analysis need not focus upon the terms "furnished" or "available" because the facts clearly illustrate that Moreno had permissive and exclusive use of the company car. *See Price,* 101 N.M. at 442, 684 P.2d at 528 (test under "furnished or available" clause is availability of automobile for regular use, not frequency of use); *see also Waggoner v. Wilson,* 31 Colo.App. 518, 507 P.2d 482 (1972) ("available" construed to require potential use of vehicle to be to a substantial degree under control of insured, and vehicle should not be considered "available" where keys and specific permission must be obtained each time use is desired).

Neither party alleges ambiguity in the language of the exclusionary clause; therefore, because New Mexico law has not defined the terms "regular use" or "frequent use" as used in the nonowned automobile provision, they are to be construed in their usual or ordinary sense. *See Western Commerce Bank v. Reliance Ins. Co.,* 105 N.M. 346, 732 P.2d 873 (1987) (unambiguous insurance contracts must be construed in their usual and ordinary sense unless language in policy requires something different).

The term "regular use" suggests a principal use as distinguished from a casual or incidental use, *State Farm Mut. Auto. Ins. Co. v. Bates,* 107 Ga.App. 449, 130 S.E.2d 514 (1963), and further denotes customary use as opposed to occasional or special use. *Zumstein,* 138 Ariz. at 472, 675 P.2d at 732; *cf. Universal Underwriters Ins. Co. v. Farmers Ins. Co. of Idaho,* 108 Idaho 249, 697 P.2d 1263 (Ct.App.1985) (insured made special arrangements to use nonowned vehicle). "Frequent use" means an often repeated but irregular, casual, or incidental use. *Keplinger,* 115 Ariz. at 390, 565 P.2d at 896.

In resolving the factual question, the district court relied upon *Kunze* which considered the time and place of the accident giving rise to the claim and the purpose for which the automobile was supplied. *See also Hartford Ins. Group v. Winkler,* 89 Nev. 131, 508 P.2d 8 (1973) (critical time period is time at which accident occurred). Another point of consideration in making this determination is the presence or absence of an expressed or implied understanding with the owner regarding the use of the vehicle. *See Brooks v. Link,* 212 Kan. 690, 512 P.2d 374 (1973).

While not necessarily endorsing the analysis adopted by *Kunze,* we quote as instructive the following language from the case on which it relied, *Pacific Automobile Insurance Co. v. Lewis,* 56 Cal. App.2d 597, 132 P.2d 846 (1943):

> [An automobile] furnished for all purposes and at all times and places would clearly be for his regular use. One furnished at all times but strictly for business purposes alone could hardly be said to have been furnished for his regular use at a time and place when it was being used for personal purposes. It may be assumed that when a car is furnished all of the time for business purposes, with permission to use the same for incidental personal purposes, all within a certain area, the car might be said to be furnished for regular use within that

> area. But when a car thus furnished for such a use is driven to a distant point on one occasion, with the special permission of the one furnishing the car, that particular use would hardly seem to be a "regular use" of the car. It cannot be said, as a matter of law, that such a use on a particular occasion, which is a departure from the customary use for which the car is furnished, is a regular use within the meaning of these clauses of the policies.

Id. at 600–01, 132 P.2d at 848. *But see Grange Ins. Ass'n v. MacKenzie,* 103 Wash.2d 708, 694 P.2d 1087 (1985) (en banc) (court held that exclusive use of automobile necessarily constitutes regular use, regardless of purposes of that use, in determining whether nonowned automobile exclusion applied).

Unlike the result in *Kunze,* however, our review of the record does not find support for the district court's finding that, at the time of the accident, the company car had not been furnished or made available for Moreno's frequent or regular use. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tapia v. Panhandle Steel Erectors Co.,* 78 N.M. 86, 428 P.2d 625 (1967).

Although conflicting testimony was presented on the question of whether Chambless had knowledge of Moreno's personal plans to go to Lubbock on September 6, we find persuasive Moreno's testimony that Chambless told him "to go ahead and take the Marquis; and I told him that I was going to go do some shopping in Lubbock ... He told me to go ahead and take the Marquis but be careful." Further Moreno stated that, as usual, he had planned to make a business contact in Lubbock on Saturday regardless of whether he had taken his personal car or the company car that weekend. On cross-examination Moreno testified that prior to September 6 there were a few occasions of which Chambless and Cable Repair's president, Mr. White, were aware that Moreno would use the company car to drive from Levelland to Lubbock with the purpose of shopping or having dinner without calling on business clients.

Chambless' testimony revealed that he assumed Moreno would take the company car on this particular weekend, but could not recall discussing which car Moreno should take. He stated that on "Thursday I told him he needed to take this equipment up to Levelland * * * and as far as I know he never took his personal vehicle on company business because he wouldn't have a mobile phone in his personal vehicle plus our insurance—insurance-wise, you know, it's not covered." Chambless also testified that Moreno "used his own discretion on it just as long as we didn't get into the aspect of him using it * * * in excess for his own personal benefit." However, Chambless stated he knew Moreno was going to take care of personal matters in Levelland since that was his weekend off.

Nevertheless, the fact that the insured's use was contrary to any alleged restrictions placed on the use of the company car by the employer does not detract from the insured's expected and actual use of the vehicle on a regular basis so as to exclude coverage under the nonowned vehicle provision of the policy. *See Zumstein,* 138 Ariz. at 473, 675 P.2d at 733. In *Zumstein,* the insured employee had sole possession of the keys to a truck which he kept at his residence and drove to work. That court found where an insured had use of or the opportunity to use a vehicle on more than an infrequent or casual basis, or where the use or potential use is recurring, the effect of the nonowned vehicle clause is to exclude coverage. *Id.* at 473–74, 675 P.2d at 733–34.

Although the weekend of September 6 initially was designated an "off" weekend, as soon as the supervisor requested Moreno to use the company car to haul equipment to Levelland, the characterization of the weekend changed. It would have been unreasonable on the part of the employer, knowing that Moreno had personal plans for the weekend, to expect him not to make use of the company car while remaining in Levelland before returning to "on-duty" status in Hobbs on Monday morning. Taking into account the purpose behind Moreno's regular use of the car, it also would be

unreasonable to describe Moreno's use of the company car on the night of the accident as merely casual, incidental, or irregular. This is unlike the situation described in *Pacific* where the car was driven to a distant point on one occasion with special permission. Moreover, Moreno's use of the company car on this particular evening was not a departure from his customary use for which the car was furnished. The geographic use in this instance was not unique, but well within established patterns of use. The mixed use of business and personal was typical of Moreno's use during "on duty" and, on several occasions, "off" duty weekends.

Accordingly, under the facts of this case, we reverse the judgment of the district court and remand for the entry of judgment in favor of State Farm.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

785 P.2d 726

Roger SCHMITZ, Plaintiff,

v.

Leo R. SMENTOWSKI and Keith Mock and Opal Mock, Defendants,

v.

COLORADO NATIONAL BANK-EXCHANGE, Cross-Defendant-Appellant,

v.

Keith MOCK and Opal Mock, Cross-Claimants-Appellees,

v.

Leo R. SMENTOWSKI and Marcella Smentowski, Cross-Defendants.

No. 17975.

Supreme Court of New Mexico.

Jan. 10, 1990.

Beck & Cooper, Robert O. Beck, Clayton, Ross & O'Brien, P.C., Richard G. Gilloon, Colorado Springs, Colo., for appellant.

Kastler and Kamm, Paul A. Kastler, John William Clever, Raton, Charles D. Alsup, Clayton, for appellees.

OPINION

BACA, Justice.

This is an appeal from the judgment of the district court of Union County of a jury verdict in favor of appellees, cross-claimants below, the Mocks, against appellant, cross-defendant below, the Colorado National Bank–Exchange (the Bank). This case has presented us with multiple claims and asks us to consider an issue of first impression in this jurisdiction.

The Bank contends that the trial court erred in allowing judgment based on a theory of prima facie tort, arguing that we should not recognize the cause of action; that the Mocks did not demonstrate that the Bank was motivated solely by disinterested malevolence as required in a prima facie tort action; that the elements of prima facie tort were improperly pleaded and proved; that the Bank as a holder of a promissory note could not have been found negligent with regard to that note as a matter of law; that the resulting trust under which the note was held could not affect the Bank's right to that note; that the court abused its discretion by allowing the Mocks to amend their complaint to include prima facie tort, and that this abuse violated the Bank's due process rights. The Mocks, in turn, maintain that the Bank did not properly preserve its allegations for appeal, that they in fact are the rightful claimants of the note, and that they properly pleaded and proved their theory of prima facie tort. We agree with the Mocks' substantive claims and affirm the judgment below.

FACTS.

In 1979, the Mocks purchased two adjacent ranches from the Pogues and the Edmondsons (neither party is involved in this suit) as part of a three-party land exchange effectuated pursuant to Section 1031 of the Internal Revenue Code, I.R.C. § 1031 (1969), whereby they sold a feed lot and farm to Schmitz, plaintiff below, in exchange for cash and a promissory note in the amount of $230,000. The Pogues received the cash as payment in full, while the Edmondsons were paid in part in cash, with the balance in the form of a note payable in annual installments of $35,838.66. Pursuant to the exchange, the Mocks received deeds to and possession of the two ranches; Schmitz received deed to and possession of the feed lot; the Pogues were paid in full, and Schmitz owed the Mocks $230,000 represented by the note. The note was made payable on its face to Smentowski, an accountant acting as strawman to facilitate the three-way tax-free exchange of property. Smentowski had no personal interest in the note. He held legal title in trust for the true parties in interest. The Mocks gave Edmondsons a first mortgage in their newly acquired ranch to secure their $230,000 debt on the property; the payments on the note received by Smentowski from Schmitz were paid directly to the Edmondsons to cover the mortgage payments.

In 1981, Smentowski received a loan from the Bank. The Bank took possession of the note, so that the Smentowski loan would appear to bank examiners to be

backed by more collateral than it in fact was. The evidence indicates that all parties to the transaction, including the Bank, had actual knowledge that Smentowski did not have any beneficial interest in the note —thus, the Bank knew that it had no interest in the note as collateral and that others had claims and defenses to the note. However, despite this knowledge, in 1986, when Smentowski defaulted on his loan, the Bank attempted to collect the balance due on the note from Schmitz. The Bank notified Schmitz of Smentowski's default and requested that he direct future payments on the note into the court. Edmondsons thus did not receive their mortgage payments; they accelerated the mortgage and threatened foreclosure against the Mocks. The Mocks were forced to borrow on their cattle line of credit to prevent foreclosure, and this prevented them from using the line of credit to pursue their business of cattle raising.

Schmitz named Smentowski, the Bank, and the Mocks as defendants in his interpleader suit. The Mocks responded, filing cross-claims against Smentowski in gross negligence and fraud, and against the Bank in negligence. They subsequently amended their complaint against the Bank to include theories of fraud and conspiracy to defraud. On the morning of trial, the Mocks requested leave to amend their cross-claims to include theories of resulting trust and prima facie tort. The court allowed the resulting trust theory and reserved judgment on the prima facie tort. Subsequently, toward the end of Mocks' case, they moved to amend their pleadings to conform to the evidence, and the court allowed the prima facie tort theory.

The trial court directed a verdict against Smentowski, ruling he was a fiduciary holding title to the note in a resulting trust. The court also ruled against the Mocks on their conspiracy claim. The jury found the Bank was a mere holder of the note, not a holder in due course, and thus took the note subject to claims and defenses against it. The jury also found for the Mocks on their negligence and prima facie tort claims, awarding them the note and punitive and compensatory damages.

The Bank and the Mocks have raised several threshold issues, which we must resolve before reaching the substantive issues presented regarding the prima facie tort claim. The Bank claims that the district court violated its procedural due process rights and abused its discretion by allowing the Mocks to introduce the tort claim through amended pleadings late in the trial. The second threshold issue is raised by the Mocks, who claim that the Bank is precluded from pursuing its various points on appeal because it did not include them in their docketing statement. We address each issue in turn.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE THE BANK'S DUE PROCESS RIGHTS BY ALLOWING THE MOCKS TO PROCEED ON THE THEORY OF PRIMA FACIE TORT.

A. *Abuse of Discretion.*

The Bank contends that the trial court abused its discretion by allowing the Mocks to amend their complaint at trial to conform to the evidence and to reflect their prima facie tort theory, relying on SCRA 1986, 1–015(B). It claims it did not expressly or impliedly consent to try the theory; it objected to the motion to amend and to subsequent jury instructions on prima facie tort; it was surprised by the theory and had no notice of it prior to trial and therefore was prejudiced because it could not defend properly.

The theory of pleadings is to give the parties fair notice of the claims and defenses against them, and the grounds upon which they are based. *Seasons, Inc. v. Atwell,* 86 N.M. 751, 753, 527 P.2d 792, 794 (1974). It is true that, before a party may take a case to a jury on a particular theory, that theory must have been pleaded, or tried with the consent of the opponent. *Ciesielski v. Waterman,* 86 N.M. 184, 186, 521 P.2d 649, 651 (Ct.App.), *rev'd on other grounds,* 87 N.M. 25, 528 P.2d 884 (1974). However, notice pleading does not require that every theory be denominated in the pleadings—general allegations of conduct

are sufficient, as long as they show that the party is entitled to relief and the averments are set forth with sufficient detail so that the parties and the court will have a fair idea of the action about which the party is complaining and can see the basis for relief. *Id.; Kisella v. Dunn,* 58 N.M. 695, 700, 275 P.2d 181, 186 (1954); *see* SCRA 1986, 1-008.

The Mocks, in their original pleadings, stated the essential elements of prima facie tort as an alternative cause of action with sufficient particularity to give the Bank notice of their theory—our system of notice pleading does not require more. Although perhaps not as artful as would be hoped for, the pleadings outline the elements necessary to prove prima facie tort, by alleging:

(1) that the Bank had knowledge of Smentowski's strawman status;

(2) that the transfer of the note to the Bank was wrong because the Bank knew it had no interest in the note;

(3) the Bank accepted the note with knowledge that the Mocks would be injured;

(4) the Mocks were injured by the Bank's acts.

This recital is sufficient, as a bare minimum, to give notice that the Mocks were complaining of a lawful act, conducted with the intent to injure and without sufficient economic or social justification, that did injure them, i.e. a prima facie tort. *See Azby Brokerage, Inc. v. Allstate Ins. Co.,* 681 F.Supp. 1084, 1087 (S.D.N.Y.1988); *Porter v. Crawford & Co.,* 611 S.W.2d 265, 268 (Mo.Ct.App.1980).

It is insufficient for the Bank to complain that they did not recognize the theory underlying the allegations, and, in fact, they were apprised of the Mocks' theory before the trial began.

In the present case, although we recognize that the Mocks' initial pleadings were not a model of clarity, we are convinced that they adequately presented the elements of prima facie tort. The Bank did not object at trial to the introduction of evidence, and yet it claims that it did not consent to the theory and was prejudiced by the amendment. Simply because the Bank did not recognize the prima facie tort claim is not grounds for a finding that the court abused its discretion. However, because of the novelty of the prima facie tort claim and in the interest of justice, we have examined the Bank's claim of prejudice, and we find that the Bank vigorously defended the issues pertaining to the prima facie tort claim and was not prejudiced.

Leave to amend pleadings should "be freely given when justice so requires." SCRA 1986, 1-015(A). Amendments are within the trial court's discretion and will be reversed on appeal only for abuse of discretion. *Montano v. House of Carpets, Inc.,* 84 N.M. 129, 130, 500 P.2d 414, 415 (1972). Amendments to conform the pleadings to the evidence should be allowed when the issues are tried by the express or implied consent of the parties. SCRA 1986, 1-015(B); *Csanyi v. Csanyi,* 82 N.M. 411, 412, 483 P.2d 292, 293 (1971). Even if the party has not consented to amendment, a trial court is required to allow it freely if the objecting party fails to show he will be prejudiced thereby. SCRA 1986, 1-015(B); *Wynne v. Pino,* 78 N.M. 520, 523, 433 P.2d 499, 502 (1967).

The Bank argues that, although issues and evidence relating to the prima facie tort may have been presented at trial, the evidence was relevant to the claims initially pleaded by the Mocks, fraud and negligence, and was only incidental to the prima facie tort cause of action. As such, the Bank maintains that it cannot be charged with impliedly consenting to the theory.

Courts have found that, although evidence is not objected to at trial, there is no implied consent to a new theory or issue when the evidence is relevant to other pleaded issues, *see Moya v. Fidelity & Cas. Co.,* 75 N.M. 462, 406 P.2d 173 (1965); *Wynne v. Pino,* 78 N.M. at 523, 433 P.2d at 502, and have determined that the amendment should not be allowed if the opposing party has been prejudiced by the amendment. *See Camp v. Bernalillo County Medical Center,* 96 N.M. 611, 613, 633 P.2d

719, 721 (Ct.App.1981) (finding prejudice when the party was not allowed to present evidence that would have rebutted the moving party's theory as later presented in the amended complaint). We agree with the Bank that they did not consent to the trying of the case on a prima facie tort theory, and we proceed to determine whether in fact the Bank was prejudiced by the amendment.

The test of prejudice is whether the party had a fair opportunity to defend and whether it could offer additional evidence on the new theory. *Id.* Prejudice means undue difficulty in prosecuting the suit because of the change in theory. *Deakyne v. Comm'rs of Lewes,* 416 F.2d 290 (3d Cir. 1969).

The Bank initially claims prejudice because it had no notice of Mocks' theory and could not present evidence of economic self interest, profit motive and business advantage as a defense. It also contends that the Mocks had to show that the Bank was motivated solely by disinterested malevolence, and the Bank was prejudiced because it was unable to contest this element. As our discussion of the elements of prima facie tort, *infra,* shows, the Bank states the elements too strongly, but we also find that the Bank did present such evidence. Throughout the trial, the Bank attempted to demonstrate that it was only acting out of its own interest in moving against the note. However, the evidence also demonstrates that the jury could find that, in ruthlessly and recklessly pursuing its own interest, the Bank acted with disregard for the interests of others and should have known that its actions would inflict injury. This adequately fits within the contours of a New Mexico prima facie tort.

The Bank argues that it was prejudiced because it was unable to gain the knowledge that punitive damages *may* not be available under prima facie tort. The Bank, however, does not direct the court to any authority stating that punitive damages *are* not available, citing only *Brown v. Missouri Pacific Ry. Co.,* 720 S.W.2d 357 (Mo.1986), *cert. denied,* 481 U.S. 1049, 107 S.Ct. 2180, 95 L.Ed.2d 836 (1987), which found it unnecessary to address the issue of punitive damages. Our research indicates that punitive damages are contemplated under prima facie tort. *See* Restatement (Second) of Torts § 870 comment m (1977). Because we see no reason why punitives should not be available, we find no prejudice to the Bank on this point.

The Bank claims prejudice because it did not know that a prima facie tort claim must be exclusive and that no established tort theory can be available. However, the evidence shows that the Mocks did not have any other tort claim available upon which they could recover, and consequently there was no prejudice.

The Bank also contends that a prima facie tort theory requires that the act complained of must be otherwise lawful, and it was prejudiced because it was unable to develop evidence to contest this element. We find it hard to believe that the Bank is now claiming that its actions in moving against the note were unlawful and therefore they should be relieved of their tort liability because they were prejudiced in being unable to present such evidence. In any case, courts considering prima facie tort claims have determined that this requirement merely restates the issue discussed above, that the plaintiff can have no other tort theory available to support recovery, and we therefore find the Bank was not prejudiced by this claim. *See Bandag of Springfield, Inc. v. Bandag, Inc.,* 662 S.W.2d 546, 554 (Mo.Ct.App.1983).

Lastly, the Bank argues that it was prejudiced because it could not develop evidence for the balancing approach we adopt today in determining whether an act complained of can be determined tortious as a matter of law before the facts are submitted to the jury. The judge must engage in the balancing process and apply the factors discussed *infra* to determine whether liability in tort will exist for the type of injury complained of. Restatement (Second) of Torts § 870 comment k (1977). The jury then applies the standards developed by the court to the facts it finds. *Id.* We find that the trial judge did engage in this balancing test, that the factors to be

considered were fully developed at the trial, and therefore the Bank was not prejudiced.

Thus, we hold that the Bank was not prejudiced by the pleading amendment. The Mocks pleaded with sufficiency to give the Bank notice of its claim, and, in any case, the Bank was not prejudiced by the amendment to conform to the evidence.

B. *Due Process.*

The Bank contends that the trial court, by allowing the trial amendments, violated its procedural due process rights, as guaranteed by the United States and New Mexico Constitutions. *See* U.S. Const. amend. V, XIV; N.M. Const. art. II, § 18. In essence, the Bank argues that due process requires regular procedures to ensure fairness, that there was no state interest in allowing the Mocks to amend their complaint, that the Bank had no notice of the Mocks' heretofore unrecognized theory, and thus its fundamental right to reasonable notice and a fair opportunity to defend was violated.

The Bank's argument falls on a variety of grounds, the most obvious being that it was not denied process—it participated in a full trial, with every opportunity to be heard, and with fair procedures. The trial court considered the Bank's arguments against the Mocks' amendment, and found them unpersuasive. We have already held that the court did not abuse its discretion in allowing the amendments; in other words, we have determined that the ruling was fair. We are at a loss to understand how much more process the Bank feels it is due. *See In re Miller,* 88 N.M. 492, 497–98, 542 P.2d 1182, 1187–88 (Ct.App.1975), *rev'd on other grounds,* 89 N.M. 547, 555 P.2d 142 (1976).

II. THE BANK PROPERLY PRESERVED ITS RIGHT TO APPEAL.

The Mocks contend that the Bank did not preserve its right to claim error on appeal because it did not raise the issues in its docketing statement. Although the court of appeals requires a docketing statement as a jurisdictional matter for perfecting appeals, this court does not. "It is within our discretion to consider error preserved below and presented in appellant's brief after having been omitted from the docketing statement." *Gallegos v. Citizens Ins. Co.,* 108 N.M. 722, 731, 779 P.2d 99, 108 (1989). The docketing statement is not jurisdictional to this court. *Id.* Thus, we will consider the substantive issues raised on this appeal.

III. THE BANK'S CLAIM TO THE NOTE AS A HOLDER.

The Bank makes several claims to the note. It claims that, as a holder of the note, it cannot be liable on the note for negligence, and it contends that the trial court erred in not directing a verdict in its favor on this point. It also contends that the court erred in finding that, if the Bank was found by the jury not to be a holder in due course, the Mocks would be entitled to the note because of the resulting trust. We address each issue in turn.

A. *Negligence.*

The Bank argues that the U.C.C. allows a holder to be negligent in taking a negotiable instrument and refers us to several cases regarding holder in due course status. It is true that a holder in due course can attain that status despite his negligence in taking the instrument. He is only required to take for value, in good faith, and without notice of claims or defenses. NMSA 1978, § 55–3–302(1). It is true that good faith as used in the relevant sections of the U.C.C. is a subjective standard and requires actual knowledge of a claim or defense for the status of holder in due course to be lost (although a jury may find from the facts and circumstances of a transaction that a holder had notice). J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* 563 (2d ed. 1980). However, the Bank's argument puts the cart before the horse. The jury found that the Bank was a mere holder; it was not entitled to holder in due course status because of its *knowledge* that Smentowski had no beneficial interest in the note (and therefore had no-

tice of claims and defenses). The Mocks did not prevail on their claim that the Bank was only a holder because the Bank was negligent in taking the note—they prevailed because the Bank acted in bad faith and with notice of claims and defenses. In addition, the record indicates that the trial court sustained the Bank's motion for directed verdict on the issue of negligence as a defense to a holder, and we need not consider this issue further.

B. *Resulting Trust.*

The Bank contends that the finding that Smentowski held the note in a resulting trust is irrelevant to whether the Bank had any right to the note. To properly rule on this contention, we must first determine whether a resulting trust was created, and, if so, what affect the resulting trust had on the Bank's interest.

New Mexico has long recognized the doctrine of resulting trusts. *See Mapel v. Starriett,* 28 N.M. 1, 205 P. 726 (1922). It is an inference made by law from the circumstances and nature of the transaction between the parties, when the circumstances indicate that the party holding legal title to the property was not intended to have a beneficial interest in it. Thus, the courts infer that the holder of title holds it in trust for the beneficial owner, although there is no express intention to create a trust. *See McDermott v. Sher,* 59 N.M. 142, 280 P.2d 660 (1955).

In the case at bar, Smentowski, legitimately acting as a strawman for the real estate transaction, held the note, without any personal interest in it, for the Mocks, thereby creating a resulting trust. The Bank did not offer any evidence to rebut the inference and to show that Smentowski had a personal interest in the note.

The Bank properly points out that the trial court found it to be a holder of the note, and that, as a holder, it possessed the note and had rights in it, subject to claims and defenses. *See* NMSA 1978, §§ 55–3–301, 306, 419. The jury determined, however, that the Bank was not a holder in due course, and thus not exempt from certain defenses. *See id.* § 55–3–307. The Bank contends, nevertheless, that the trial court erred in ruling that, as a matter of law, should the Bank be found not to be a holder in due course, the Mocks were automatically entitled to the note because Smentowski held the note as a trustee in a resulting trust for the benefit of the Mocks.

We believe that the Bank has misconstrued the issue. The court did determine that Smentowski held the note in a resulting trust, and properly so. Our reading of the record does not indicate that the trial court ruled that, as a matter of law, if the Bank was found to be a mere holder of the note, the Mocks were automatically entitled to the note because of the resulting trust. By finding the resulting trust the court found that the Mocks had a legitimate interest in the note, and that Smentowski had none. The Bank claims that it is irrelevant as to it that Smentowski had no interest in the note. However, the resulting trust is relevant to the Bank because it was determined that the Bank knew of it, and thus the Bank lost its holder in due course status. The significance of the resulting trust is that it established the Mocks' claim to the note and Schmitz' defense to payment to the Bank. The jury found that the Bank took the note with notice of the trust (i.e. the Mocks' claim) and not in good faith. Thus, the jury found that the Bank was not entitled to holder in due course status, and took subject to claims and defenses of which it knew.

IV. THE PRIMA FACIE TORT.

This court is faced today with two questions: Should a cause of action in prima facie tort be recognized in New Mexico, and, if so, did the Mocks prove that the Bank committed a prima facie tort?

A. *Prima Facie Tort and New Mexico Jurisprudence.*

The Bank contends that we should refuse this opportunity to recognize prima facie tort. It claims that the two jurisdictions that have recognized prima facie tort as a specific tort cause of action, New York and

Missouri, have found prima facie tort to be arcane and unworkable, spawning much litigation without appreciable benefit to plaintiffs. We disagree, and hold today that prima facie tort is recognized in New Mexico. As will be shown, it accords with our recent tort jurisprudence, and, if properly used, provides a remedy for plaintiffs who have been harmed by a defendant's intentional and malicious acts that fall outside of the rigid traditional intentional tort categories.

Prima facie tort is not a recent innovation; its development has been discussed in various law reviews and decisions spanning practically a century. *See Beardsley v. Kilmer,* 236 N.Y. 80, 140 N.E. 203 (1923); Holmes, *Privilege, Malice, and Intent,* 8 Harv.L.Rev. 1 (1894); Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle,* 54 Nw.U.L.Rev. 563 (1959) (hereinafter Brown); Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action,* 42 Cornell L.Q. 465 (1957).

The theory underlying prima facie tort is that a party that intends to cause injury to another should be liable for that injury, if the conduct is generally culpable and not justifiable under the circumstances. Restatement (Second) of Torts § 870 (1977). With variations in the several jurisdictions that have adopted the tort, its elements are generally recognized to be:

1. An intentional, lawful act by defendant;
2. An intent to injure the plaintiff;
3. Injury to plaintiff, and
4. The absence of justification or insufficient justification for the defendant's acts.

Porter v. Crawford & Co., 611 S.W.2d 265, 268 (Mo.Ct.App.1980); *see ATI, Inc. v. Ruder & Finn, Inc.,* 42 N.Y.2d 454, 458, 368 N.E.2d 1230, 1232, 398 N.Y.S.2d 864, 866 (1977).

Although the concept that unjustified intentionally caused harm should be the basis for liability has been utilized without denominating the theory as prima facie tort throughout recent jurisprudence, *see, e.g., Diaz v. Kay-Dix Ranch,* 9 Cal.App.3d 588, 592 n. 3, 88 Cal.Rptr. 443, 445 n. 3 (1970); *Moran v. Dunphy,* 177 Mass. 485, 59 N.E. 125 (1901); *Tuttle v. Buck,* 107 Minn. 145, 119 N.W. 946 (1909); *Mangum Electric Co. v. Border,* 101 Okla. 64, 222 P. 1002 (1923), New York was the first state to adopt prima facie tort as a specific cause of action. *See Advance Music Corp. v. American Tobacco Co.,* 296 N.Y. 79, 70 N.E.2d 401 (1946); Brown, 54 Nw.U.L.Rev. at 566. The cause of action as it developed in New York, became stylized, as courts added requirements; for example, that special damages be proven, that the complaint not plead any other tortious conduct, that the activity complained of be otherwise lawful and not fit into any other established tort category, and that the activity complained of be motivated by a solely malicious intent. Note, *Prima Facie Tort,* 11 Cumb.L.Rev. 113, 116–18 (1980). In recent years, New York has retreated somewhat from these requirements, allowing alternative pleadings and expanding the definition of prima facie tort. *Board of Educ. v. Farmingdale Classroom Teachers Ass'n, Local 1889,* 38 N.Y.2d 397, 406, 343 N.E.2d 278, 284–85, 380 N.Y.S.2d 635, 644–45 (1975).

Restatement (Second) of Torts § 870 (1977) has adopted a much more general theory of prima facie tort, providing that: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."

The Restatement approach embodies a balancing process, because "not every intentionally caused harm ... deserves a remedy in tort." *Id.* comment e. Thus, the activity complained of is balanced against its justification and the severity of the injury, weighing: (1) the injury; (2) the culpable character of the conduct; and (3) whether the conduct is unjustifiable under the circumstances. *Id.* The dual nature of the determination is manifested by the requirement that the conduct be both culpable—wrongful or improper in general—and

unjustifiable—under the circumstances no privilege should apply. *Id.*

The Restatement further breaks down the analytical process into four considerations that should be considered in balancing the above factors: "(1) the nature and seriousness of the harm to the injured party, (2) the nature and significance of the interests promoted by the actor's conduct, (3) the character of the means used by the actor and (4) the actor's motive." *Id.*

It is apparent from a discussion of the Restatement view that, although it considers the same factors as do the New York courts, it does so in a more flexible way, by balancing the factors rather than by creating stylized requirements.

Instructive to this court in our consideration of prima facie tort is the Missouri experience. In *Porter v. Crawford & Co.*, 611 S.W.2d 265 (Mo.Ct.App.1980), the court addressed the issue we consider today: whether to allow recovery in tort for a lawful act performed maliciously and with the intent to injure the plaintiff. *Id.* at 266. *Porter* involved an automobile accident, where the defendant-insurance agent settled the plaintiff's claim and delivered a check to plaintiff in release of claims. Plaintiff deposited the draft and wrote checks against it, while, without plaintiff's knowledge, the defendant cancelled the draft. Plaintiff incurred injuries as a consequence, and brought suit alleging that, by acting with careless and reckless disregard for plaintiff's rights and without just cause, the defendant had maliciously acted with intent to injure plaintiff. *Id.* at 267.

The Missouri court examined the New York experience and the Restatement view, and fashioned a prima facie tort doctrine that combined the fundamental policy view of the Restatement with the analytically consistent aspects of the New York experience. We feel that their approach was analytically sound, and we adopt it, with refinements as discussed below.

To constitute a prima facie tort, the tortfeasor must act maliciously, with the intent to cause injury, and without justification or with insufficient justification. One early development in New York was that the defendant was required to have acted with "disinterested malevolence"—the intent to harm being the sole motivation for the action. This was a means to determine if otherwise lawful conduct was done without any beneficial end but solely to injure the plaintiff. *See Porter*, 611 S.W.2d at 269.

We reject this approach in favor of the balancing approach sanctioned by the Restatement. A sole intent to injure is, by definition, unjustifiable—a purpose other than to injure the plaintiff is a justification for the act. *Id.* Thus, if a defendant offers a purpose other than the motivation to harm the plaintiff as justification for his actions, that justification must be balanced to determine if it outweighs the bad motive of the defendant in attempting to cause injury. *See id.;* Restatement (Second) of Torts § 870 comment c (1977); *but see Rodgers v. Grow-Kiewit Corp.-Mk.*, 535 F.Supp. 814, 816 (S.D.N.Y.), *aff'd* 714 F.2d 116 (2d Cir.1982) ("[M]otives of profit, economic self-interest or business advantage are by their terms not malicious, and their presence, even if mixed with malice or personal animus, bars recovery under prima facie tort.")

We believe that to allow a defendant to escape liability solely because he can demonstrate some economic benefit to himself from the complained of act would defeat the policy behind our recognition of prima facie tort—to allow a plaintiff to recover for intentionally committed acts that, although otherwise lawful, are committed with the intent to injure. Thus, we hold that the act must be committed with the intent to injure plaintiff, or, in other words, without justification, but it need not be shown that the act was solely intended to injure plaintiff. *Porter*, 611 S.W.2d at 269; Restatement (Second) of Torts § 870 (1977); *see Speer v. Cimosz*, 97 N.M. 602, 606, 642 P.2d 205, 209 (Ct.App.), *cert. denied*, 98 N.M. 50, 644 P.2d 1039 (1982); *Bynum v. Bynum*, 87 N.M. 195, 197–98, 531 P.2d 618, 620–21 (Ct.App.), *cert. denied*, 87 N.M. 179, 531 P.2d 602 (1975).

We also accept the view held by New York and Missouri that prima facie tort may be pleaded in the alternative; however, if at the close of the evidence, plaintiff's proof is susceptible to submission under one of the accepted categories of tort, the action should be submitted to the jury on that cause and not under prima facie tort. *Bandag of Springfield, Inc. v. Bandag, Inc.*, 662 S.W.2d 546, 552–53 (Mo. Ct.App.1982); *Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d at 406, 343 N.E.2d at 284–85, 380 N.Y.S.2d at 644–45. Thus, double recovery may not be maintained, and the theory underlying prima facie tort—to provide remedy for intentionally committed acts that do not fit within the contours of accepted torts—may be furthered, while remaining consistent with modern pleading practice. *Id.*

B. *Adoption of Prima Facie Tort Is Consistent with New Mexico Jurisprudence.*

Contemporary scholarship recognizes that there exists a residue of tort liability, which has escaped categorization in the forms of tort action, that is available for development into recognized torts as the need arises. *Brown*, 54 Nw.U.L.Rev. at 573; *Porter*, 611 S.W.2d at 268. In recognizing the tort of prima facie tort, this court is acting well within the tradition of the development of tort law in this jurisdiction. New Mexico has recognized that tort law is not static—it must expand to recognize changing circumstances that our evolving society brings to our attention. Thus, in other areas, we have recognized that intentional, malicious conduct that injures another, even though it may not have been recognized by the heretofore accepted areas of intentional tort, can serve as a basis for tort liability. We have also been very willing to adopt the view of the Restatement of Torts to assist our development of new tort areas.

Accordingly, New Mexico has recognized as tortious inducing a breach of contract, adopting the view promulgated in Restatement of Torts § 766 (1939). *Wolf v. Perry*, 65 N.M. 457, 461, 339 P.2d 679, 681 (1959) (requiring that "one who, without justification or privilege to do so, induces a third person not to perform a contract with another, is liable to the other for the harm caused thereby"); *see also Williams v. Ashcraft*, 72 N.M. 120, 381 P.2d 55 (1963) (recognizing the tort of wrongful interference with another's business relations). We have adopted the cause of action of intentional interference with prospective contractual relations, relying on the tort as articulated in Restatement (Second) of Torts § 766(B) (1977). *M & M Rental Tools, Inc. v. Milchem, Inc.*, 94 N.M. 449, 452–54, 612 P.2d 241, 244–46 (Ct.App.1980) (one who, with "bad motive," intentionally interferes with another's prospective contractual relations, is subject to liability); *Anderson v. Dairyland Ins. Co.*, 97 N.M. 155, 158–59, 637 P.2d 837, 840–41 (1981). These torts reflect the underlying theory of prima facie tort as applied to contractual relations—the underlying malicious motive of a defendant's actions, done without justification, makes an otherwise lawful act, competition, tortious.

New Mexico has also recognized the tort of intentional infliction of emotional distress, relying on Restatement (Second) of Torts § 46 (1965), *Mantz v. Follingstad*, 84 N.M. 473, 479–80, 505 P.2d 68, 74–75 (Ct. App.1972); *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983), and we have recognized that the intentional and wrongful deprivation of the right to vote or hold public office creates tort liability. *Valdez v. Gonzales*, 50 N.M. 281, 176 P.2d 173 (1946).

In light of this prior jurisprudence, it becomes evident that we have traditionally afforded relief for wrongs intentionally and maliciously committed, giving credence to the maxim of prima facie tort theory: "prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, * * * requires a justification if the defendant is to escape." *Aikens v. Wisconsin*, 195 U.S. 194, 204, 25 S.Ct. 3, 5, 49 L.Ed. 154 (1904).

C. *Application to the Case at Bar.*

All that remains is for us to determine whether the Bank committed a prima

facie tort against the Mocks. It is uncontradicted that the Bank was acting in an otherwise lawful manner. It took possession of a note as collateral on a loan, and when Smentowski defaulted on the loan, it moved to protect its interest and notified the payor to send its payment directly to the Bank.

It is also uncontradicted that the Mocks were injured by the Bank's actions. The mortgage on their ranch was not paid in a timely manner because the proceeds of the note were not turned over to Edmondson, precipitating a foreclosure action. To prevent the loss of the ranch, the Mocks were forced to borrow on their line of credit that they otherwise would have used to purchase cattle, and they thereby lost profit and were forced to under-utilize their land.

The second element of prima facie tort raises more substantial problems. The tort requires that the defendant not only intend the act, but that he also intend the harm. The Bank contends that the Mocks have not demonstrated that the Bank was motivated solely by a malicious intention to harm the Mocks; that the Bank, because it was motivated at least in part by economic self-interest, cannot be liable. As discussed above, we have rejected the requirement that the action be solely motivated by the intent to harm, as accepted by New York, in favor of the Restatement's balancing approach, whereby motives such as economic self-interest are weighed as an issue of justification.

The Bank contends that, nevertheless, our precedent dictates that we should adopt a standard of sole motivation to harm, citing *M & M Rental Tools,* 94 N.M. 449, 612 P.2d 241 (Ct.App.1980). However, *M & M* dealt with interference with prospective contract; the rights involved with prospective contract are speculative, and more concrete rights are entitled to a greater degree of protection. *Dairyland Ins. Co.,* 97 N.M. at 158–59, 637 P.2d at 840–41. The rights implicated by a prima facie tort are not prospective—real, concrete damages must be proven, and we see no reason to adopt a higher standard of intent.

The Bank further contends that even Missouri requires that disinterested malevolence be shown, citing us to *Kiphart v. Community Fed. Sav. & Loan Ass'n,* 729 S.W.2d 510 (Mo.Ct.App.1987), and *Centerre Bank of Kansas City v. Distributors, Inc.,* 705 S.W.2d 42 (Mo.Ct.App.1985). Missouri does require that specific intent to injure be shown; merely showing the intent to do the act is insufficient. *See Kiphart,* 729 S.W.2d at 516. However, it does not require that the intent be solely to injure, and it requires that the intent be balanced to determine if the activity was beyond the bounds of what society should tolerate. *Porter,* 611 S.W.2d at 270. In *Kiphart,* the court found no specific intent to harm. The activity complained of was an interrogation to determine whether the plaintiff, a teller, was responsible for a cash shortfall. The court determined that, under the circumstances, the Bank was justified, and that it did not go so beyond the bounds of what it was entitled to do in protecting its economic interest to show a specific intent to harm. 729 S.W.2d at 517.

Centerre is interesting because the bank's actions there demonstrate why the Colorado National Bank stepped beyond the bounds of justifiable activity. In *Centerre,* the bank extended loans to a corporation. Upon the corporation's subsequent sale, the bank called its demand note, because it no longer considered the loan good. The bank eventually sued to collect, and the defendant corporation and personal guarantors counterclaimed, alleging *inter alia,* prima facie tort. The counterclaimants demonstrated that the bank knew that by calling its note it would put the corporation out of business, and presented evidence of personal animus toward the corporation's new owners. The court expressed doubt regarding the evidence of intent to injure, but resorted to the balancing test and determined that the bank was justified in calling the loan because it was acting to protect its *valid* business interest. 705 S.W.2d at 54; *see also Bank of Boston Int'l v. Arguello Tefel,* 644 F.Supp. 1423 (E.D.N.Y.1986).

The facts of *Centerre* demonstrate how the case at bar is easily distinguishable, and points out the crucial issue for us to decide in determining whether the requisite intent is present. The Colorado National Bank was not acting pursuant to a valid business interest. It did not make a valid business decision to call the note, and cannot now hide behind its claim that it was merely protecting its loan as a business justification. The standard for prima facie tort is whether there is an absence of justification or insufficient justification for the defendant's act. *Kiphart,* 729 S.W.2d at 516. In this case, the Bank's acts are not sufficiently justifiable—it knew Smentowski had no interest in the note and had accepted it initially not as collateral but to satisfy the bank examiners. The Bank does not contend that it did not intend the act, but maintains that it did not intend the harm and that its motive was justified and not malicious. The real issue for this court is whether the Bank's intentional act, without sufficient justification and with the certain knowledge that by moving against the note in which it had no interest it would injure an innocent party, rises to the level of intending the harm.

The Mocks contend that a prima facie tort requires nothing more than a showing that the act complained of was wrongful, intentional, and without justification, and that the injury was a natural and foreseeable consequence of the act. In other words, they argue that it is not necessary that the Bank possessed ill will or a malicious motive, i.e. that it intended to harm them, as long as it intended the act that caused the harm. Thus, they claim that because the Bank intended to move against the note, because this act was wrongful and unjustified under the circumstances, and because it caused the Mocks financial injury, the Bank is liable for prima facie tort.

We disagree with this analysis. To allow such a lax standard would be to invite every victim of an intentional act to bring an action in prima facie tort and would subvert the purpose of prima facie tort by eliminating the element requiring that a defendant intended injury to the plaintiff.

Nevertheless, we do agree that the Bank's actions did rise to the level of intending to commit the harm. Thus, we hold that, when a defendant, such as the Bank, has intentionally acted with the certainty that injury will necessarily result, the intent to injure has sufficiently been proved to allow a court to resort to the Restatement's balancing approach to determine whether the tort has been committed. This approach differs from that adopted to New York, yet we believe that the balancing approach allows this lessened degree of proof of intent to be considered. *See Brown,* 54 Nw.U.L.Rev. at 569–70; *Morrison v. National Broadcasting Co.,* 24 A.D.2d 284, 266 N.Y.S.2d 406 (1965) (finding liability for intentional, foreseeable infliction of harm in tort, although not in the narrow confines of the prima facie tort doctrine as it had by then evolved in New York), *rev'd on other grounds,* 19 N.Y.2d 453, 227 N.E.2d 572, 280 N.Y.S.2d 641 (1967); *Smith v. Fidelity Mut. Life Ins. Co.,* 444 F.Supp. 594, 598 n. 6 (S.D.N.Y. 1978); *but see Donahue v. Pendleton Woolen Mills, Inc.,* 633 F.Supp. 1423 (S.D. N.Y.1986) (where plaintiff alleged defendant acted in reckless disregard of plaintiff's rights and not that defendant intended to injure plaintiff, no cause of action in prima facie tort).

Nevertheless, the Bank argues that the Mocks had alternative theories for tort relief available, specifically in fraud and conversion, and thus they should not have been allowed to proceed on the theory of prima facie tort. We agree that prima facie tort should not be used to evade stringent requirements of other established doctrines of law. *See, e.g., Lundberg v. Prudential Ins. Co. of America,* 661 S.W.2d 667, 671 (Mo.Ct.App.1983) (prima facie tort cannot be used to avoid employment at will doctrine); Restatement (Second) of Torts § 870 comment j (1977) ("In determining whether a new tort can appropriately eliminate a restrictive feature of a traditional tort it is important to give careful consideration to the nature of the restriction."). However, it is apparent that the Mocks possessed claims in neither fraud nor con-

version. A fundamental element of fraud is a misrepresentation of fact, made with the intent to deceive a third party and to induce his reliance. *Cargill v. Sherrod,* 96 N.M. 431, 631 P.2d 726 (1981). On the facts presented, it is apparent that the Bank did not misrepresent facts to the Mocks to induce their reliance, and a cause of action in fraud would not lie. A cause of action in conversion requires proof of wrongful possession of property inconsistent with the owner's rights. *Molybdenum Corp. v. Brazos Eng'g Co.,* 81 N.M. 708, 710, 472 P.2d 971, 973 (1970). The present facts indicate that the Bank lawfully came into possession of the note; it was their subsequent activity that was tortious. Thus, the Mocks could not have proceeded with either theory.

The Bank also contends that the Mocks pursued the prima facie tort theory rather than that of the fraud to evade the stringent clear and convincing standard of proof required to prove fraud. As already discussed, the Mocks had no basis to pursue the fraud theory. In addition, the court properly instructed the jury that the standard of proof for prima facie tort was by a preponderance of the evidence.

Thus, it is apparent that the Mocks did present the elements of a prima facie tort, and it is therefore necessary to resort to the balancing test to determine whether the Bank's acts could reasonably have been found by the jury to be tortious. The factors we consider are: (1) the nature and seriousness of the harm to the injured party; (2) the interests promoted by the actor's conduct; (3) the character of the means employed by the actor, and (4) the actor's motives. Restatement (Second) of Torts § 870 comments f, g, h & i (1977); *Lundberg,* 661 S.W.2d at 671. In considering the first factor, physical, concrete harm is weighed more heavily than emotional or prospective economic harm. With reference to the second, the court must consider established privileges or rights. In balancing the third consideration, conduct offensive to society's concepts of fairness and morality favors liability, and in determining the last, the degree of malice is significant. *Id.*

Here, the Mocks received palpable economic injury. As a result of the Bank's actions, they were forced to pay off the mortgage in toto, borrowing funds from their line of credit, and thereby suffering injury to their ranching business. With regard to the second factor, although under other circumstances the Bank would be privileged to protect its loan and move against the collateral, the Bank's knowledge that it had no interest in the note negates its right to move against it. Thus, the character of the means used favors the Mocks. In considering the third factor, again, although under different circumstances the Bank would have rightfully acted as it did, the evidence indicates that the Bank was concerned solely with its own economic well-being, without privilege, to the exclusion of any harm its actions would cause to innocent parties that would result. Its knowledge of the underlying factors makes its means offensive and unfair and denotes that the Bank was acting under the color of economic privilege to harm innocent people—means that were both offensive and unfair. Finally, the Bank's motive, although not actually to injure the Mocks, was with such utter disregard for the Mocks' interests as to rise to the level of specific intent to injure. The Bank's argument that it acted solely for its own economic benefit does not negate its culpability under these circumstances.

It was proper for the court below to balance these factors, and, as we have demonstrated, the jury's decision was reasonable. We therefore AFFIRM.

IT IS SO ORDERED.

SOSA, C.J., and WILSON, J., concur.

785 P.2d 740

SUNWEST BANK OF FARMINGTON, a New Mexico banking corporation, Plaintiff–Appellee,

v.

Don KENNEDY, Sharon Kennedy, Edith Kennedy, and Estate of Troy Kennedy, Deceased, and/or the Heirs-at-Law of Troy Kennedy, Defendants–Appellants.

No. 18124.

Supreme Court of New Mexico.

Jan. 12, 1990.

F.D. Moeller, Farmington, for defendants-appellants.

Tansey, Rosebrough, Gerding & Strother, James B. Payne, Farmington, for plaintiff-appellee.

OPINION

BACA, Justice.

Defendants Kennedys appeal the district court of San Juan County's grant of summary judgment to plaintiff Sunwest Bank of Farmington (Sunwest). The other defendants to the action have not contested the judgment. We affirm.

FACTS

In September 1982, the Kennedys borrowed $165,000 from Valley Bank, the predecessor of Sunwest, for the use of Kennedy, Inc., a corporation owned by the Kennedys, with its principal asset a car dealership. At the time that the promissory note was issued, in addition to assuming primary liability on the note, the Kennedys each signed an "Unconditional and Continuing Guaranty" with the bank, obligating

them to "pay any and all liabilities, obligations or indebtedness, of any kind or nature" of the corporation.

The original term of the note was one year, although the parties contemplated annual renewals allowing the loan to be repaid over a ten-year period; it was extended twice, in September of 1983, and September of 1984. In December 1984, the Kennedys sold their interest in the corporation to the other defendants in this suit, James Copeland, James Clark, Charlie Craven, and Santex, Inc. Copeland, Clark, and Craven also executed personal guarantees on the payment of the note.

In August 1985, Kennedy, Inc., now doing business as Copeland–Craven Pontiac, Oldsmobile–Nissan, Inc., executed a modification of the note, contemplating a three-year amortization, and, because Copeland and Clark had bought out the interests of Craven and Santex, Inc., Sunwest released Craven from his personal guarantee. These actions were accomplished without notice to the Kennedys.

The note subsequently went into default, leaving an amount owed of $104,730.30. Sunwest then brought this suit to collect.

The issue we consider on this appeal is whether the bank, by releasing Craven from his personal guaranty of the note and by extending the terms of the note without notice to the Kennedys, affected a discharge of the Kennedys' liability on the note.

In determining whether summary judgment was proper, the evidence on appeal is considered in a light most favorable to the party opposing the motion. *Green v. General Accident Ins. Co. of Am.*, 106 N.M. 523, 527, 746 P.2d 152, 156 (1987).

A. *Did Craven and Santex, Inc. Become Co–Makers of the Note by Subsequently Guaranteeing the Indebtedness?*

The Kennedys argue that, by the terms of the "Assumption of Indebtedness" agreement signed by Craven and Santex, Inc., those parties became co-makers or co-debtors with the Kennedys. Thus, they contend that, because Sunwest subsequently released Craven and Santex from their obligation as guarantors, the Kennedys also were released to the extent of their right of contribution.

The Kennedys correctly state the law that such a release by the holder of a note operates to discharge the obligations of subsequent parties and co-debtors who are jointly and severally bound, absent the approval of the maker. *See Wood v. Emminger*, 44 N.M. 636, 641, 107 P.2d 557, 562 (1940). The applicability of this argument, however, is premised upon Craven and Santex being elevated to the status of co-maker or co-debtor.

The Kennedys also correctly define a maker as the party that "engages that he will pay the instrument according to its tenor at the time of his engagement." NMSA 1978, § 55–3–413(1). In accordance with this definition, the Kennedys contend that Copeland and Craven, when they assumed the indebtedness, became makers by agreeing to be co-equal with the Kennedys. They argue that Copeland and Craven specifically agreed to become liable "as if the Transferee had executed such instruments as of the dates thereof as the principal obligor[,]" purportedly citing to the record, but without citation. Sunwest, however, has directed our attention to that language in the record. By the "Agreement for Assumption of Indebtedness," Kennedy, Inc. assumed the debt vis-a-vis the Kennedys, as transferee. Neither Craven nor Santex, Inc. were party to this agreement, and neither assumed any liability through it. Additionally, by the terms of the agreement, the Kennedys agreed that the assumption of indebtedness by Kennedy, Inc. did not relieve the Kennedys from personal liability for the debt.

Sunwest also directs our attention to the "Contract of Sale," in which Craven and Santex, Inc. agreed *with the Kennedys* to take over payment of the loan. However, this agreement is between, *inter alia*, the Kennedys, Craven, and Santex. Sunwest was not party to this agreement. Thus, although the contract may give rise to a cause of action between the Kennedys, Craven, and Santex, Inc., it has no effect on

the Kennedys' obligations vis-a-vis Sunwest.

It is apparent, therefore, that the Kennedys' argument that Craven and Santex were co-makers fails. Although Craven did sign a personal guarantee of the loan, and both parties executed the "Contract of Sale" with the Kennedys, they did not assume by these actions primary liability for the note. Because Craven was not a co-maker but merely a subsequent guarantor, it is equally apparent that Sunwest's release of their obligations is irrelevant to the Kennedys' on-going liability. The cited authority states that a release discharges subsequent parties; the Kennedys did not undertake their obligation contemplating Craven's participation, and none of the cited authority, and indeed none that our research disclosed, indicates that the release of subsequent obligors relieves earlier obligors from responsibility.

B. *Did Sunwest Materially Alter the Kennedys' Obligation Without Consent?*

The Kennedys argue that Sunwest, by releasing co-guarantors and by extending the time period for payment of the note, materially altered the terms of the note without consent, thus discharging the Kennedys' obligation. *See First Nat'l Bank in Albuquerque v. Abraham*, 97 N.M. 288, 291, 639 P.2d 575, 578 (1982) ("[A] party to a note may be discharged on his obligation if a material alteration is made in the renewal without his consent."); *see also* NMSA 1978, § 55–3–606; *Western Bank v. Aqua Leisure, Ltd.*, 105 N.M. 756, 757, 737 P.2d 537, 538 (1987). As already discussed, Craven was a subsequent guarantor, and his guaranty ran only to Sunwest; his release could not affect the Kennedys' rights.

The Kennedys contend that they did not sign as co-makers and that therefore the language in the note stating: "If I'm signing this Note as comaker, I agree to be equally responsible with the borrower * * *. You may extend or change the terms of payment and release any security without notifying me or releasing me from my responsibility on this Note[,]" is not applicable to them and does not signify their consent to an extension. However, they did sign personal guarantees, stating in part: "[Sunwest] may from time to time and without affecting or impairing Guarantors' liability hereunder * * * modify or amend any * * * and all of the collateral, security, guarantees, documents and instruments evidencing the Guaranteed Obligations * * *." Most significantly, the Kennedys signed the original note as makers. They received the benefits of the original obligation and undertook an obligation to repay the note. *See* NMSA 1978, § 55–3–413(1). Additionally, in transferring the debt from the Kennedys to Kennedy, Inc., pursuant to NMSA 1978, § 55–3–603(2), and with Sunwest's consent, the Kennedys agreed that their personal liability—their liability as the makers of the note—to repay the indebtedness remained unaltered. Their liability as makers to repay was absolute.

The Kennedys maintain that, notwithstanding their status as makers and their obligations pursuant to their personal guarantees and their agreement, in the transfer, to continuing personal liability, they never consented to the extension of the note. They contend that, although they consented to modification or amendment, they did not consent to an extension, which they conclude is a term of art not synonymous with modification or amendment.

We find, however, that this argument is without merit. The parties to the original note contemplated continuing modification of the note over a ten-year period. Furthermore, the Kennedys' status as makers, and not as accommodation parties or sureties, seals their fate. Although a surety or accommodation party to a note may be discharged when the holder unauthorizedly grants an extension, *see* NMSA 1978, § 55–3–606(1), and Official Comment 1; J. White and R. Summers, *Handbook of the Law Under the Uniform Commercial Code* 524–25 (2d ed. 1980), the maker of the note does not have this defense available. *See, e.g., F.D.I.C. v. Blue Rock Shopping Center, Inc.*, 766 F.2d 744 (3d Cir.1985);

United Am. Life Ins. Co. v. Perillo, 462 F.2d 254 (9th Cir.), *cert. denied,* 409 U.S. 1008, 93 S.Ct. 442, 34 L.Ed.2d 301 (1972); *Toomey v. Cammack,* 345 A.2d 453 (D.C. 1975); *Wohlhuter v. St. Charles Lumber & Fuel Co.,* 62 Ill.2d 16, 338 N.E.2d 179 (1975) (holding co-makers liable on note despite subsequent sale of corporate assets and bank having misfiled security agreement thereby losing interest in collateral); *Commerce Union Bank v. May,* 503 S.W.2d 112 (Tenn.1973) (despite subsequent transferee's failure to insure building against fire as required and without maker's consent, maker liable for note).[1] The Kennedys, as makers, remain primarily liable on the note, and, although they undoubtedly have recourse against the other parties to the note by virtue of the contract of sale, they have no defense against Sunwest's claim.

The Kennedys nevertheless maintain that *Abraham* states that "a party to a note may be discharged * * * if a material alteration is made in the renewal without his consent." 97 N.M. at 291, 639 P.2d at 578. They contend that, because they gave no consent to the extension, they must be discharged. We note the permissive language used in *Abraham* and the factual posture of that case, which involved a renewal rather than a mere extension, where it was not evident that the parties intended extensions from the totality of the circumstances, and where indices of fraud were evident. By contrasting the facts of *Abraham* with the facts presented to us today, it is apparent that the Kennedys intended that the note would be renewed and that they participated in the transactions regarding the note with full awareness of their on-going liability.

Thus, in light of the Kennedys' agreement to remain personally liable as makers, we hold that the district court did not err in granting summary judgment, and we AFFIRM.

IT IS SO ORDERED.

SOSA, C.J., and WILSON, J., concur.

785 P.2d 743

Michael Patrick NORMAND and Andrew James Normand, minors, By and Through Clyde P. NORMAND, next friend, and Genevieve J. Normand, his wife, Petitioners–Appellees,

v.

Andralene RAY and James Ray, Respondents–Appellants.

No. 18434.

Supreme Court of New Mexico.

Jan. 18, 1990.

1. The Kennedys have not argued that by virtue of the sale of the dealership and subsequent assumption of their debt by Kennedy, Inc., the corporation became primary obligor and the Kennedys became sureties as a matter of law, and therefore the significance of their express consent to continuing liability on this possible change of status and the possibility of invoking the suretyship defenses under NMSA 1978, Section 55–3–606 need not be considered. *Cf. Westinghouse Credit Corp. v. Wolfer,* 10 Cal.App.3d 63, 88 Cal.Rptr. 654 (1970); *Smiley v. Wheeler,* 602 P.2d 209 (Okla.1979); *Twombley v. Wulk,* 258 Or. 188, 482 P.2d 166 (1971); *Hemenway v. Miller,* 55 Wash.App. 86, 776 P.2d, 710, *review granted,* —— Wash. ——, 781 P.2d 1323 (1989).

Anthony F. Avallone, Glenn B. Neumeyer, Las Cruces, for appellants.

Ben A. Longwill, Las Cruces, for appellees.

OPINION

DONNELLY, Judge.

Maternal grandparents appeal from an order of the district court granting custody of their two grandchildren to the father and stepmother of the children. The grandparents raise nine points on appeal which we consolidate and discuss as follows: (1) whether the trial court abused its discretion in the hearing following remand; (2) whether the trial court's order entered after remand exceeded the court's jurisdiction; (3) whether the trial court erred in rejecting the findings of fact submitted by grandparents; and (4) whether the findings of fact adopted by the trial court were supported by substantial evidence. We affirm the order of the trial court. During the pendency of this appeal, Michael Normand reached the age of majority; thus, we dismiss as moot, grandparents' appeal concerning the custody of Michael. *See Romine v. Romine,* 100 N.M. 403, 404, 671 P.2d 651, 652 (1983).

This is the second appeal to this court involving the custody of the children. *See Normand v. Ray,* 107 N.M. 346, 758 P.2d 296 (1988). Appellee Clyde Normand (father) is the natural father of Michael Patrick Normand, born December 17, 1971, and Andrew James Normand, born September 29, 1974. The father was divorced in Texas from Sharon Normand, the children's mother, in 1974; the divorce decree awarded custody of the children to the mother. In 1975, custody of the children was transferred by the mother to the grandmother, Andralene Ray. Thereafter, in 1978, the father petitioned the Texas

court for custody of the children; grandparents contested the transfer of custody. Following a jury trial, the Texas court ordered custody of the children be transferred to the father.

In contravention of the Texas order changing custody of the children, the grandparents moved with the children to another city without informing the father and kept their whereabouts secret. In 1985, grandparents initiated adoption proceedings in New Mexico and did not inform the trial court that the Texas decree had awarded custody of the children to the father. Grandparents told the court that the father had abandoned the children and could not be located. Acting on the statements of the grandparents, the New Mexico court entered an order terminating the father's parental rights and granted a decree of adoption to the grandparents.

In 1986, the father married Genevieve Normand (stepmother). Thereafter, in 1987, the father discovered the location of the children in New Mexico and filed a petition for writ of habeas corpus seeking custody. Following a hearing, in September, 1987, the trial court granted the writ directing that custody of the children be surrendered to the father, finding that the 1978 Texas judgment placing custody of the children in the father was valid and enforceable and that the New Mexico decree of adoption was void because it had been fraudulently procured by grandparents. Following an appeal by grandparents, this court upheld the trial court's order granting the writ of habeas corpus and voided the decree of adoption. The opinion of this court, however, directed that the cause be remanded "with instructions to the trial court to hold a hearing to take evidence and enter an appropriate order to determine what custodial arrangement will be in the best interests of the minor children. In all other respects, the trial court judgment is affirmed." *Id.* at 349, 758 P.2d at 299.

Following entry of the mandate of this court and remand, the trial court held an evidentiary hearing and adopted findings of fact and conclusions of law. On March 20, 1989, the trial court entered an order determining among other things, that "the best interests of the two children would be served by continuing their custody with the [father and stepmother]," and that the grandparents "should be given reasonable rights of supervised visitation with both [children]."

I. HEARING ON REMAND

Grandparents assert that in conducting the hearing after remand the trial court abused its discretion when it did not require physical presence of both children for an in-camera interview by the court pursuant to NMSA 1978, Section 40–4–9 (Repl. Pamp.1989). In view of our determination that grandparents' appeal is moot as to Michael Normand, we address the issue raised by grandparents as it relates to Andrew Normand, now age fifteen.

Section 40–4–9 provides in part, that in cases where a judgment or decree is entered awarding the custody of a minor:

> (B) If the minor is fourteen years of age or older, the court shall consider the desires of the minor as to with whom he wishes to live before awarding custody of such minor.
>
> (C) Whenever testimony is taken from the minor concerning his choice of custodian, the court shall hold a private hearing in his chambers. The judge shall have a court reporter in his chambers who shall transcribe the hearing; however, the court reporter shall not file a transcript unless an appeal is taken.

Although the provisions of Section 40–4–9 direct that the trial court shall consider the desires of a minor over fourteen years of age concerning custody, under the statute, the trial court is not conclusively bound to award custody according to such preference. *Merrill v. Merrill,* 82 N.M. 458, 460, 483 P.2d 932, 934 (1971); *Stone v. Stone,* 79 N.M. 351, 352, 443 P.2d 741, 742 (1968); *see also Schuermann v. Schuermann,* 94 N.M. 81, 607 P.2d 619 (1980). Instead, the controlling inquiry of the court in any child custody dispute involves a balancing of all relevant factors and determin-

ing the best interests of the child. *See Schuermann v. Schuermann.*

In *Merrill,* this court observed:

> The prevailing and correct rule, concerning the proper weight to be given to the expressed wish of minors, whose custody is at issue, is that set forth in Annot. 4 A.L.R.3d 1396 at 1402 (1965), where it is stated that:
>
> "* * * when a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment * * *."
>
> their wishes concerning their own custody are a factor to be considered by the court in arriving at its conclusion on the issue, but it is in no sense controlling. (citation omitted).

Id. at 459–60, 483 P.2d at 933–34.

In proceedings involving an award of child custody, the trial court is vested with wide discretion, and the court's conclusion concerning the best interests of a child will not be overturned on appeal absent proof that the decision of the trial court amounted to a manifest abuse of discretion under the evidence. *Fitzsimmons v. Fitzsimmons,* 104 N.M. 420, 423, 722 P.2d 671, 674 (Ct.App.), *writ quashed,* 104 N.M. 378, 721 P.2d 1309 (1986).

Following this court's remand of the case to the trial court, the testimony of the two children was presented by deposition at the custody hearing. The deposition testimony of Andrew, taken in Las Cruces on December 27, 1988, indicated that he was fourteen years of age on September 29 and that he was living in California with his father, stepmother, stepbrother, stepsister, a half-sister, and his brother Michael. Andrew expressed love for his grandparents and somewhat mixed feelings concerning his father and stepmother. Andrew stated his preference was to live with his grandparents; he also testified that while living in Texas with his grandparents, they had not discussed with him the efforts of his father to obtain custody of the children, nor had his grandparents ever informed him, in any detail, of matters concerning his father.

After the issuance of the writ of habeas corpus in August, 1987, custody of the children was transferred to the father and stepmother. Thereafter, the family moved to Germany where the father was serving in the United States Army. The family currently resides in California.

The evidence indicates that the children lived with their grandparents for over ten years after the grandparents intentionally defied the Texas child custody order. Considering the length of time that the children were separated from their father and the intentional action taken by the grandparents limiting any contact or exchange of meaningful information concerning the children's father for over ten years, it was not an abuse of discretion for the trial court to decline to follow Andrew's preference as to the award of custody and in ascertaining the best interests of the children. In determining that custody of Andrew should remain with his father and stepmother, the trial court also found that the grandparents should be permitted visitation.

Examination of the record indicates that the depositions of both children were admitted into evidence and considered by the trial court. There is no evidence that the children's preferences as to custody were not freely given and that the depositions were not sensitively conducted.

Grandparents argue that the trial court erred in denying their motion to require the attendance of the children at the hearing. Grandparents contend that it is mandatory under Section 40–4–9(C) that the court conduct an in-camera hearing in order to ascertain the desires and feelings of the children concerning the award of custody. Although Section 40–4–9(C) provides that in custody proceedings concerning a minor's choice of custodian "the court shall hold a private hearing in his chambers" whenever testimony is taken from a minor, this provision does not preclude presentation of deposition testimony by a child. The language of Section 40–4–9 evinces a legislative directive that rather than subject children to adversarial proceedings in open court, they should be interviewed in chambers concerning their preferences as to custody. The statute's

clear import is to minimize emotional trauma affecting children in custody proceedings and to protect the child from the tug and pull of competing custodial interests. We do not deem the statute to be mandatory; rather, we conclude the holding of such in-camera hearing is a matter entrusted to the sound discretion of the trial court. Because grandparents were permitted to depose both boys and to elicit testimony concerning their preferences as to the award of custody, and there is no showing this testimony was inhibited or not freely given, we find no error in the trial court's denial of the motion for an in-camera hearing.

Grandparents also contend that the trial court erred in not permitting them to have a clinical psychologist evaluate the boys concerning their placement and their best interests. However, the trial court did not prevent the grandparents from presenting a psychologist's expert testimony concerning the best interests of the children. Instead, the court expressly stated that grandparents could utilize an expert whose testimony relied on information obtained from the children's depositions and who could present testimony in the form of opinion based upon hypothetical questions.

Although we agree with grandparents that testing and evaluating the children would have been preferable, grandparents have not shown that the alternatives authorized by the court unfairly restricted the presentation of expert testimony or resulted in any actual prejudice. Grandparents presented the testimony of Dr. Howard Daniels, a psychologist, who testified that the children loved their grandparents and had closely bonded with them. His stated opinion was that the best interests of the children would be to permit them to reside with the grandparents.

In determining the best interests of the children in child custody proceedings, the trial court is not limited to a consideration of the children's expressed preferences, but may also consider, among other things, the children's interaction and interrelationship with their parents and siblings, as well as the children's adjustment to their home, school and community and the mental and physical health of the respective parties. Section 40–4–9(A). The court must evaluate these factors in light of the children's age, the developing relationship between the children and their parents, and how well the child is developing physically, mentally and emotionally. In determining the best interests of the children, the trial court could also properly consider the grandparents' previous history of lack of candor in the adoption proceedings and their prior disregard of the Texas court order concerning the transfer of custody of the children. *See Lopez v. Lopez,* 97 N.M. 332, 334, 639 P.2d 1186, 1188 (1981); *see also Alfieri v. Alfieri,* 105 N.M. 373, 379, 733 P.2d 4, 10 (Ct.App.1987); *see generally* Annotation, *Alienation of Child's Affections As Affecting Custody Award,* 32 A.L.R.2d 1005 (1953); Annotation, *Award of Custody of Child Where Contest is Between Child's Mother and Grandparent,* 29 A.L.R.3d 366 (1989); Note, *A Limitation on Grandparental Rights in New Mexico: Christian Placement Service v. Gordon,* 17 N.M.L.Rev. 207 (1987).

Under the circumstances discussed above, we find no abuse of discretion by the trial court in its denial of the motion for an in-camera hearing requiring the boys to appear and testify in person nor in its denial of a psychologist testing and evaluating the boys at the custody hearing.

II. PROCEEDINGS ON REMAND

Grandparents argue that the trial court exceeded its jurisdiction in conducting the hearing on remand and that the trial court erred in considering facts adduced at the habeas corpus proceeding conducted by the court. This court's mandate following the prior appeal from the order granting habeas corpus directed that the trial court hold a hearing, take evidence, and enter an appropriate order to determine what custodial arrangement would be in the best interests of the minor children.

On remand the trial court has only such jurisdiction with respect to an issue appealed as is conferred by the opinion and

mandate of the appellate court. *Hughes v. Hughes,* 101 N.M. 74, 75, 678 P.2d 702, 703 (1984); *Apodaca v. Unknown Heirs,* 98 N.M. 620, 624–25, 651 P.2d 1264, 1268–69 (1982). The opinion of this court detailed facts previously determined by the trial court and which this court found controlling on appeal.

Under the prior findings adopted by the trial court in the habeas corpus action, and as set forth in our prior opinion, the father filed suit against the grandparents in Texas seeking award of custody of the children. The findings adopted by the court included a determination that following trial a decree was entered awarding custody to the father; the grandparents left with the children without informing the father of their whereabouts; over the next few years the grandparents moved to several different cities hiding the children's location from their father; the father's efforts to locate the children were unsuccessful; grandparents filed proceedings to adopt the children in New Mexico and did not inform the New Mexico court of the 1978 Texas decree awarding custody of the children to the father; and grandparents informed the New Mexico court that the father had abandoned the children and that he could not be located. The prior opinion of this court determined that "[s]ubstantial evidence in the record supports the trial court's conclusion that the adoption judgment [secured by grandparents] was obtained through fraud." 107 N.M. at 348, 758 P.2d at 298.

In carrying out this court's mandate, the trial court's focus necessarily involved a determination as to the best interests of the children at the time of the hearing on mandate; the trial court, however, was not required to disregard evidence presented at the prior hearing and which this court relied upon in rendering its opinion on appeal. Although we agree that as a general rule custodial rights should be determined by current evidence, *Greene v. French,* 97 N.M. 493, 495, 641 P.2d 524, 526 (Ct.App. 1982), in view of the fact that the conduct of the grandparents over an extended period precluded any meaningful contact by the father with both boys during their formative years, the trial court could properly consider such facts, as well as the prior conduct of the grandparents in determining the best interests of the children.

The trial court did not exceed its jurisdiction following issuance of this court's mandate.

III. DENIAL OF REQUESTED FINDINGS

Grandparents also assert that the trial court erred in refusing to adopt their requested findings of fact and that certain findings submitted by them were supported by uncontradicted evidence.

The requested findings of fact submitted by grandparents, among others, provided that the interaction and interrelationship between the children and grandparents was positive; that the children were happy during the time they were in the physical custody of grandparents; that the grandparents were good caretakers of the children; that the interaction and interrelationship between the children, the father and stepmother and step-siblings was not loving; that in the children's minds, grandparents are their parents; that after custody was awarded to the father and stepmother contact between the children and the grandparents was discouraged; that the children were required to care for their own physical needs; and that Andrew was unhappy in the present custodial setting.

It is not error for a trial court to refuse to adopt findings favorable to an unsuccessful party and that contradict other findings adopted by the trial court. *Cowan v. Chalamidas,* 98 N.M. 14, 16, 644 P.2d 528, 530 (1982). Moreover, the trial court need not adopt findings of fact touching on every material fact; it is sufficient if the findings of the trial court address those ultimate findings of fact necessary to support its decision. *Sanchez v. Sanchez,* 84 N.M. 498, 500, 505 P.2d 443, 445 (1973). "Ultimate facts" are those facts which are essential and determinative facts upon which the trial court's conclusions are based. *Goldie v. Yaker,* 78 N.M. 485, 488, 432 P.2d 841, 844 (1967).

In view of the actual finding adopted by the trial court that the best interest of Andrew would be to continue his custody with his father and stepmother, it was not error to refuse to adopt the findings of fact and conclusions of law submitted by grandparents.

IV. SUFFICIENCY OF EVIDENCE

Lastly, grandparents challenge the sufficiency of evidence to support the findings of fact adopted by the trial court underlying the court's conclusion that the best interest of Andrew requires that he continue to reside with his father and stepmother.

Grandparents attack the findings of the trial court based upon their contentions that specific findings adopted by the court are irrelevant to its determination of the best interests of the boys, and that other findings entered by the court have no basis in the record or are not supported by substantial evidence.

Findings 1 and 2, adopted by the trial court, found that during the time the boys were in the custody of the grandparents, from 1985 to 1987, the boys did not attend public school; instead, they were educated by grandparents who used materials supplied by a home study correspondence school. The court also found that "the value of this education is unknown." Grandparents argue these findings are contradicted by the record and relate to prior matters outside the relevant time-frame for determining the best interests of the children. We disagree. The depositions of both children indicated that they had been taught at home while residing with grandparents, that they were currently attending schools in California, and that generally their academic progress had improved during the time that they resided with their father and stepmother. The court's findings concerning the children's education were relevant and supported by evidence in the record. The fact that grandparents have testified that they would send the children to public school if custody were awarded to them did not render irrelevant the findings adopted by the court. The burden of showing that facts existing at the present time are materially different from those adduced at a former hearing rests upon the party making the claim. *Gulf States Equip. Co. v. Toombs,* 317 S.W.2d 554, 556 (Tex.Civ.App.1958).

The trial court also found that, based on the grandparents' past conduct, if custody of the children were awarded to the grandparents, the best educational interests of the children, or future compliance with court decrees could not be assured. Grandparents argue that there is no basis in the evidence to support these findings and that the trial court apparently relied upon evidence presented at the previous habeas corpus hearing as a predicate for such findings. On remand from this court, the plans of the parties concerning the future education of the children was a relevant inquiry. In evaluating this factor the trial court properly considered the adequacy of the education provided during the time the children were in the custody of the grandparents. Similarly, in considering the best interests of Andrew and in evaluating the probability that the grandparents would comply with future court decrees, the trial court could properly consider the grandparents' disregard for the Texas child custody decree and the grandparents' fraudulent procurement of the New Mexico adoption decree. In *Lopez,* this court recognized that a parent's demonstrated lack of cooperation and refusal to follow prior court orders concerning child visitation may, in appropriate cases, constitute grounds for change of custody. *Id.* at 334, 639 P.2d at 1188; *see also Alfieri v. Alfieri,* 105 N.M. at 379, 733 P.2d at 10.

The challenged findings were material and relevant to the trial court's determination of the best interests of Andrew.

Grandparents further challenge as unsupported by the evidence, the trial court's findings that the father and stepmother have provided appropriate housing or environment for the two boys, or that they are appropriate parents. The court's findings have support in the record. Among other evidence, the deposition testimony of both boys described their current home, school

participation, and the parenting practices of the father and stepmother. This evidence, together with the reasonable inferences properly drawn therefrom, constituted substantial evidence to support the trial court's findings.

Additionally, grandparents contend that the court abused its discretion in finding that Michael prefers to live in California with his father and stepmother and that Andrew prefers to live in New Mexico with grandparents; and that in light of the mixed wishes expressed by the children, it would not be beneficial to separate them. Under this point grandparents reassert their argument that the court erred in rejecting proposed findings of fact submitted by them and which were supported by uncontradicted testimony. In considering this argument, we are further mindful of the fact that the older son is now an adult.

In reviewing challenges to the findings of the trial court, a reviewing court does not reweigh evidence or determine the credibility of the witnesses, but ascertains whether the evidence, viewed in a light most favorable to the prevailing party, reveals the existence of substantial evidence to support the court's decision; if so, the decision must be affirmed. *Alfieri v. Alfieri,* 105 N.M. at 377, 733 P.2d at 8. Findings of fact are to be liberally construed so as to uphold the judgment of the trial court, and findings are sufficient if a fair consideration of all of them taken together justifies the judgment of the trial court. *State ex rel. Goodmans Office Furnishings, Inc. v. Page & Wirtz Constr. Co.,* 102 N.M. 22, 24, 690 P.2d 1016, 1018 (1984). Even where specific findings adopted by the trial court are shown to be erroneous, if they are unnecessary to support the judgment of the court and other valid material findings uphold the trial court's decision, the trial court's decision will not be overturned. *Specter v. Specter,* 85 N.M. 112, 114, 509 P.2d 879, 881 (1973). Moreover, in proceedings involving determination of the best interest of the children, the court may also consider the possible adverse effect of custody changes upon the children. *Seeley v. Jaramillo,* 104 N.M. 783, 786, 727 P.2d 91, 94 (Ct.App. 1986).

Here, the trial court adopted findings that petitioners were providing a beneficial environment for the children, that the scholastic performance of the children was improving while in the custody of appellees, and that the parenting provided by appellees was appropriate and beneficial. These ultimate findings were sufficient to support the trial court's order awarding custody.

We have reviewed the record and determine the trial court's findings and conclusions continuing custody in the father and stepmother are supported by substantial evidence and were not contrary to law.

The appeal of grandparents as to Michael Normand is dismissed as moot; in all other respects the judgment of the trial court is affirmed. Appellees are awarded their costs on appeal.

SOSA, C.J., and BACA, J., concur.

785 P.2d 1031

Carl A. OTERO, Petitioner–Appellant,

v.

NM EMPLOYMENT SECURITY DIVISION and Pacheco Trucking, Respondents–Appellees.

No. 18560.

Supreme Court of New Mexico.

Jan. 22, 1990.

Chris Elias Garcia, Albuquerque, for petitioner-appellant.

D. Sandi Gilley, Albuquerque, for respondents-appellees.

OPINION

RANSOM, Justice.

Carl Otero was fired after two weeks as a truck driver in the employ of Pacheco Trucking. He was fired because, with his driving record, the employer's insurance carrier refused to provide insurance coverage for Otero while driving the employer's vehicles.

Otero applied for unemployment compensation and the initial approval of his claim was appealed by the employer to the appeals tribunal of the New Mexico Employment Security Division. The hearing officer determined that Otero was disqualified for benefits because the discharge was for reasons constituting misconduct connected with work. The board of review affirmed the appeals tribunal and, on certiorari to the district court, the board was affirmed. Otero appeals, complaining of the finding that the discharge was for reasons constituting misconduct connected with work. We conclude the determination of the Employment Security Division was not supported by substantial evidence and reverse.

On appeal, the parties debate whether Otero was fired: (1) because of convictions for driving while intoxicated and with a revoked license prior to his employment with Pacheco Trucking; (2) because the employer's insurance carrier would not provide coverage for Otero; or (3) because Otero misrepresented his driving record when applying for the job.

Otero argues in his brief in chief that his driving record does not constitute disqualifying misconduct connected with his work because: (1) there was no employ-

ment relationship at the time of this conduct, and (2) the conduct was not violative of some code of behavior (i.e., duty) contracted between the employer and the employee. The Division argues that it was Otero's falsification of his employment application by misrepresenting his driving record that constituted disqualifying misconduct. In his reply brief, Otero asserts that, since the evidence adduced at the administrative hearing shows the sole reason considered by the employer for terminating Otero's employment to have been the refusal of the employer's insurance carrier to provide insurance, the only acts by Otero material to the employer's decision were his prior driving violations, not his failure to reveal those violations when applying for employment.

The Unemployment Compensation Law provides that an individual shall be disqualified for benefits "if it is determined by the [Division] that he has been discharged for misconduct connected with his work or employment." NMSA 1978, § 51-1-7(B) (Repl.Pamp.1987). To be disqualifying, misconduct must evince a willful or wanton disregard for the employer's interests and must significantly infringe upon legitimate employer expectations. *Rodman v. New Mexico Employment Sec. Dep't*, 107 N.M. 758, 761, 764 P.2d 1316, 1319 (1988) (citing *Mitchell v. Lovington Good Samaritan Center, Inc.*, 89 N.M. 575, 577, 555 P.2d 696, 698 (1976)). Accordingly, the Division argues that, because Otero was asked about driving violations both on the application and verbally, he had every reason to know that the requested information was vital to the employer for hiring and insurance coverage purposes. Yet, knowing that his driving record would reveal serious violations, Otero consciously elected to omit the requested pertinent information from the job application and deliberately indicated in answer to an oral inquiry that he had no known driving violations.

The authority relied upon by Otero includes *Weaver v. Wallace*, 565 S.W.2d 867, 870 (Tenn.1978) ("misconduct connected with work" is a breach of duty owed to the employer, as distinguished from society in general, and misdeeds predating the employment consequently cannot constitute misconduct connected with work in the subsequent employment); *Nelson v. Department of Employment Sec.*, 98 Wash.2d 370, 655 P.2d 242 (1982) (for off-duty misconduct to justify denial of unemployment compensation benefits, the employer must show the employee's misconduct (1) had some nexus with the employee's work, (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a) violative of some code of behavior contracted for between the employer and the employee and (b) done with the intent or knowledge that the employer's interest would suffer); *Giese v. Employment Div.*, 27 Or.App. 929, 557 P.2d 1354 (1976) (off-duty conduct was not a breach of a rule or regulation that had a reasonable relation to the employer's interest); and *Employment Sec. Comm'n v. Acosta*, 93 Ariz. 120, 378 P.2d 929 (1963) (claimants on strike were not employees).

The Division responds that, in *Weaver*, the claimant was fired for failure to meet suitable standards for employment due to his pre-existing records of arrests and convictions, and the employer neither expressly nor implicitly raised the issue of misrepresentation during the application stage of the employment relationship. Each of the other cases involved a claimant who was discharged for actions committed either while employed but off duty and off the employment premises, or while on strike.

The appeals tribunal and the district court both found that Otero's conduct, although off the job, was connected so closely with the employer's interests as to constitute disqualifying misconduct. Otero interprets these findings to refer to his driving violations several years before hire. The Division argues that these findings refer to misrepresentations made to the employer, and that the transcript of the administrative hearing establishes the hearing officer and the parties all focused only on the circumstances surrounding the claimant's conduct during the pre-hiring application stage of his employment and not on the actual violations.

The proposition appears well grounded in reason and precedent that a willful misrepresentation of a material fact made on an employment application provides grounds for terminating the employment for misconduct. *See Roundtree v. Board of Rev.*, 4 Ill.App.3d 695, 281 N.E.2d 360 (1972); *Miller Brewing Co. v. Department of Industry, Labor and Human Relations*, 103 Wis.2d 496, 308 N.W.2d 922 (Wis.App.1981). Clearly, misrepresentation of a driving record on an application for a position as a truck driver is sufficiently inimical to the business interests of the employer and, if the applicant subsequently is hired, is sufficiently connected with the employment to constitute grounds for termination for an act of misconduct.

However, we do not agree with the Division's characterization of the contents of the administrative hearing transcript. Moreover, upon review of the whole record we conclude the evidence does not support the Division's reading of the challenged finding to the effect that the misrepresentation was the cause for discharge. *See Trujillo v. Employment Sec. Dep't*, 105 N.M. 467, 734 P.2d 245 (Ct.App.1987) (whole record review applied). At oral argument, the Division argued that Otero would not have been hired but for his misrepresentations of qualifications of great significance to the employer. Thus, his discharge followed from those misrepresentations. The Division also argues that, from the prominence given the question of driving violations, it can be inferred that the misrepresentations were a tacit cause for the discharge.

The Division, in short, argues that cause and effect may be inferred as a fact. However, while a cause and effect relationship may exist between the acts of misrepresentation and the employer's decision to *hire* Otero,[1] the clear evidence of record precludes any reasonable inference that such a relationship exists between the acts of misrepresentation and the decision to *fire* Otero.

True, the hearing officer noted for the record that Otero left blank the question on his application form asking about known driving violations, and, in response to a question by the hearing officer, the employer stated that Otero also verbally indicated he had no known driving violations. However, neither the employer's testimony nor any other evidence in the record establishes that these misrepresentations had anything to do with the decision to terminate Otero's employment. Rather, the employer's testimony unequivocally establishes that, as claimed by Otero on appeal, the sole reason for terminating the employment was the employer's inability to obtain insurance coverage for Otero. When asked by the hearing officer whether any reason existed other than Otero's record for the decision to fire him, the employer responded:

> No, he was—he was always on time. He did the job for me. I just, you know, my hands are tied on this one. I just can't * * * keep him. I tried to fight to even keep him on, but I just can't do it. I just can't afford the insurance premium payments and try to stay in business.

The employer testified that he was forced to fire his own brother at the same time he fired Otero, also because the insurance company refused to provide coverage, and that he received a letter from the insurer requiring him to sign an exclusion endorsement verifying that neither individual was driving for him. Significantly, the employer also testified that *he would have retained Otero* if Otero could have rectified certain alleged errors on his driving record, and that he would consider Otero for rehire on the same conditions. *Nowhere* in the record does the employer intimate that his decision to fire Otero was due to Otero's misrepresentations of his driving record.

Given the testimony before it, the Division erred in finding that Otero was terminated because he had lied on his employment application. The facts instead sug-

1. Otero disputes this conclusion, arguing that the employer also hired his own brother despite knowledge of the latter's driving record. The employer's testimony is not conclusive on this point.

gest a situation quite close to the one considered by the Tennessee Supreme Court in *Weaver*. There, the court reversed a denial of benefits that had been based on the lower court's finding that the employee was discharged for lying on his application about his past convictions. The court concluded this finding was irreconcilable with the employer's explanation that the employee was discharged because, given its subsequent knowledge of his convictions, it no longer considered him to be a suitable employee.[2] Here too, the gravamen of the employer's explanation was that, with Otero's record of driving offenses, he was not suitable for employment as a truck driver because he could not be insured.

Given the foregoing considerations, the decision of the district court is reversed and the case is remanded for entry of judgment consistent with this opinion.

IT IS SO ORDERED.

SOSA, C.J., and MONTGOMERY, J., concur.

BACA, Justice (dissenting).

Being unable to agree with the majority opinion, I respectfully dissent. The majority holds that Otero was fired from his position not because of misrepresentations made on his employment application but because of the inability of Pacheco Trucking to obtain insurance because of his driving record. The majority holds that this did not constitute misconduct connected with his work. NMSA 1978, § 51-1-7(B) (Repl.Pamp.1987). In my view the reasons for firing Otero were his misrepresentations on the written application and his further misrepresentations made to oral inquiries concerning his driving record. The fact of Otero's misconduct, i.e. his errant driving, which occurred prior to his employment is not the reason for his discharge. The employment questionnaire is an extremely short document which barely elicits the name, addresses, and telephone numbers of the applicant and then highlights one question which is of paramount importance to one in the trucking business, to wit: What is your driving record? When this question was left blank, the person taking the application followed up with an oral inquiry about Otero's driving record; Otero misrepresented his record as being clean.

For off duty misconduct to justify denial of unemployment compensation benefits, the employer must show the employee's conduct: 1) had some nexus with the employee's work; 2) resulted in some harm to the employer's interests; and 3) was in fact conduct which was (a) violative of some code of behavior contracted for between the employer and the employee, and (b) done with the intent or knowledge that the employer's interests would suffer. *Nelson v. Dep't of Employment Security*, 98 Wash.2d 370, 655 P.2d 242 (1982). One can hardly imagine conduct that falls more closely within the perimeters outlined by *Nelson*. Nothing could be more critical to the owner and operator of a trucking enterprise than the safe driving record and the insurability of those persons driving for him. The fact that Pacheco would have kept Otero on and that he proved to be a good employee "always on time, did a good job" only serves to emphasize the importance of the information attempted to be elicited and misrepresented by Pacheco.

Otero was actually aware of his driving record and knew of its effects on his personal insurability. In his attempt to secure personal car insurance his driving record became a factor in its refusal.

To suggest he was let go because he was uninsurable is to ignore the fact that but

2. *Weaver* slightly differs from the present case in that the employer was the federal government and a federal statute provided that the reasons given by the government for the discharge of the employee were to be accepted as final and binding. 565 S.W.2d at 869 (construing 5 U.S.C. § 8506). Here, since the employer is a private individual, the Division properly engaged in a fact finding process to determine the reasons underlying the dismissal. Nonetheless, as discussed in the body of this opinion, no substantial evidence was presented from which the conclusion could be drawn that the employer fired Otero because of his misrepresentations on the employment application.

for his misrepresentations on the applications he never would have been hired and in a position to be terminated when this fact with all its economic repercussions came to light. Mr. Otero notes that with knowledge of Mr. Pacheco's brother's driving record he was hired and like Otero was only released after his insurability became a question. Mr. Otero, unlike a brother, had the true facts of his record been known would not have gotten in the door at this trucking company. One can advertise in the paper and unearth scores of truck drivers, but brothers and other relatives are always with us and may not serve as the basis for sound business decisions.

Mr. Otero having been dismissed because of misrepresentations on the application constituting misconduct on the job, I would affirm the district court.

WILSON, J., concurs.

785 P.2d 1035

Terry CALLAWAY, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 18896.

Supreme Court of New Mexico.

Jan. 25, 1990.

Rehearing Denied Feb. 14, 1990.

Marchiondo, Vigil & Voegler, Michael E. Vigil, Albuquerque, for petitioner.

Hal Stratton, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

SOSA, Chief Justice.

We granted petitioner a writ of certiorari to review the court of appeals' 2–1 decision affirming his convictions (*State v. Callaway*, 109 N.M. 564, 787 P.2d 1247 (Ct.App.1989), Apodaca, J., dissenting). After consideration of the petition, the court of appeals' opinion, arguments raised on the petition and on appeal, and pertinent portions of the appellate record, we reverse the court of appeals. On remand to the district court, the petitioner shall be discharged from custody.

The issue is whether the trial court erred in granting a mistrial in petitioner's first trial, and then denying his motion to bar retrial on double jeopardy grounds. We do not find it necessary to restate the facts leading to mistrial, as the court of appeals' opinion adequately does that. Nor do we find it necessary to reconsider the arguments adduced for and against the trial court's sua sponte granting of mistrial. Suffice it to say that we find Judge Apodaca's dissent persuasive in its disagreement with the majority's opinion.

For clarification, we add the following points to Judge Apodaca's argument. Petitioner had thrice moved for mistrial for reasons unrelated to the grounds on which the trial judge eventually based his order. Petitioner's prior motions should not have detrimentally affected his appeal.

> [W]hether retrial is barred "depends not only upon whether the declaration of mistrial followed a request by the defendant for a mistrial, but whether the mistrial was declared in a manner and under circumstances which fully recognize the right of the defendant to retain that primary control [over the course to be followed]...." Even though the defendant has attempted once to waive his right to go to the jury (by the motion), he does not thereby waive the "primary right" to retain control if the attempt is rejected (by denial of the motion).

State v. Flick, 495 A.2d 339, 345 (Me.1985) (quoting *Braxton v. United States*, 395 A.2d 759, 767 (D.C.Ct.App.1978)). The quoted rule is doubly applicable when any prior motion for mistrial is predicated on grounds unrelated to those actually relied upon by the court in ordering a mistrial.

The standards to be applied in evaluating a trial court's actions in ordering a mistrial are amply set forth in *State v. Messier*, 101 N.M. 582, 584, 686 P.2d 272, 274 (Ct.App. 1984), and *State v. Saavedra*, 108 N.M. 38, 41–43, 766 P.2d 298, 301–03 (1988), and therefore we shall not discuss those standards here. The majority in the court of appeals opinion did not choose the wrong standards; instead, it misapplied those standards. In particular, the court of appeals' reliance on *Porter v. Ferguson*, 324 S.E.2d 397 (W.Va.1984) was misplaced. In that case, defendant's counsel twice deliberately disobeyed the court's order prohibiting inquiry into a key witness' prior arrests. The attorney first asked the witness, "Were you not arrested on anything?", *Id.* at 399, and then, after an explicit admonition, defense counsel once again asked why the witness had been arrested. *Id.*

Contrary to the setting in *Porter*, here defense counsel asked a legitimate question, not prohibited by previous court order, and then got an unresponsive answer from the witness which, had defense counsel *solicited* the response, would have violated the court's order. The trial judge then reacted angrily and declared a mistrial, even though the prosecution denied that it wanted a mistrial, and even though defense counsel objected to the granting of a mistrial. We sympathize with the trial court's zeal both in seeking to assure petitioner a fair trial and to protect the State's case from prejudicial assault, but the court went too far. Its justifiable displeasure with the witness was misdirected toward petitioner.

Previous testimony had established that the victim had been dissuaded from filing a complaint against petitioner with police officials. Thus, defense counsel was permitted to have asked the witness, a state trooper, if the trooper had done anything to dissuade the victim from filing a complaint. When the witness then volunteered that he had not believed the victim's story, it was the witness' fault and not that of defense counsel that such prejudicial testimony was injected into the trial. We agree that defense counsel should have sought the witness out and warned him not to disobey the court's order, but the fact that defense counsel was remiss in doing so should not redound to petitioner's harm.

The court in *Porter* stated: "[W]hen the trial court acts irrationally, irresponsibly or precipitately in response to a prosecutor's motion for a mistrial, such action will not be condoned, and double jeopardy will bar a retrial of the accused for the same offense." *Id.*, 324 S.E.2d at 401. The above rule applies even more forcefully when the trial court sua sponte orders a mistrial.

Further, the trial court here failed to explore other alternatives to a mistrial. *See, eg., State v. Gardner*, 103 N.M. 320, 706 P.2d 862 (Ct.App.), *cert. denied*, 103 N.M. 287, 705 P.2d 1138 (1985). The witness' testimony was not so prejudicial that its damage could not have been corrected by an admonition to the jury to disregard it. The words of the Supreme Court in a similar setting are applicable here: "[I]t seems abundantly apparent that the trial judge made no effort to exercise a sound

discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial." *United States v. Jorn,* 400 U.S. 470, 487, 91 S.Ct. 547, 558, 27 L.Ed.2d 543 (1971). *See Saavedra.* Our holding is made irrespective of the fact the trial court failed to issue findings and conclusions on why it ordered the mistrial. *See Arizona v. Washington,* 434 U.S. 497, 516–17, 98 S.Ct. 824, 835–36, 54 L.Ed.2d 717 (1978).

Accordingly, "we can only conclude that reprosecution of the defendant [violated] his right under the Fifth Amendment of the United States Constitution not to to be put in jeopardy twice for the same offense." *State v. Sedillo,* 88 N.M. 240, 243, 539 P.2d 630, 633 (Ct.App.1975).

Reversed and remanded with instructions to discharge petitioner from custody.

IT IS SO ORDERED.

RANSOM, MONTGOMERY and WILSON, JJ., concur.

BACA, Justice (dissenting).

I am unable to agree with the majority's opinion and therefore dissent. I am satisfied with the analysis contained in the majority opinion of the court of appeals with regard to the question of double jeopardy. I would therefore adopt that portion of that opinion as my dissent.

[redacted]

785 P.2d 1039

In the Matter of MARCIA L. and Paul L., Children.

Crenice and Priscilla CORDOVA, Plaintiffs–Appellants,

v.

STATE of New Mexico, ex rel. HUMAN SERVICES DEPARTMENT, Defendant–Appellee.

No. 11,282.

Court of Appeals of New Mexico.

Dec. 21, 1989.

Filbert J. Montes, Chavez and Montes, Albuquerque, for plaintiffs-appellants.

Peter Klages, Acting General Counsel, NM Human Servs. Dept. Albuquerque, for defendant-appellee.

A.J. Ferrara, Albuquerque, guardian ad litem.

OPINION

DONNELLY, Judge.

Foster parents, Crenice and Priscilla Cordova, appeal from an order of the children's court denying their motion to intervene in an action brought by the Human Services Department (Department) to terminate the parental rights of the natural parents of Marcia L. and Paul L., minor children. Two issues are raised on appeal: (1) whether the court erred in refusing to allow intervention as a matter of right; and alternatively, (2) whether the court abused its discretion in failing to allow permissive intervention. We affirm.

The Department initially obtained custody of the two children in 1985, when they were abandoned by their natural mother. In February 1986, the Department placed the children with foster parents. At that time, Marcia L. was almost three years old, and Paul L. was almost one. In 1987, the parental rights of the natural parents were terminated and the children were then subject to adoption. After ordering termination of parental rights, the children's court continued to conduct periodic reviews at least every six months in accordance with NMSA 1978, Section 40–7–60 (Repl. Pamp.1989). At these reviews the legal custodian is to "demonstrate all reasonable efforts taken to implement the permanent plan established for the child." *Id.*

The children remained with the foster parents until June 1988, at which time the Department received a complaint of neglect

and abuse involving the foster parents. When a subsequent investigation substantiated the charge, the children were placed in All Faiths Receiving Home on June 22, 1988. Thereafter, foster parents filed a petition seeking to adopt the minor children and moved to intervene in the proceeding initiated by the Department to terminate the parental rights of the natural parents of the children. Contemporaneous with the filing of their motion to intervene, foster parents also moved for the issuance of a temporary restraining order to enjoin the Department from placing the minor children with other individuals until there had been a resolution of foster parents' petition for adoption. The children's court denied the petition for intervention.

I. INTERVENTION AS MATTER OF RIGHT

Foster parents allege that the children's court erred in denying their motion to intervene as a matter of right in the action instituted by the Department to terminate the parental rights of the natural parents of the children.

SCRA 1986, 1–024(A), governs intervention as of right. This rule provides:

> A. Intervention of right. Upon timely application anyone shall be permitted to intervene in an action:
>
> (1) when a statute confers an unconditional right to intervene; or
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 1–024(A), as adopted by our supreme court, is almost identical to Federal Rule 24(a). As observed in 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.07[1], at 24–50 (2d ed. 1987), an application for non-statutory intervention as a matter of right under Rule 24(a) must meet the following requirements:

> The application must (1) be timely, (2) show an interest in the subject matter of the action, (3) show that the protection of the interest may be impaired by the disposition of the action, and (4) show that the interest is not adequately represented by an existing party.

Foster parents assert that they have an interest in the action to terminate parental rights of the natural parents. However, in order to establish an interest in the pending action a party seeking to intervene must show that it has an interest that is significant, direct rather than contingent, and based on a right belonging to the proposed intervenor rather than an existing party to the suit. *In re Penn Cent. Commercial Paper Litig.,* 62 F.R.D. 341, 346 (N.Y.1974).

In the instant case, foster parents have failed to establish a basis for intervention as a matter of right. Moreover, the motion to intervene in the proceedings to terminate the rights of the natural parents was filed after entry of orders terminating the rights of the natural parents and granting custody to the Department.

Examination of foster parents' motion to intervene indicates that it was not accompanied by a pleading setting forth the claim or defense for which intervention was sought. Rule 1–024(C) provides that "[t]he motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention in sought." The rule requires that such a pleading accompany the motion so as to enable the court to determine whether the applicant has a right to intervene. *See Lebrecht v. O'Hagan,* 96 Ariz. 288, 394 P.2d 216 (1964); *Duff v. Draper,* 96 Idaho 299, 527 P.2d 1257 (1974); *AMFAC Fin. Corp. v. Pok Sung Shin,* 2 Haw.App. 428, 633 P.2d 1125 (1981). *See also* J. Walden, *Civil Procedure in New Mexico* § 692), at 161–62 (1973). Thus, foster parents have not set forth by an appropriate pleading the claim or defense for which they seek intervention. Although foster parents filed a motion for leave to intervene, the motion did not comply with the requirements of Rule 1–024(C), or adequately apprise the children's court of the claims sought to be raised by intervention. *See Shevlin v. Schewe,* 809 F.2d 447 (7th Cir.1987) (failure

to submit pleading as required by rule was fatal to motion to intervene where pleading was neither filed on a timely basis nor at any time offered in the record).

Foster parents have failed to establish that they were entitled to intervention as a matter of right.

II. PERMISSIVE INTERVENTION

Alternatively, foster parents contend that even if the children's court properly denied their application to intervene as a matter of right, it was error to deny their application for permissive intervention.

Rule 1–024(B) provides in applicable part:

> B. Permissive intervention. Upon timely application anyone may be permitted to intervene in an action:
>
> (1) when a statute confers a conditional right to intervene; or
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.
>
> In exercising its discretion pursuant to this paragraph the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The granting or denial of permissive intervention is within the discretion of the court wherein intervention is sought, and the court's ruling thereon will not be set aside on appeal absent a showing of an abuse of discretion. *In re Melvin B., Sr.,* 109 N.M. 18, 780 P.2d 1165 (Ct.App.1989). *See Shump v. Balka,* 574 F.2d 1341 (10th Cir.1978); *Levi v. University of Hawaii,* 67 Haw. 90, 679 P.2d 129 (1984); *see also O'Hare v. Valley Utils., Inc.,* 89 N.M. 105, 547 P.2d 1147 (Ct.App.1976).

Children's Court Rule SCRA 1986, 10–108(D)(2) authorizes permissive intervention in neglect or abuse proceedings, by a parent, guardian or custodian, where the applicant is not alleged to have neglected or abused the child. Although the commentary to Rule 10–108(D)(2) envisions application of this rule in a manner similar to permissive intervention as provided in Rule 1–024, foster parents do not meet the criteria of Rule 10–108(D)(2) since they were neither parents, guardian, nor custodian. *See Christian Placement Serv. v. Gordon,* 102 N.M. 465, 697 P.2d 148 (Ct.App.1985) (grandparent lacks right to intervene in adoption proceedings where motion is based on status of grandparent and not on other grounds); *see generally* Annotation, *Standing of Foster Parent to Seek Termination of Rights of Foster Child's Natural Parents,* 21 A.L.R.4th 535 (1983).

The present action was initiated by the Department in order to terminate the parental rights of the natural parents of the minor children. Foster parents' motion sought to have the two children placed with them for adoption. As discussed under Point I, foster parents' motion to intervene was defective in that it was not accompanied by a pleading setting forth the claim or claims of movants and foster parents failed to properly show an abuse of discretion by the trial court in denying permissive intervention. R. 1–024(A). *See also Campbell v. Edinger,* 607 P.2d 697 (Okla. 1980) (denial of motion to intervene held not to constitute abuse of discretion where motion sought to enlarge scope of proceedings).

CONCLUSION

Foster parents have failed to establish an abuse of discretion or error on the part of children's court in denying their motion for intervention.

The order denying the motion to intervene is affirmed.

IT IS SO ORDERED.

BIVINS, C.J., and HARTZ, J., concur.

786 P.2d 37

Phillip BALLENGEE and Angela Ballengee, Plaintiffs–Appellees,

v.

NEW MEXICO FEDERAL SAVINGS AND LOAN ASSOCIATION, Defendant–Appellant.

No. 18286.

Supreme Court of New Mexico.

Jan. 22, 1990.

John A. Mitchell, Santa Fe, for defendant-appellant.

Threet & King, Martin E. Threet, Albuquerque, for plaintiffs-appellees.

OPINION

SOSA, Chief Justice.

PARTIES ON APPEAL

Defendant-appellant, New Mexico Federal Savings and Loan Association (the S & L), appeals a judgment awarded by the trial court on January 11, 1989, to plaintiffs-appellees, Phillip and Angela Ballengee (the Ballengees). The Ballengees had filed a complaint for declaratory judgment on November 13, 1986, asking the court to declare the parties' rights and liabilities in certain notes and a mortgage. The S & L had filed a third-party complaint against Diversified Investment Services (DIS), but DIS defaulted and is not a party to this appeal.

FACTS

On April 26, 1984, the Ballengees borrowed $46,000 from DIS and gave DIS a note (captioned "COMBINED NOTE AND SECURITY AGREEMENT") as well as a mortgage on their home in Albuquerque. The mortgage contained the words: "Mortgagee reserves the right to transfer, assign and/or convey this mortgage without consent of Mortgagor." DIS gave the Ballengees $9,000 cash at the time of closing the transaction, and on May 15, 1984, executed a note, entitled "Promissory Note," in favor of Ballengees in the amount of $37,000. This note was delivered to the Ballengees on September 28, 1984. DIS assigned the Ballengees' note and mortgage to the S & L on February 12, 1985. In a letter to the Ballengees, DIS advised the Ballengees, "[Y]ou will now make all payments to [the S & L] with the monthly payment coupon." On March 18, 1985, the S & L advised the

Ballengees in writing, "Your mortgage loan with DIS has been assigned to [the S & L]." On May 29, 1985, DIS executed a document in favor of the S & L captioned "ASSIGNMENT OF MORTGAGE." In its pleadings, the S & L refers to this assignment as a ratification "of the earlier *de facto* assignment."

After DIS' assignment of the Ballengees' note to the S & L, DIS paid some $400 per month to the S & L to make the payments on the Ballengees' note, and paid investment income of nearly $300 per month directly to the Ballengees. Then, DIS began to experience financial difficulties, ceased making regular payments to the Ballengees, and advised the Ballengees that they would have to make payments to the S & L themselves in order to keep the assigned note current. The Ballengees for some twenty months made payments directly to the S & L. The Ballengees consulted an attorney to determine if they could cancel their contract with DIS. The attorney advised them to keep making payments to the S & L. They negotiated with the S & L a change in the date of their monthly payments.

THE RULING BELOW

Trial was held on August 23, 1988. In a letter to counsel dated October 7, 1988, the trial court summarized its findings, in pertinent part, as follows:

> The evidence and exhibits in this case disclose that [the S & L] was not a holder in due course of a note and mortgage assigned to them by [DIS] * * * * It is my opinion that [the S & L] is subject to all of the defenses that [the Ballengees] would have against [DIS].
>
> It is further my opinion that [the Ballengees] would have a right of setoff against [DIS] because of it's [sic] note to [the Ballengees] and, therefor, [sic] that setoff would be good as against [the S & L].

In its findings of fact and conclusions of law dated October 25, 1988, the court found, inter alia:

> The investment scheme and the $37,000 promissory note from [DIS] to [the Ballengees] was a security transaction, as a security is defined by Section 58–13B–1 *et. seq.* [sic].
>
> The investment scheme and note were not registered as required by law.
>
> [The Ballengees] have made regular payments on the instrument to [the S & L] * * * for a total of $18,453.63.
>
> . . . .
>
> The obligatory instrument given to [DIS] was not a negotiable instrument as defined by Section 55–3–104 NMSA 1978 Comp.
>
> . . . .
>
> Pursuant to Section 58–13B–40, NMSA 1978 [the Ballengees] are entitled to a refund of the consideration paid for the unregistered security, the $37,000 promissory note, this is an offset that they can claim against [the S & L].
>
> . . . .
>
> The mortgage placed of record against [the Ballengees'] property should be deemed satisfied.

In its judgment entered January 11, 1989, the court ruled in pertinent part as follows:

> The Combined Note and Security Agreement . . . from [the Ballengees] to [DIS] * * * is not a "negotiable instrument" as defined by the Uniform Commercial Code . . . Section 55–3–104 . . . and [the S & L] is a holder of the Note, but it is not a "holder in due course," as defined by the UCC, Section 55–3–302 * * * *
>
> [The S & L] . . . took the note subject to claims and defenses as defined by the UCC, Section 55–3–306.
>
> [The Ballengees], having admitted their signatures on the Note, satisfied their burden to establish a defense thereto as required by the UCC, Section 55–3–307 . . . to-wit:
>
> The promissory note dated May 15, 1984 from DIS to [the Ballengees] . . . constituted a "security" as defined [in] * * * Sections 58–13–1, et. seq * * * and was sold in violation of the Securities Act.
>
> [The Ballengees] may assert against [the S & L] the above defense to the Note and * * * the Mortgage.

> [The Ballengees] are not estopped by the Note and the Mortgage or by their conduct from asserting the above defense against [the S & L]. [The Ballengees] are entitled to enforce against [the S & L] ... the remedies provided in the Securities Act, Section 58–13B–42 ... which [the Ballengees] might have enforced against [DIS].

ISSUES RAISED ON APPEAL

On appeal, the S & L contends (1) that the Securities Act relied on by the trial court (NMSA 1978, Sections 58–13B–1 to –56 (Repl.Pamp.1986)) did not apply to acts occurring before July 1, 1986, when the law took effect, and that even if the Act did apply, the Ballengees' sole remedy under the Act was against DIS to recover the amount paid less any income received; (2) that the Ballengees are estopped to assert both the invalidity of their note and any defense on the note against the S & L, and (3) that the Ballengees' note was a negotiable instrument under the UCC and the S & L is entitled to the rights of a holder in due course.

The Ballengees counter by arguing that the S & L was not a holder in due course because the Ballengees' note to DIS was not a negotiable instrument in that it does not contain the words "or order" on it, and was transferred by assignment and not by indorsement to the S & L. Further, the Ballengees argue, the court was justified in finding both that the DIS note to the Ballengees was an unregistered security and in finding that the Ballengees could set off the amount of this note against the mortgage and note held by the S & L.

OUR HOLDING ON APPEAL

We affirm that portion of the trial court's ruling which voids the note and mortgage in the S & L's hands. The S & L may not collect the balance due on the note from the Ballengees. However, we reverse the trial court as to its measure of damages. We rule that the Ballengees are estopped to recover from the S & L any and all payments they made to the S & L up to the date on which suit was filed.

The crux of our holding involves the concepts of negotiation and negotiability. The note in question was negotiable but not negotiated. NMSA 1978, Section 55–3–201, provides, in pertinent part, as follows:

> (3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

Under prior law, "[A] note being so transferred, without indorsement, the holder acquired only such title thereto as the transferor had in the note, and it was subject to any defense which existed against the note in the hands of the original payee." *Hill v. Hart*, 23 N.M. 226, 234–35, 167 P. 710, 712 (1917).

This policy was adopted by the Uniform Commercial Code, as codified at NMSA, 1978, Section 55–3–306, which reads, in pertinent part:

> Unless he has the rights of a holder in due course any person takes [a negotiable instrument] subject to: (a) all valid claims to it on the part of any person * * * *

Subsection (a), according to the official comment, "includes not only claims of legal title, but all liens, equities or other claims of right against the instrument or its proceeds. It includes claims to rescind a prior negotiation and to recover the instrument or its proceeds." *Id.*, Official Comment 2.

The distinction in prior law between assignment or other mere transfer of an instrument, and negotiation, has been continued into the UCC. *Security Pac. Nat'l Bank v. Chess*, 58 Cal.App.3d 555, 129 Cal. Rptr. 852 (1976). Hence, under Section 55–3–201, negotiation takes place only upon indorsement. That section also provides, "Transfer of an instrument vests in the transferee such rights as the transferor has therein * * * *" Yet, as the courts have interpreted this section,

> [T]o hold ... that [this section] enables the transferee of a holder to become [without the necessity of indorsement] a holder who is then able, other conditions being met, to be a holder in due course, would be to render the other sections [of Article Three of the UCC] nugatory.

United Overseas Bank v. Veneers, Inc., 375 F.Supp. 596, 605 (D.Md.1973).

Here, there being no indorsement, the S & L was not a holder in due course, and it took the note "subject to any defense which existed against the note in the hands of" DIS. *Hill,* 23 N.M. at 234–35, 167 P. at 712. That is, *as a mere assignee,* the S & L took the note subject to all defenses and equities to which the note was subject in the hands of DIS. *Estrada v. River Oaks Bank & Trust Co.,* 550 S.W.2d 719, 728 (Tex.Ct.App.1977). As the Supreme Court of Colorado has emphasized, "Two methods for transferring instruments evidencing legal rights are recognized: transfer and a special form of transfer, negotiation." *La Junta State Bank v. Travis,* 727 P.2d 48, 51 (Colo.1986) (en banc).

Here, the S & L could protect itself from the defenses available to the Ballengees against DIS only if the instrument had been properly negotiated. Or, to state the same proposition another way, because the note was not properly negotiated, the Ballengees may assert any defense against the S & L that they could have asserted against DIS, including the defense that the note was an unregistered security, voidable under NMSA 1978, Section 58–13B–42.

The Ballengees' defense is clearly contemplated by the language in the official commentary to Section 55–3–306, namely, "other claims of right against the instrument or its proceeds [as well as] claims to rescind a prior negotiation and to recover the instrument or its proceeds" NMSA 1978, § 55–3–306, Official Comment 2. Thus we affirm the trial court insofar as it ruled that the Ballengees may assert against the S & L any defenses permitted them against DIS under Section 58–13B–42.

■ However, we reverse the trial court as to its measure of damages. The Ballengees are estopped to assert recovery of the payments they have already made to the S & L through the date suit was filed. Official Comment 2 to NMSA 1978, Section 55–3–104, provides:

> While a writing cannot be made a negotiable instrument within this article by contract or by conduct, nothing in this section is intended to mean that in a particular case a court may not arrive at a result similar to that of negotiability by finding that the obligor is estopped by his conduct from asserting a defense against a bona fide purchaser. Such an estoppel rests upon ordinary contract principles of the law of simple contract; it does not depend upon negotiability, and it does not make the writing negotiable for any other purpose.

Here, while the Ballengees' conduct does not rise to the level of estoppel insofar as absolute negotiability of the note is concerned, it nonetheless does constitute estoppel insofar as it relates to their installment payments to the S & L on the note. The Ballengees made these payments not without forethought, and, after a certain point, following legal advice. Further, the S & L accepted the payments in good faith. Further, there was detrimental reliance on the S & L's part. It took no action, either directly with DIS or by, perhaps, filing suit against it, to obtain the "unqualified indorsement" to which the UCC says it had the "specifically enforceable right."

We thus hold that the doctrine of equitable estoppel prevents the Ballengees from recovering prior installments up to date of suit. We have held in a somewhat similar case that "equitable estoppel results from a course of conduct which precludes one from asserting rights he otherwise might assert against one who has in good faith relied upon such conduct to his detriment." *First State Bank at Gallup v. Clark,* 91 N.M. 117, 121, 570 P.2d 1144, 1148 (1977). In the facts before us, insofar as the damages discussed above are concerned, we hold that a proper case of equitable estoppel has been shown.

For the foregoing reasons the judgment of the trial court is affirmed in part, re-

versed in part, and remanded for entry of judgment in accordance with our opinion herein.

MONTGOMERY, J., specially concurs.

STEVE HERRERA, Judge First Judicial District, sitting by designation, concurs.

MONTGOMERY, Justice (specially concurring).

I concur in the foregoing opinion even though the result it reaches, as one commentator states, "seems questionable." *See* 4 W. Hawkland, UCC Series § 3-201:09 at 285 (1984):

> [I]f [an] instrument is payable to order, ... the transferee does not become a holder until the instrument has been properly indorsed; until then, he is a mere transferee. In order to become a holder in due course, he must be without notice and in good faith both at time of acquiring holder status and at the time of giving value. Since holder status is not acquired until the instrument has been indorsed, if prior to that time he receives notice of a claim or defense, he will be denied holder in due course status. Thus a good faith purchaser for value who merely forgets to obtain an indorsement and receives notice of a defense prior to obtaining the indorsement is denied the right to become a holder in due course. This result, which is clearly compelled by the Code, seems questionable.

Professor Hawkland goes on to point out that a transferee who gives value for the instrument is entitled to compel indorsement by the transferor, citing UCC § 3-201(3) (NMSA 1978, Section 55-3-201(3)). Since the transferee has this "specifically enforceable right," I would be inclined to favor applying the equitable maxim, "Equity regards that as done which ought to be done," 2 J. Pomeroy, Equity Jurisprudence § 363 (5th ed. 1941), and hold in favor of the S & L on the holder-in-due-course issue in this case. As Professor Hawkland states, if the transferee

> has clear title and at the time of purchase was in good faith and without notice, there is no reason to subject him to the defense of any obligor with whom he has not dealt. Unlike the holder who has not given value and therefore can, after notice, protect himself by refusing to give the agreed consideration, the transferee who has merely failed to obtain the indorsement has no means of protecting himself. The failure to obtain the indorsement should not affect the relative equities between him and the obligor.
>
> ....
>
> Nevertheless, except in the case of depository bank/transferees [citing *Bowling Green, Inc. v. State Street Bank & Trust Co.,* 307 F.Supp. 648 (D.Mass. 1969), *aff'd,* 425 F.2d 81 (1st Cir.1970)], the clarity of subsection 3-201(3) has discouraged any court from holding otherwise.

Hawkland, *op. cit. supra* at 285-86.

Thus, a leading commentator in the commercial law field finds that the result in this case, although "questionable," is compelled by the Uniform Commercial Code and that the clarity of the statute has discouraged any court from reaching a contrary result. Professor Hart, another distinguished commercial law commentator, seems to approve this reading of the statute and the case law. He points out that the holdings in the *Bowling Green* cases—that the depository bank need not take by indorsement in order to be a holder—have been questioned and states:

> It would appear that the Code should be read to require an indorsement. Comment 7 to Section 3-201 states that "there is no effective negotiation until the indorsement is made. Until that time the purchaser does not become a holder * * * *"

2 F. Hart, Bender's UCC Service *Commercial Paper,* § 3.10 at 3-66 (1989).

There comes a time when judges, along with commentators, must put aside their inclinations and perceptions of the "relative equities" between the parties and yield to the language the legislature has enacted. Of course, commercial law has long fa-

vored the bona fide purchaser—a transferee for value, without notice—in order to promote the free flow of commerce, whether in land, commercial paper or other things of value. *See, e.g., First Nat'l Bank of Albuquerque v. Stover,* 21 N.M. 453, 155 P. 905 (1916) (bona fide holder of negotiable paper protected against defenses when without notice of defect). This policy, however, has now been implemented, insofar as negotiable instruments are concerned, in the specific language of Article 3 of the Uniform Commercial Code. A holder in due course gets the protection so long afforded by general principles of commercial law; a "mere transferee" does not. The Code tells us, specifically, who is and who is not a holder in due course. In this case, as the Chief Justice's opinion rules, the S & L was not a holder in due course.

786 P.2d 42

STATE of New Mexico, Plaintiff-Appellee,

v.

Jesus Martinez SANCHEZ, Defendant-Appellant.

No. 18750.

Supreme Court of New Mexico.

Feb. 5, 1990.

Jacquelyn Robins, Chief Public Defender, Linda Yen, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen., Patricia Gandert, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Marc A. Gordon, Carlsbad, Trial Counsel.

OPINION

SOSA, Chief Justice.

Defendant Jesus Martinez Sanchez appeals his convictions of driving with a suspended or revoked license and driving while under the influence of intoxicating liquor (DWI), contrary to NMSA 1978, Sections 66-5-39 (Repl.Pamp.1984, now Repl.Pamp. 1989) and 66-8-102 (Repl.Pamp.1987). Defendant contends, because the aggregate, maximum, authorized statutory penalty for his convictions amounted to more than 180 days incarceration, the district court erred

in denying his demand for jury trial on his appeal *de novo* from the magistrate court.

Our jurisdiction is authorized by the provisions of NMSA 1978, Section 34-5-14(C) (Repl.Pamp.1981), based upon certification by the New Mexico Court of Appeals. The controlling issue concerns the constitutional right to trial by jury and is of substantial public interest that should be determined by the supreme court. Based upon the following discussion, we reverse the judgment of the district court.

Defendant originally was charged and convicted in magistrate court with DWI, a petty misdemeanor, and driving with a suspended or revoked license, a misdemeanor. The combined statutory penalty for these offenses amounted to nine months—ninety days on the DWI conviction and 180 days on the conviction of driving with a suspended or revoked license. The trial in magistrate court was a bench trial despite the lack of evidence in the record to establish that defendant knowingly, intelligently, and voluntarily waived his right to jury trial. *See* SCRA 1986, § 6-602 (Repl.Pamp.1988) (jury trial for petty misdemeanor requires oral or written demand at time of entering plea or in writing within ten days after time of entering plea; if offense is misdemeanor, case shall be tried by jury unless defendant waives jury trial with approval of court and consent of state); *State v. Shroyer*, 49 N.M. 196, 160 P.2d 444 (1945). However, even a valid waiver would not have precluded the defendant from requesting a jury in the *de novo* appeal in district court. *See* N.M. Const. art. II, § 12; SCRA 1986, § 6-703(A) & (H) (Repl.Pamp.1988) (defendant aggrieved by judgment rendered by magistrate court may appeal to district court for *de novo* review governed by Rules of Criminal Procedure for District Courts); SCRA 1986, § 5-605(A) (criminal cases required to be tried by jury shall be so tried unless defendant waives jury trial with approval of court and consent of state); *Southern Union Gas Co. v. Taylor*, 82 N.M. 670, 486 P.2d 606 (1971) (trial *de novo* defined as a trial "anew"). Upon the finding of guilt on both charges, the magistrate court ordered the maximum sentence for each offense, but then suspended five of the six months on the driver's license conviction and ordered 120 days' total incarceration and five months' supervised probation.

Defendant appealed his convictions to the district court and filed a demand for jury trial. *See* NMSA 1978, § 35-13-2(A) (Repl. Pamp.1988) (appeals from magistrate courts shall be tried *de novo* in district court). Subsequently, the state's motion to strike defendant's jury demand was granted based upon: (1) a notice filed by the state that it would not seek enhancement of defendant's sentence, (2) the state's stipulation to limit the sentence to that imposed by the magistrate court, and (3) the district court's declaration before trial that, if defendant was convicted of the charges, the court would limit the maximum sentence of incarceration to no more than 180 days. Following the bench trial, defendant was found guilty of both charges and sentenced identically to that ordered by the magistrate court. *See* NMSA 1978, § 35-13-2(C) (on *de novo* appeal district court may impose the same, a greater, or lesser penalty).

This certification presents the following question: Whether, in determining the constitutional right to jury trial of a defendant charged with more than one petty crime arising from a single incident, a court should consider the objective measure of the combined, maximum statutory penalties or the subjective measure of the actual penalty threatened at the commencement of trial. We hold that the objective measure is to be used in making this determination.

The sixth amendment to the United States Constitution specifies that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * *" The right to trial by a jury is made applicable to the states by the fourteenth amendment. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *see also* N.M. Const. art. II, § 12. In *Duncan*, the Court, finding it necessary to draw a line

separating petty offenses from serious crimes, held that certain petty offenses are not subject to the sixth amendment jury trial provision and should not be subject to the fourteenth amendment jury trial requirement applied to the states. 391 U.S. at 159, 88 S.Ct. at 1452.

The subsequent case of *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) (plurality opinion), examined objective criteria in resolving the reach of the constitutional right to a jury trial. The Court reiterated its reliance on the objective criterion of the maximum, authorized penalty, finding it to be the most relevant and reflective of the seriousness with which society regards an offense. *Id.* at 68, 90 S.Ct. at 1887. The Court held that "a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty' " so as to permit a defendant to demand a trial by jury. *Id.* at 69, n. 6, 90 S.Ct. at 1888, n. 6. However, the *Baldwin* court also recognized the importance to a defendant of the actual penalty to be imposed. But, as noted by the Tenth Circuit Court of Appeals in *Haar v. Hanrahan,* 708 F.2d 1547 (10th Cir.1983): "The plurality [in *Baldwin*] left unclear * * * the relevance of this 'subjective' factor to the constitutional calculus of the right to a jury trial." *Id.* at 1550.

We note that the related issue of whether the penalties for several petty crimes could be considered in the aggregate in determining a defendant's right to a jury trial has been addressed by the Tenth Circuit Court of Appeals in *United States v. Potvin,* 481 F.2d 380 (10th Cir.1973), and by this court in *Vallejos v. Barnhart,* 102 N.M. 438, 697 P.2d 121 (1985). However, it was not until 1983, in *Haar v. Hanrahan,* that the Tenth Circuit squarely was faced with choosing between the objective or subjective measures of aggregate criminal penalties in determining the right to a jury trial. The *Potvin* court favored combining the potential, aggregate penalties that could result from various charges arising out of a single criminal transaction. The court stated that "defendants can view as no less serious a possible penalty of a year in prison when charged with two offenses arising out of the same act, transaction, or occurrence, than if charged with one offense having a potential penalty of one year's imprisonment." 481 F.2d at 382.

> However, the *Potvin* opinion [did] not reveal whether the right to a jury trial should be determined on the basis of the potential penalties provided in the statutory definition of the crimes, or on the basis of the actual penalties faced by the defendant. The choice between the "objective" penalty provided by statute and the "subjective" penalty actually faced by the defendant [prior to trial] determines how *Potvin* is applied in [a case involving multiple offenses arising out of the same transaction].

Haar, 708 F.2d at 1552.

Vallejos also appears to have confused the issue by injecting a footnote discussion of the subjective measure of the actual criminal penalty faced by a defendant into the majority's opinion analysis that adopted the objective measure in determining whether to afford the defendant, in this case, his statutory right to jury trial. *Vallejos* involved an appeal *de novo* from the metropolitan court to the district court, distinguished from the present case that involves a *de novo* appeal to the district court from the magistrate court. *But see* NMSA 1978, § 34-8A-2 (Repl.Pamp.1981) (for all purposes of state law a metropolitan court is a magistrate court). There defendants were charged with multiple traffic violations. In construing Section 34-8A-5(B), applicable to metropolitan court and mandating that "if the penalty does not exceed ninety days' imprisonment * * * the action shall be tried by the judge without a jury," the court held that defendants were entitled to a jury trial where the aggregate penalty exposed them to imprisonment of ninety days or more. 102 N.M. at 440-41, 697 P.2d at 123-24. Referring to *Duncan* and *Baldwin,* the court stated:

> Both cases are highly supportive of our decision * * * in that they state the most relevant criteria of the seriousness of an offense to be "the severity of the maxi-

mum authorized penalty." *Baldwin,* 399 U.S. at 68, 90 S.Ct. at 1888.

* * * * * *

[W]e do not consider *Duncan* and *Baldwin* to be in conflict with the principle that the authorized *aggregate* penalty determines the existence of the right to a jury trial in a multiple-offense situation. *Accord Haar v. Hanrahan,* 708 F.2d 1547 (10th Cir.1983); *United States v. Potvin,* 481 F.2d 380 (10th Cir.1973).

Vallejos, 102 N.M. at 441, 697 P.2d at 124 (emphasis in original); *see also Meyer v. Jones,* 106 N.M. 708, 749 P.2d 93 (1988) (*Vallejos* holding accords with analysis of period of potential deprivation of liberty as basis for determining nature of offense and attendant right to jury trial).

In *Haar v. Hanrahan,* cited in *Vallejos,* the Tenth Circuit was asked to decide whether a New Mexico defendant, charged in magistrate court with two offenses arising out of the same incident with an aggregate, potential sentence in excess of six months, was entitled to a jury trial. Although decided prior to a statutory amendment permitting a district court to impose a greater sentence than that imposed by the magistrate court, a resolution of the issue required the *Haar* court to choose between the objective or subjective measure of aggregated criminal penalties in determining the right to a jury trial. While noting the merits of each choice in terms of the values *Potvin* sought to protect, the court adopted the subjective measure. The court reasoned that a narrow, subjective interpretation of *Potvin* more closely followed the Supreme Court's rationale in *Duncan* and *Baldwin,* adhering to the view that an expansion of the definition of a "serious" offense was better left to the U.S. Supreme Court.

Recently, however, the U.S. Supreme Court did address the issue in *Blanton v. City of North Las Vegas, Nevada,* 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989). In contrast to the *Haar* opinion, the Court reaffirmed the *Baldwin* Court's objective standard in its discussion of whether adverse collateral consequences, such as fines, license suspensions, probation and community service, when taken together with the authorized penalty of incarceration would be sufficient to require a jury trial. Quoting *Landry v. Hoepfner,* 840 F.2d 1201, 1209 (5th Cir.1988), the Court stated: "The judiciary should not substitute its judgment as to seriousness [of a crime] for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.'" 489 U.S. at ——, 109 S.Ct. at 1292.

Thus, while encouraging deference to the legislature's classification of serious and petty crimes as determined by the sanctions imposed for those who are found guilty, the Court ruled that primary emphasis must be placed on the maximum authorized period of incarceration in determining the right to jury trial. The Court noted that additional statutory penalties such as fines and probation could entitle a defendant to a jury trial "only if he can demonstrate that * * * [, when] viewed in conjunction with the maximum authorized period of incarceration, [the additional penalties] are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.* 489 U.S. at ——, 109 S.Ct. at 1293. The Court further recognized that, although such sanctions may result in a significant infringement of personal freedom, they cannot approximate in severity the loss of liberty that incarceration entails. *See id.* 489 U.S. at ——, 109 S.Ct. at 1292; *accord Meyer v. Jones,* 106 N.M. at 710, 749 P.2d at 95 (potential period of probation more than six months does not present degree of liberty deprivation that would trigger right to jury trial).

Unlike the present case wherein the defendant was charged with several petty offenses arising out of the same transaction, the decisions in *Duncan, Baldwin,* and *Blanton* involved fact situations wherein the defendants were charged only with one offense. Nevertheless, defendant relies upon those holdings, as well as the majority discussion in *Vallejos,* for the con-

tention that the actual sentence imposed cannot be constitutionally determinative of the right to a jury trial. On the other hand, the state contends that, pursuant to the footnote discussion in *Vallejos* and the Tenth Circuit's opinion in *Haar*, the subjective measure controls and the district court is not required to accord defendant a right to jury trial if the court placed in the record prior to trial a declaration that defendant would not be subjected to imprisonment more than 180 days in the event the defendant was found guilty of the charged offenses.

We believe, however, an acceptance of the state's argument would be inconsistent with one of the basic purposes of the sixth-amendment guarantee to a jury trial: "to prevent oppression by the Government" by interposing the safeguard of a jury trial between the accused and a possibly "corrupt or overzealous prosecutor * * * [or a possibly] compliant, biased, or eccentric judge." *Duncan*, 391 U.S. at 155–56, 88 S.Ct. at 1451. Recognizing the power in the prosecution or the trial court to deprive the accused of the right to a jury trial in this way would frustrate the purpose.

Further, in light of the language in *Blanton* that, with regard to criminal penalties, the judiciary should not substitute its judgment for that of the legislature, we explicitly overrule any notion that the subjective measure in terms of the actual sentence threatened prior to trial should be used in determining a defendant's right to a jury trial. *Accord State v. Grimble*, 397 So.2d 1254 (La.1980) (trial court may not curtail accused's right to jury trial by agreeing in advance to limit sentence; legislative determination of seriousness of crime entitles accused to jury trial, not arbitrary decision of trial court). Thus, we find the footnote discussion in *Vallejos*, which is unsupported by authority and devoid of any basis for its conclusion, to be without binding effect as a rule of law.

Moreover, the *Vallejos* holding, although not expressly overruling *State v. James*, 76 N.M. 416, 415 P.2d 543 (1966), which held that the potential sentences facing a defendant should not be cumulated but rather should be treated separately, did so implicitly. The defendant in *James* was charged with three separate petty misdemeanors and was not permitted to combine the possible sentences in order to be entitled to a jury trial. Accordingly, to be clear, the case of *State v. James*, 76 N.M. 416, 415 P.2d 543 (1966), is hereby expressly overruled. We find the rationale surrounding the concept of the objective measure to be more in line with the constitutional mandate for jury trials in cases in which the possible sentence exceeds six months, whether for a single offense or for multiple offenses arising from the same incident or transaction.

Therefore, the ruling of the district court that denied defendant his request for a jury trial is reversed. This cause is remanded for proceedings not inconsistent with this opinion.

IT IS SO ORDERED.

RANSOM, MONTGOMERY and WILSON, JJ., concur.

BACA, J., dissents.

BACA, Justice (dissenting).

Today this court has decided that a defendant on trial for multiple petty crimes is entitled to a trial by jury even when the court determines that it will not impose a sentence greater than ninety days, simply because the aggregate potential penalty exceeds ninety days. Yet, the United States and New Mexico Constitutions do not dictate the result reached today, our legislature has not mandated the result, and our precedent stands opposed to the result. We are faced with a choice between two noble goals: extending the guarantees of a trial by jury, and providing an efficient judicial system. The result reached by the majority, while not required by the sixth amendment and not required by due process, will seriously interfere with the efficiency of our courts and logjam our already seriously overburdened judicial system, and accordingly, I dissent.

The United States Supreme Court has not spoken directly on the constitutionality of the aggregate sentencing situation we

are faced with today. *See Blanton v. City of N. Las Vegas,* 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989); *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970); *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). In *Haar v. Hanrahan,* 708 F.2d 1547 (10th Cir.1983), the Tenth Circuit refused to expand the definition of a serious offense constitutionally requiring the opportunity for a jury trial, and found that, in a situation where sentences could be aggregated, when none of the crimes were by definition a serious crime, the right to a jury attached only if the possible sentence actually faced by the defendant exceeded six months. *Id.* at 1553. The majority today, however, implicitly contends that *Haar* was overruled in part by the adoption of the "objective test" in *Blanton. Blanton* did adopt an objective test, but the majority misconstrues its significance as it applies to the case at bar.

The sixth amendment requires a defendant be afforded a jury in a trial for a serious crime. *District of Columbia v. Clawans,* 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937). However, this right is not guaranteed for petty crimes, because the potential infringement of sixth amendment rights by restricting access to the jury is outweighed by expediency and the right to a speedy trial. *Duncan,* 391 U.S. at 160, 88 S.Ct. at 1453. The legislature, by deciding that a penalty greater than six months could be imposed has determined that, in the eyes of society, the offense is serious. *See id.* ("The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments.'" [Citation omitted.]) When a crime is punishable by more than six months in prison, it is not the penalty per se that initiates the guarantee of a jury, but the value judgment of society implicit in the penalty. The length of the sentence is a statement that the crime is serious—and the sixth amendment guarantee of a right to a jury attaches because the trial is for a *serious* crime.

A jury trial is also constitutionally mandated when incarceration exceeds six months. *See United States v. Potvin,* 481 F.2d 380 (10th Cir.1973); *see also Frank v. United States,* 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969) (no jury required for criminal contempt where Congress has not specified a range of sentences and therefore has not categorized offense as serious; jury required only if potential sentence exceeds six months). Possible incarceration for such a long period is potentially a great infringement of an individual's liberty interest, mandating that the sixth amendment be given effect. *See Muniz v. Hoffman,* 422 U.S. 454, 477, 95 S.Ct. 2178, 2190, 45 L.Ed.2d 319 (1975).

The majority has misplaced its emphasis on the quotation from *Blanton, see* 109 N.M. at 431, 786 P.2d at 45, that states that the legislature is the appropriate body to determine a sentence for a particular criminal act and that the judiciary should not substitute its own judgment for that of the legislature in determining whether a crime is "serious." This view is proper when the length of a sentence is being used to determine whether a crime is serious, but it has no place in a consideration of the issue we face today.[1] The constitution requires the right to a jury when the crime is serious or the actual sentence faced is serious. The legislature has already spoken on whether it considers driving while intoxicated and driving with a suspended or revoked license "serious crimes," as that term of art is used in the case law, and it has said "no." The only issue, then, is whether the defendant faces serious incarceration and, in this case, the trial judge has said "no."

In addition, this view potentially abrogates separation of powers principles by

1. The context in which *Blanton* was decided should be considered as well. In *Baldwin,* the Court determined that the objective test was determinative of the right to a jury trial when the legislature authorized confinement for greater than six months. *Blanton,* on the other hand, considered the opposite question—does a sentence of less than six months automatically classify the offense as petty. While determining that it did not as a matter of constitutional law, the Court reaffirmed the significance of the legislature's objective classification as an objective benchmark.

infringing on the judiciary's proper role to determine the proper sentence for an individual defendant. The trial judge has been delegated the authority to use his or her judgment to assess the circumstances of a given infraction and to determine a sentence, within the broad outlines defined by the legislature. A determination of whether a particular defendant should receive the maximum possible sentence or a lesser sentence within the range set by the legislature is an integral part of the judicial task. Sentencing is a function that involves the three bodies of our government, and each branch must be allowed to fulfill its function. To deny the role of the judiciary in setting sentences and the accompanying effect it may have on the right to a jury trial when that right turns solely on the length of possible incarceration and the defendant's liberty interest is a serious infringement on judicial power. *See Mistretta v. United States,* 488 U.S. 361, ——, 109 S.Ct. 647, 650–51, 666, 102 L.Ed.2d 714 (1989) (discussing the role of the judiciary in sentencing while determining the constitutionality of the United States Sentencing Commission).

Thus, what we are left with is the majority's interpretation of NMSA 1978, Section 34–8A–5(B) (Repl.Pamp.1981) to require a jury. This interpretation contradicts this court's precedents, and it flies in the face of principles of separation of powers and accepted principles of statutory construction.

This court has previously decided the issue presented today, and we properly recognized the conflicting interests presented by it. In *Vallejos v. Barnhart,* 102 N.M. 438, 697 P.2d 121 (1985), we held that, when a defendant is subject to incarceration for greater than ninety days when penalties for multiple crimes are aggregated, he has a right to a jury. *Id.* at 441, 697 P.2d at 124 (interpreting NMSA 1978, § 34–8A–5(B) (Repl.Pamp.1981)). We also indicated that, if the judge declares on the record prior to trial that he or she will not impose a sentence greater than ninety days, the defendant has no right to a jury trial. *See also State v. James,* 76 N.M. 416, 420, 415 P.2d 543, 546 (1966) ("The consolidation of the petty offenses for trial does not change their nature * * * *") The acceptance of the "objective test" with reference to the sentence for one crime to determine whether it is serious is irrelevant to this situation and does not affect the constitutionality of our precedent. Yet, the majority has determined that it justifies our abolishing accepted principles.

Thus, it is apparent that the majority's decision is neither based on a constitutional requirement nor an analysis of our precedent. Furthermore, in promulgating NMSA 1978, Section 34–8A–5(B) (Repl. Pamp.1981), our legislature has acted in derogation of the common law, and thus the statute should be strictly construed. *See Tomlinson v. State,* 98 N.M. 213, 215, 647 P.2d 415, 417 (1982). The statute specifically refers to the right to a jury when a potential sentence exceeds ninety days in a trial for an individual offense, not the aggregate situation. The statute passes constitutional muster when given its plain meaning, and we should not expand it beyond its plain meaning and the scope obviously intended by the legislature. *See Vallejos,* 102 N.M. at 441–42, 697 P.2d at 124–25 (Stowers, J., dissenting).

If the guarantees of a jury were the only values at issue today, the majority's decision would not cause any great harm. However, the guarantees of a jury must be balanced against the costs to the judicial system. In *Duncan,* the Supreme Court found that petty offenses were traditionally exempt from jury requirements by the common law, and stated that "possible consequences to defendants from convictions for petty crimes have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications." 391 U.S. at 160, 88 S.Ct. at 1453. This court has recently affirmed its commitment to the significance of a speedy trial, stating that our system " 'places the primary burden on the courts and the prosecutors to assure that cases are brought to trial.' " *Zurla v. State,* 109 N.M. 640, 789 P.2d 588 (1990) (quoting *Barker v. Wingo,*

407 U.S. 514, 529, 92 S.Ct. 2182, 2191, 33 L.Ed.2d 101 (1972)). While this court in *Zurla* directly placed the burden on the court system to expeditiously bring cases to trial, today it has eroded the judiciary's ability to operate efficiently, both to the prejudice of society and defendants whose trials will be further delayed in our already overcrowded court system. I do not feel that the benefits of the protections afforded by a jury outweigh these countervailing considerations, and I anticipate disastrous results in the lower courts of this state.

[redacted]

[redacted]

786 P.2d 51

STATE of New Mexico, Plaintiff–Appellant,

v.

Ismael RUIZ, Jr., Defendant–Appellee.

No. 11239.

Court of Appeals of New Mexico.

Dec. 19, 1989.

Certiorari Denied Jan. 10, 1990.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jacquelyn Robins, Chief Public Defender, Jonathan A. Abbott, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

HARTZ, Judge.

The state contends that the district court lacked authority to order defendant confined in the county jail for his one-year sentence. We agree and reverse and remand for imposition of a correct sentence.

Defendant was convicted of battery on a peace officer and resisting arrest. Later the district court found him to be a habitual offender, with one prior conviction. The district court suspended defendant's eighteen-month sentence for battery and his six-month sentence for resisting arrest. Pursuant to the habitual offender statute, the district court enhanced the sentence for battery by one year. As required by law, the one-year enhancement was not suspended or deferred. NMSA 1978, § 31–18–17(B) (Repl.Pamp.1987). The district court ordered that the sentence be served in the Chaves County Detention Center on a work-release program and granted defendant credit toward his sentence for two days of presentence confinement.

NMSA 1978, Section 31–20–2(A) (Repl. Pamp.1987) provides:

> A. Persons sentenced to imprisonment for a term of one year or more shall be imprisoned in a corrections facility designated by the corrections department, unless a new trial is granted or a portion of the sentence is suspended so as to provide for imprisonment for not more than eighteen months; then the imprisonment may be in such place of incarceration, other than a corrections facility under the jurisdiction of the corrections department, as the sentencing judge, in his discretion, may prescribe; provided that a sentence of imprisonment for one year or more but not more than eighteen months shall be subject to the provisions of Subsections D and E of this section and shall not be imposed unless the requirements set forth in Subsection D of this section are satisfied.

Section 31–20–2(D) states in pertinent part:

> D. A sentence of one year or more but not more than eighteen months and providing for imprisonment in a place of incarceration other than a corrections facility under the jurisdiction of the corrections department pursuant to Subsection A of this section, which shall be known as the local sentencing option, shall not be imposed unless:
>
> * * * * * *

(2) the governing authority in charge of the place of incarceration has entered into a joint powers agreement with the corrections department * * *.

The parties agree that there was no joint powers agreement applicable in this case. The provisions of Section 31–20–2(D) are mandatory, not discretionary. Therefore, the district court was required to sentence defendant to a corrections facility designated by the corrections department, and not the county jail, if defendant was "sentenced to imprisonment for a term of one year or more." § 3120–2(A).

Defendant contends that the term of his sentence was not the one-year term imposed by the judgment, but the 363 days remaining after credit for two days of presentence confinement. Although Section 31–20–2(A) does not refer to credit for presentence confinement, he argues that the statutory provision authorizing a local sentence option is ambiguous and we must therefore interpret it in his favor in accordance with the "rule of lenity" in criminal matters. *See Brock v. Sullivan,* 105 N.M. 412, 414, 733 P.2d 860, 862 (1987). Yet even were we to agree that incarceration in a state correctional institution is necessarily a harsher penalty than incarceration in a county jail, we would not agree that the rule of lenity compels defendant's reading of the statute. We will not construe penal statutes contrary to their plain meaning. *See State v. Pedroncelli,* 100 N.M. 678, 681, 675 P.2d 127, 130 (1984); *State v. Reaves,* 99 N.M. 73, 75, 653 P.2d 904, 906 (Ct.App.1982). Nor will we add words or nuances to a statute that makes sense as written. *See State v. Gutierrez,* 102 N.M. 726, 699 P.2d 1078 (Ct.App.1985). Our role is to "ascertain and give effect to the intention of the Legislature in construing a statute." *Arnold v. State,* 94 N.M. 381, 383, 610 P.2d 1210, 1212 (1980).

The "sentence" in this case was the one-year term imposed by the judgment of the district court, not the 363 days remaining to be served on that sentence after imposition of the sentence. The language of the district court judgment itself suggests as much. The judgment reads: "IT IS THE FURTHER ORDER OF THE COURT that the sentence herein is suspended EXCEPT for ONE (1) YEAR to be served in the Chaves County Detention Center." The two days of presentence confinement did not result in a 363–day sentence; they simply were applied as credit toward the one-year sentence. The judgment stated: "Defendant shall receive credit for 2 days presentence confinement."

More importantly, the statutory scheme requires that the "sentence" be defined as the one-year term. Although defendant argues that the credit for presentence confinement is similar to the sentence enhancement for habitual offenders or users of firearms in that it "alters" the sentence, the terminology in the statutory provisions suggests otherwise. The various habitual offender provisions state that the offender's "basic sentence shall be increased," Sections 31–18–17(B), (C), and (D); and the firearm enhancement statute provides: "the basic sentence of imprisonment prescribed for the offense in Section 31–18–15 NMSA 1978 shall be increased * * *." NMSA 1978, § 31–18–16(A) (Repl.Pamp. 1987). Because those provisions explicitly state that the "sentence" is to be changed, it is appropriate to conclude that those statutes provide for "alterations" of the sentence. *See State v. Reaves,* 99 N.M. at 74, 653 P.2d at 905. In contrast, NMSA 1978, Section 31–20–12 (Repl.Pamp.1987) states: "A person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense." The language is not that the presentence confinement reduces the sentence, but that the confinement is credited toward the sentence; the sentence remains unaltered.

Moreover, when Section 31–18–17(B) requires that a habitual offender's "basic sentence shall be increased by one year," we have no doubt that the statute does not require the offender to be incarcerated for a period of one year after imposition of sentence. The offender is certainly entitled to credit for presentence confinement

against the actual sentence imposed. In other words, the "sentence" required by Section 31–18–17(B) is not the period of incarceration computed after credit for presentence confinement, which is the definition of "sentence" defendant proposes for Section 31–20–2. We would expect the legislature to use the word "sentence" consistently throughout the sentencing statutes and see no reason to believe that the legislature's meaning of the word "sentence" in Section 31–20–2 is different from its meaning in the habitual offender statute. In both statutes, "sentence" refers to the term of incarceration imposed by the court before credit for presentence confinement.

Finally, defendant's argument that he should be permitted to serve his time in the county jail pending resolution of his appeal challenging his convictions has been mooted by our affirmance of those convictions by separate memorandum opinion. In any event, the district court's direction that defendant serve his term in the Chaves County Detention Center predated the appeal and therefore could not have been predicated on defendant's pursuit of an appeal.

The portion of the court's judgment and sentence directing that defendant's sentence be served in the Chaves County Detention Center is contrary to law. The cause is remanded to the district court for entry of an amended sentence consistent with this opinion.

IT IS SO ORDERED.

DONNELLY and ALARID, JJ., concur.

786 P.2d 53

KENNECOTT COPPER CORPORATION, Claimant–Appellant,

v.

Fabian CHAVEZ, Superintendent of Insurance, and the New Mexico Subsequent Injury Fund, Respondents–Appellees.

No. 11311.

Court of Appeals of New Mexico.

Jan. 4, 1990.

Charles E. Stuckey, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for claimant-appellant.

MacDonnell Gordon, Sp. Asst. Atty. Gen., Hinkle, Cox, Eaton, Coffield & Hensley, Santa Fe, for respondents-appellees.

OPINION

APODACA, Judge.

Kennecott Copper Corporation (employer) appeals the workers' compensation judge's (judge) order granting summary judgment to the Subsequent Injury Fund (the fund). Summary judgment was based on the judge's conclusion that the statute of limitations for a claim against the fund had run and the claim was therefore untimely. Employer raises two issues: (1) were there issues of material fact on the question of whether employer knew or should have known that it had a claim against the fund in 1983? and (2) should *Hernandez v. Levi Strauss, Inc.*, 107 N.M. 644, 763 P.2d 78 (Ct.App.1988), which declared application of the four-year statute of limitations, have retrospective effect and apply to this appeal? We agree with the judge's determination and affirm.

Jimmy Sedillos (employee), a long-time employee of employer, suffered numerous work-related injuries to his left knee. The first of these occurred in 1971. After an operation and physical therapy, he had 10% impairment to the knee. Employee returned to work. However, further surgery was required by subsequent deterioration of the cartilage in the left knee. Employer paid medical and disability benefits, and employee returned to work after recovery from each operation. In May 1983, employee again injured his left knee in the course of his employment. After treatment, it was determined in August 1983 that he could not continue to work. At that time, employer began paying temporary total disability benefits to employee.

In March of 1988, employer filed a claim against the fund for reimbursement of a portion of the benefits paid to employee. The fund moved for summary judgment, contending employer knew or should have known that it had a claim against the fund in May of 1983 and that the four-year statute of limitations had expired. In support of its motion, the fund attached a copy of employer's medical report of employee's May 2, 1983 injury, and supervisor's accident report dated May 5, 1983. In opposition to the motion for summary judgment, employer relied on the affidavit of Lillian Medina, who handled workers' compensation benefits for employer since November 1985. Employer also relied on the affidavit of an independent insurance adjuster and the deposition testimony, notes and correspondence of an orthopedic surgeon. The judge held that employer knew or should have known it had a colorable claim against the fund when it began paying total disability benefits in August of 1983. He concluded the claim was filed more than four years later and was consequently not timely.

Summary judgment is proper only if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Koenig v. Perez*, 104 N.M. 664, 726 P.2d 341 (1986). If there are

undisputed facts under which there is no room for a reasonable difference of opinion, then the timeliness of a claim may be determined as a matter of law. *Pena v. New Mexico Highway Dep't,* 100 N.M. 408, 671 P.2d 656 (Ct.App.1983). Employer contends there are circumstances surrounding the 1983 accident that precluded the judge from determining as a matter of law that it knew or should have known it had a claim against the fund. We disagree.

The following facts are undisputed: (1) over the years, employee suffered knee injuries, resulting in permanent impairment to the left knee; (2) employer had actual knowledge of that impairment; (3) employee suffered further injury to the left knee in May of 1983; (4) employer had notice of that accident and the nature of the injury; (5) employer began paying total disability benefits to employee on August 17, 1983; and (6) employer filed its claim against the fund on March 7, 1988. Employer contends these facts are insufficient to show that it had knowledge of a relationship between the May 1983 accident and employee's subsequent disability. We disagree and conclude that, based on these facts, the judge could determine as a matter of law that employer's claim against the fund was not timely.

Employer maintains it did not have the knowledge required until July of 1987. Employer argues disputed factual issues existed on the cause of employee's disability and points to the orthopedic surgeon's deposition testimony that he believed an earlier letter from him written to employer stating that employee had a 40% physical impairment of the knee resulting in part from the May 1983 accident was incorrect. The surgeon testified in his January 16, 1989 deposition that it was his present opinion that employee's existing impairment was due to injuries and surgeries that he had undergone before 1983.

The record clearly reflects, however, that employer knew of the previous impairment to employee's left knee. Employer also knew that the May 1983 accident resulted in an injury to the left knee. Additionally, letters from employee's treating physician to employer in 1983 and 1984 connected the May 1983 accident with previous injuries to the knee. In fact, one letter written in August of 1983 stated that employee's inability to work resulted from a combination of all injuries to his left knee. The physician also advised employer by letter dated March 19, 1984, that he did "not believe that [employee was] going to be able to work more than a half day at a time, and therefore, [he] would consider him for disability retirement."

We disagree with employer's assertion that conflicting inferences may be drawn from the August 1983 letter. That letter stated that "[t]he inability of [employee] to work more than a half day stems from all the previous injuries and operations to his knee." Additionally, the same physician had written employer on May 25, 1983, stating, with reference to the May 1983 accident, that employee "complained of pain on the lateral aspect" (referring to the left knee). When these letters are read together, we believe that only one inference could be reasonably drawn: that the May 1983 accidental injury was related to employee's disability.

It is thus evident that employer knew of the preexisting impairment to employee's left knee and of the injury to the same knee in May of 1983. Surely, based on knowledge of these two facts, employer should have known it had a potential claim against the fund. Since employer had actual knowledge of the preexisting disability and notice of the later injury, we conclude it had four years from the date of the later injury within which to file its claim. *See Hernandez v. Levi Strauss, Inc.; Davis v. Los Alamos Nat'l Laboratory,* 108 N.M. 587, 775 P.2d 1304 (Ct.App.1989).

Employer argues that a doctor's deposition, stating that employee's disability did not arise from the May 1983 accident, raised issues of material fact. If a trier of fact were to accept as true the doctor's deposition statement that employee's disability did not arise from the May 1983 accident, then we believe it would follow that employer would then not be able to assert a claim against the fund, since there

would be no subsequent injury triggering the claim. *See Ballard v. Southwest Potash Corp.*, 80 N.M. 10, 450 P.2d 448 (Ct. App.1969) (requiring a subsequent injury compensable under Workers' Compensation Act for compensation from the fund). Thus, although the doctor's deposition may have created a conflict in the facts, we view them as not material to the issue of timeliness. We fail to understand how the doctor's opinion, rendered during a deposition several years in the future, would have any bearing on what employer knew or should have known in 1983. For the same reason, other affidavits relied on by employer do not raise issues of material fact on the question of when employer knew or should have known it had a claim against the fund.

We now turn to the second issue, employer's argument that the four-year statute of limitations announced in *Hernandez* should not be given retrospective effect. In determining whether a new decision should be given retrospective effect, the following factors must be considered: (1) whether the decision establishes a new principle of law, either by overruling clear precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the inequity imposed by retrospective application; (3) the merits and demerits of each case must be weighed by looking to the history of the rule in question, the rule's purpose and effect, and whether retrospective operation of the rule will further or retard its operation. *Whenry v. Whenry*, 98 N.M. 737, 652 P.2d 1188 (1982) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)). *See also Walker v. Maruffi*, 105 N.M. 763, 737 P.2d 544 (Ct.App.1987). We shall discuss each of these three factors separately.

Under the first factor, if the new law imposes significant new duties and conditions and takes away previously existing rights, then the law should be applied prospectively. *See Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982). We do not view *Hernandez* as having overruled precedent on which litigants may have relied. Although employer interprets *Duran v. Xerox Corp.*, 105 N.M. 277, 731 P.2d 973 (Ct.App.1986), as establishing a principle regarding statutes of limitations applicable to the fund, we disagree with this interpretation. We have held that *Duran* simply stated that the one-year statute of limitations under the Workers' Compensation Act did not apply to claims against the fund, and did not exclude application of other periods of limitation. *See Hernandez v. Levi Strauss, Inc.*

Employer also argues that the administrative practice of the Workers' Compensation administration since *Duran* precludes retrospective application. It argues that the administration has interpreted *Duran* as holding that there is *no* statute of limitations against the fund. We believe there are two sound responses to this argument. First, we do not consider assertions made by affidavit of a claims adjuster as sufficient or adequate to show that the administration has followed a practice based on its belief that there is no statute of limitations against the fund. Second, we believe that administrative practices in contravention of law are not legally sufficient to preclude retrospective application of that law. Neither did *Hernandez* take away any previously existing right. We are not convinced that, before *Hernandez* was decided, employers had the right to file claims against the fund within a period exceeding four years from the time they knew or should have known they had a claim.

We also do not believe that the limitations rule announced in *Hernandez* was an issue whose resolution was not clearly foreshadowed. Neither are we convinced by employer's argument that it could not foresee that some statute of limitations would apply for claims against the fund. Indeed, statutes of limitations governing civil claims have been in existence for a considerable number of years. *See* NMSA 1978, §§ 37-1-1 to 37-1-28 (Orig.Pamp.). We determine that the rule of *Hernandez* was foreshadowed by the decision in *Duran*, which stated that the statute of limitations found in the Workers' Compensation Act

did not apply to claims against the fund. *Duran* clearly left unresolved the question of which statute of limitations did apply. Section 37–1–4, providing a four-year limitation, is the catch-all time bar for all civil causes of action not specifically addressed elsewhere. This statute is not new. We thus conclude that the four-year statute of limitations announced in *Hernandez* was clearly foreshadowed by both *Duran* and the general limitations periods for civil claims.

Employer also argues that the triggering event declared in *Hernandez,* as commencing the running of the four-year period, was not foreshadowed. We disagree. Since this "knowledge" criterion is the same event that triggers the running of the statute for claims filed by an injured worker, *ABF Freight Sys. v. Montano,* 99 N.M. 259, 657 P.2d 115 (1982), we consider it a reasonable and foreseeable extension to conclude that an employer's claim against the fund would likewise begin to run when it knew or should have known it had a claim.

Fairness is the underlying consideration under the second factor. Employer argues it would be unfair to hold that its claim is governed by a four-year statute of limitations when it has been operating under the assumption that there was no statute of limitations on claims against the fund. We consider it unreasonable for employer to assume there was no statute of limitations on its claim. Since the purpose of a statute of limitations is to encourage promptness in filing causes of action and to eliminate stale claims, *Gaston v. Hartzell,* 89 N.M. 217, 549 P.2d 632 (Ct.App.1976), we believe it would be far more unfair to hold that an employer may assert a claim against the fund for an indefinite period.

Finally, under the third factor, we consider whether application of the rule at issue would further or retard its operation. We believe that application of the rule will serve to bar only those actions against the fund that are based on stale claims. On public policy grounds, we determine that application of the rule would further its purpose and operation, not impede it.

Having carefully considered the *Whenry* factors, we hold that the four-year statute of limitations with respect to claims by an employer against the fund, as announced in *Hernandez,* should be applied retrospectively. We interpret *Hernandez* itself as having declared that the rule would have retrospective effect, and we have consistently applied the four-year statute of limitations since *Hernandez. See City of Roswell v. Chavez,* 108 N.M. 608, 775 P.2d 1325 (Ct.App.1989); *Davis v. Los Alamos Nat'l Laboratory.*

In summary, we hold that the four-year statute of limitations, as applied in *Hernandez,* governs claims against the fund in all cases not governed by the 1988 amendment, 1988 N.M.Laws, ch. 109, § 7. Under our analysis, since under either of the two arguments asserted by employer the fund was entitled to judgment as a matter of law, summary judgment was proper. We therefore affirm the judge's order granting summary judgment.

IT IS SO ORDERED.

DONNELLY, J., concurs.

BIVINS, Chief Judge, concurring in part; specially concurring in part.

I concur in the discussion and result as to the first issue. I concur in the result only as to the second issue.

786 P.2d 57

David SALAZAR, Claimant–Appellee,

v.

YELLOW FREIGHT SYSTEM, INC., Self–Insured, Respondent–Appellant.

No. 11149.

Court of Appeals of New Mexico.

Jan. 4, 1990.

OPINION

DONNELLY, Judge.

Respondent, Yellow Freight System, Inc., appeals from the order of the Workers' Compensation Division (WCD) judge awarding compensation benefits, payment of medical services, and attorney's fees to claimant resulting from a work-related accident. Two appellate issues are presented: (1) whether claimant's action for workers' compensation benefits was barred by the doctrine of res judicata; and (2) whether the WCD judge's determination of disability and the award of compensation benefits are supported by the requisite evidence. We affirm.

Claimant was employed as a diesel mechanic for respondent. On July 19, 1987, claimant fell from a ladder during the course and scope of his employment and injured his back and buttocks. He was treated by a physician and returned to work on July 22, 1987. On August 18, 1987, respondent discharged claimant after a routine physical examination conducted by the Department of Transportation revealed traces of a controlled substance in claimant's urine sample.

The following month, on September 26, 1987, claimant filed an action for workers' compensation benefits, alleging that he was disabled as a result of his injury sustained on July 19, 1987. Following an informal conference before a WCD judge on November 5, 1987, a recommended resolution of claimant's action was filed on November 30, 1987. Although notified of the hearing date for the informal conference, claimant did not appear, but claimant's former attorney appeared at the conference. Claimant later testified that he had discharged his attorney prior to that hearing.

After the informal hearing, the WCD judge issued a recommended resolution of the claim, providing in part:

> [T]hat the case be resolved as follows:
>
> a) Claimant's disability, if any, is not a natural and direct result of any work accident;
>
> b) The claim is dismissed without prejudice and; [sic]
>
> c) Authorization to withdraw as counsel for Claimant is granted.

The recommended resolution further stated that any party who failed to file notice of acceptance or rejection of this recommended resolution within thirty days of receipt would be bound by the recommended resolution. On December 30, 1987, respondent filed a written acceptance of the recommended resolution; claimant made no response to the recommended resolution. On May 5, 1988, the judge entered an order directing that "the Recommended Resolution of May 2, 1988 * * * [shall] be filed."

Claimant filed a second claim for workers' compensation benefits against respondent on March 14, 1988 and alleged permanent partial disability as a result of injuries sustained by claimant on July 19, 1987. Respondent filed a written answer denying any liability, and, among other things, asserted the affirmative defense of res judicata. After an informal hearing, a WCD judge filed a recommended resolution which proposed dismissal of claimant's second claim on the ground that the proceeding was barred since, in the prior action, claimant's "disability, if any," had been

determined not to have resulted from a work-related accident.

Claimant rejected the recommended resolution. A formal hearing on the merits ensued, and the workers' compensation judge adopted findings of fact and conclusions of law and entered a compensation order which determined that claimant was 35% permanently partially disabled as a result of his accident on July 19, 1987. Respondent filed a timely appeal to this court.

I. DEFENSE OF RES JUDICATA

Respondent argues that the WCD judge erred in rejecting its affirmative defense of res judicata. Respondent contends that because the WCD entered an order in the first administrative proceeding determining that claimant had failed to establish that his injury stemmed from a work-related accident, and since claimant failed to pursue an appeal from the disposition of that action, the WCD erred in not determining that claimant was barred from relitigating his claim under the doctrine of res judicata. As part of the same issue, and related thereto, respondent urges that the claim is also barred under NMSA 1978, Section 52–5–5 (Repl.Pamp.1987).

In asserting that the order in the first proceeding is res judicata as to the claim sought to be raised in the second action, respondent argues that (1) because the workers' compensation judge in the first proceeding found that claimant's disability, if any, was not a natural and direct result of the July 19, 1987, accident; and (2) because claimant did not notify the director of his acceptance or rejection of the WCD judge's proposed informal resolution, the determination required by Section 52–5–5(C) was conclusive.

Respondent also argues that under *Armijo v. Save 'N Gain*, 108 N.M. 281, 771 P.2d 989 (Ct.App.1989), claimant's failure to timely challenge the recommended administrative resolution as set forth in Section 52–5–5(C) precludes further litigation of the workers' compensation action arising out of injuries he sustained as a result of the July 19, 1987 accident. Section 52–5–5(C) provides in pertinent part that following the issuance of the recommended resolution, each party has thirty days to notify the director as to acceptance or rejection of the recommended resolution. Failure to notify constitutes waiver, and a party who fails to notify the director is bound conclusively by his or her recommendation. *See* § 52–5–5(C).

We determine that Section 52–5–5(C) is not controlling under the facts herein, nor is the decision in the first administrative proceeding res judicata. The WCD judge's recommended resolution entered in the first proceeding expressly provided that "[t]he claim is dismissed without prejudice." *See Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct.App.1976) (holding dismissal without prejudice was not res judicata and that such dismissal ordinarily imports further proceedings). In determining whether an order is final, we construe the order in question in a practical, rather than technical, manner. *Clancy v. Gooding*, 98 N.M. 252, 647 P.2d 885 (Ct.App. 1982). A judgment or order is not final unless all issues of law and of fact necessary to be determined have been decided, and the case has been completely disposed of to the extent the court or hearing officer has the power to dispose of it. *Id.* The phrase "without prejudice," when used in an order of dismissal, evinces an intent not to clothe the order with finality and indicates that the order of dismissal was not intended to have a res judicata effect as to the merits of the controversy. *See Bralley v. City of Albuquerque*, 102 N.M. 715, 699 P.2d 646 (Ct.App.1985) (a dismissal without prejudice leaves the parties as if no action had been instituted); *see also Royal Ins. Co. v. Rousselot*, 720 S.W.2d 2 (Mo.Ct.App. 1986) (dismissal "without prejudice" in worker's compensation proceeding held not to be a determination of rights or issues on the merits, nor bar to refiling of claim).

In an effort to explain the dismissal "without prejudice," respondent seems to be arguing that the workers' compensation judge was concerned about future medical expenses. *See Graham v. Presbyterian Hosp. Center*, 104 N.M. 490, 723 P.2d 259

(Ct.App.1986) (court may dismiss main part of claim with prejudice, but should dismiss claim for future medical expenses without prejudice). Thus, respondent argues that, in order to avoid internal contradiction within the recommendation, it should be interpreted to mean dismissal with prejudice as to the main claim and dismissal without prejudice as to future medical expenses. We reject this argument for the following reasons: First, the prehearing officer's recommended resolution makes no distinction between any part of the claim. It simply recommends that "[t]he claim is dismissed without prejudice." Second, in the same recommended resolution, respondent's position is stated, in part, as being "[t]hat the injury did not occur in the course and scope of employment with Yellow Freight Systems." Respondent's stated position is also that if claimant is disabled it is not the result of any work accident. To now argue that the "without prejudice" language was intended to preserve future medical expenses runs counter to the position respondent took at the time of the prehearing conference. If claimant did not sustain a work-related accident, then he would have been entitled to no benefits at all, including medical expenses.

Armijo, relied upon by respondent, differs from the instant case. In *Armijo* the informal resolution and dispositional order entered by the WCD did not state that it was "without prejudice." In the instant case, under the language of the order itself, claimant was not precluded from initiating and pursuing a second claim for workers' compensation benefits arising from the same facts. Consequently, claimant was not bound by the findings and conclusions contained in the order of dismissal in the first proceeding.

II. SUFFICIENCY OF THE EVIDENCE

Respondent also challenges the validity of the judge's finding of claimant's disability in the second proceeding and contends that the determination is not supported by requisite substantial evidence. The judge found that claimant was 35% permanently partially disabled to his body as a whole.

Respondent's challenge to the evidence is based on his view that the prehearing officer made a factual determination in the first recommended resolution which conclusively binds claimant in this proceeding. The finding is that "Claimant's disability, if any, is not a natural and direct result of any work accident[.]" As noted above, however, claimant was not bound by the findings and conclusions entered in the first proceeding. Thus, our answer to respondent's first issue disposes of the second issue as well.

The determination of disability as reflected in the findings of fact and conclusions of law and the compensation order entered by the workers' compensation judge is supported by substantial evidence.

CONCLUSION

The compensation order is affirmed. Claimant is awarded $3,000 for the services of his attorney on appeal.

IT IS SO ORDERED.

BIVINS, C.J., and MINZNER, J., concur.

786 P.2d 674

Leo SANCHEZ, Plaintiff–Appellant,

v.

NEW MEXICO DEPARTMENT OF LABOR, EMPLOYMENT SECURITY DIVISION, and Furr's, Inc., Defendants–Appellees.

No. 18193.

Supreme Court of New Mexico.

Feb. 12, 1990.

Duff Westbrook, Albuquerque, for plaintiff-appellant.

Hal Stratton, Atty. Gen., D. Sandi Gilley, Sp. Asst. Atty. Gen., for defendants-appellees.

OPINION

MONTGOMERY, Justice.

Plaintiff Leo Sanchez (Sanchez) appeals the denial of his application for unemployment benefits. The Department of Labor, Employment Security Division (Department), originally awarded him benefits. His employer, Furr's Inc. (Furr's) appealed. After hearing evidence the Department's hearing officer reversed, holding that Sanchez was disqualified from receiving benefits because his employment had been terminated for misconduct. After the Department's Board of Review affirmed the hearing officer, Sanchez filed a petition for certiorari in district court pursuant to NMSA 1978, Section 51-1-8(M) (Repl. Pamp.1987), and SCRA 1986, 1-081(C) (now SCRA 1986, 1-081(B) (Cum.Supp.1989)). The district court entered findings and conclusions upholding the denial of benefits. Finding that the ruling of the district court is supported by substantial evidence in the record as a whole, we affirm.

I.

Sanchez was employed as assistant manager at a supermarket in Albuquerque. As part of his job he was responsible for ensuring that grocery items were unloaded from delivery trucks onto the loading dock and then stocked onto the store's shelves prior to the store's opening at 8:00 a.m. In order to accomplish this he was required to report to work at 4:00 a.m.

In 1987 the store had been experiencing problems with excess shrinkage of inventory. Because of this, in February 1987 the employer hired a security officer to conduct an investigation of what was apparently an ongoing inventory theft problem. In July 1987, still concerned with possible theft, the employer instituted a policy whereby all members of management were prohibited from opening or closing the store unaccompanied by another employee. Under the policy the person in charge of opening the store, accompanied by another authorized employee, was required to sign the opening/closing log, print the name of the second employee present, and indicate actual time of opening. Sanchez was aware of this policy and had, along with other managerial employees, signed a written copy of the policy. The copy signed by Sanchez stated that *"THERE WILL BE ABSOLUTELY NO EXCEPTIONS TO THIS POLICY!!!"*

On the morning of December 31, 1987, the investigator employed by Furr's was

conducting surveillance from a parking lot across the street from the store. He observed Sanchez arriving at the store at approximately 3:26 a.m. He testified that Sanchez circled the store once in his car, then parked near the building, not in his usual parking place, and entered the store alone. He left approximately ten minutes later, drove around the building a second time with his lights off, and then drove away. He returned shortly after 4:00 a.m. and parked in his usual space. By the time he returned two other employees had opened the store. They discovered that the alarm system for both the front and back doors of the store had been turned off. Sanchez' time card indicated that he clocked in at 4:08 a.m.

Sanchez steadfastly maintained that the reason he entered the store early was to verify whether a delivery truck had arrived. He stated that the store had experienced problems with trucks arriving late or not at all and that during this period the store was understaffed and it therefore had become increasingly difficult for him to ensure that the store shelves were stocked on time. He further claimed that he had asked the manager to call him to tell him whether the truck had arrived, and when he was not called he went to the store to check for himself. When he left the store he went to pick up another employee whom he often gave a ride to work, but when the employee did not come out he returned to the store in order to begin his shift at 4:00.

The security officer testified that he was keeping the store under surveillance because of problems with shortages in cigarettes. There are suggestions in the record that Sanchez had been under suspicion because his wife owned a smoke shop, but at the hearing the Furr's district manager testified that Sanchez was not fired because he was suspected of stealing but because he had violated the company policy by entering the store alone. There is no evidence that Sanchez had violated the policy on any other occasion.

Sanchez argues two grounds for reversal on appeal: (1) The district court's determination that he was discharged for misconduct was not in accordance with law, and (2) the district court's decision is not supported by substantial evidence. We first discuss the standard of review, then the two issues raised.

II.

On certiorari from an agency determination the district court is to determine whether, viewing the evidence in the light most favorable to the agency's decision, the findings have substantial support in the record as a whole. *In re Apodaca,* 108 N.M. 175, 177, 769 P.2d 88, 90 (1989). The court may not reweigh the evidence. *Id.*

The district court is required to adopt the agency's findings of fact that it determines are supported by substantial evidence and to make such conclusions of law as lawfully follow therefrom. *Rodman v. New Mexico Empl. Sec. Dep't,* 107 N.M. 758, 763, 764 P.2d 1316, 1321 (1988). Where, however, the court decides that the result reached by the agency was correct, but that the specific findings are inadequate or ambiguous due to a misapprehension of the law, the court may adopt independent findings and conclusions based on the record made before the agency. *Id.* This Court reviews the district court's findings to see if they are supported by substantial evidence in the record as a whole.

In this case the district court entered its own findings and conclusions. The court concluded that "[t]he claimant's conduct in entering the employer's premises at 3:26 a.m. on December 31, 1987 alone constitutes a willful and wanton violation of a resonable [sic] and known rule," and that "[t]he claimant was discharged for misconduct connected with work and is properly disqualified from receipt of unemployment compensation benefits for having been discharged for misconduct...."

III.

NMSA 1978, Section 51-1-7(B) (Repl. Pamp.1987) provides that an individual shall not be eligible to receive unemployment compensation benefits "if it is determined by the department that he has been

discharged for misconduct connected with his work or employment." Misconduct is not defined in the statute.

Sanchez argues that the Department used an incorrect definition of "misconduct." The hearing officer concluded that:

> "misconduct" denotes a material breach of the contract of employment or conduct reflecting a wilful disregard to [sic] the employer's best interests.
>
> An employee discharged for violating a company rule, generally is considered discharged for misconduct connected with his work.... However, in order for misconduct connected with his work to be found, it must be determined that the claimant knew, or should have known of the rule and that the rule was reasonable and enforced.

Sanchez points out that this definition of misconduct was expressly rejected by this Court in *Rodman v. New Mexico Empl. Sec. Dep't,* 107 N.M. 758, 763, 764 P.2d 1316, 1321 and *In re Apodaca,* 108 N.M. 175, 179, 769 P.2d 88, 92. His contention is correct. This definition had been used by the Department in *In re Apodaca,* where we stated:

> We rejected this definition in *Rodman* as inconsistent with the *Mitchell* standard requiring a willful or wanton disregard of the employer's interests. The use of the term "or" implies that any breach of the employment contract sufficient to warrant discharge of the employee serves as adequate grounds for denial of benefits, whether or not the employee acted in a willful or wanton manner. "Where an employee has not acted with the requisite degree of 'fault' under *Mitchell,* he or she has not sacrificed a reasonable expectation in continued financial security such as may be afforded by accrued unemployment compensation benefits." (citation omitted).

108 N.M. at 179, 769 P.2d at 92 (quoting *Rodman,* 107 N.M. at 761, 764 P.2d at 1319).

This, however, does not end the inquiry. The Department's use of the incorrect definition is not fatal to its case if the reviewing court applied the correct law to the facts. *See Rodman,* 107 N.M. at 763, 764 P.2d at 1321.

This Court adopted the Wisconsin court's definition of "misconduct" 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)):

> "... 'misconduct' ... 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, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. 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."

In concluding that "[t]he claimant's conduct in entering the employer's premises at 3:26 a.m. on December 31, 1987 alone constitutes a willful and wanton violation of a resonable [sic] and known rule," and that "[t]he claimant was discharged for misconduct connected with work and is properly disqualified from receipt of unemployment compensation benefits for having been discharged for misconduct," the district court was applying the correct standard in determining that Sanchez' actions rose to the level of misconduct.

Sanchez argues that evidence of only one incident of his violating his employer's rules cannot support the district court's determination of misconduct, citing *Mitchell* and *Alonzo v. New Mexico Empl. Sec. Dep't,* 101 N.M. 770, 689 P.2d 286 (1984). Sanchez' argument fails to take into account the nature of the act involved and the reason for the policy. Misconduct is a

question of fact to be determined from all the attendant circumstances. *Trujillo v. Employment Sec. Dep't,* 105 N.M. 467, 734 P.2d 245 (Ct.App.1987). In *Mitchell* we held that although each separate incident of improper attire, name calling and other conduct evincing a willful disregard of the interests of the employer may not have been sufficient in itself to constitute misconduct, taken in totality the conduct was sufficient to classify it as misconduct. On the other hand, in *Alonzo* we held that claimant's conduct in refusing to wear a smock on one occasion was an isolated incident in an otherwise good performance record and did not rise to the level of willful or wanton misconduct that would harm her employer's business interests.

Sanchez appears to be arguing that the "totality of the circumstances" test applies only in the situation of multiple minor infractions of an employer's rules. However, we have said that

> the "totality of circumstances" is relevant in contexts other than discharge after the accumulation of a series of minor incidents. The "totality of circumstances," such as provided by the employee's past conduct and previous reprimands, may also be used to evaluate whether the employee acted with willful or wanton disregard of the employer's interests on the occasion that precipitated his or her termination.... Other relevant circumstances include the worker's knowledge of the employer's expectations, the reasonableness of those expectations, and the presence of any mitigating factors.

Rodman, 107 N.M. at 762, 764 P.2d at 1320.

In *Rodman* we pointed out that there are two components to the concept of misconduct sufficient to justify denial of benefits. "One is the notion that the employee has acted with willful or wanton disregard for the employer's interests; the other is that this act significantly infringed on legitimate employer expectations." *Id.* at 761, 764 P.2d at 1319. It is possible for a single act to meet this standard where that one act significantly affects the employer's interests and the policy behind the rule is reasonable and is known to the employee. *See, e.g., Trujillo v. Employment Sec. Dep't* (holding that employee's refusal to report for overtime work on one occasion constituted misconduct where, under employment contract, employer had right to draft employees to work overtime in emergency situations significantly affecting employer's interests; distinguishing *Alonzo* on the ground that employee's conduct in that case did not significantly affect her employer's business). *See also Coleman v. Department of Labor,* 288 A.2d 285 (Del. Super.1972) (one incident of being drunk on job and brandishing a realistic toy gun is wanton behavior not requiring prior warning before termination); *Jackson v. Doyal,* 198 So.2d 469 (La.Ct.App.1967) (an employee's deliberate violation of a reasonable rule in connection with his work is sufficient to constitute willful misconduct; misconduct should be determined not on the basis of the number of violations of a rule, but by the nature of the violation). *Cf. In re Apodaca* (no evidence that the color of employee's hair significantly affected the employer's business); *Mitchell v. Lovington Good Samaritan Center, Inc.,* 89 N.M. at 577, 555 P.2d at 698 ("*inadvertencies or ordinary negligence* in isolated instances" not misconduct) (emphasis added) (quoting *Boynton Cab Co. v. Neubeck,* 237 Wis. 249, 259–60, 296 N.W. 636, 640 (1941)).

We hold that in concluding that Sanchez' actions rose to the level of a "willful and wanton violation of a reasonable and known rule," and that this constituted misconduct connected with work, the district court correctly applied the established law to the facts.

IV

Under the second issue on appeal Sanchez argues that a significant portion of the district court's findings are irrelevant to, and therefore do not support, its conclusion that he was discharged for misconduct connected with his work. Specifically he objects to any findings relating to merchandise shortages and the employer's investigation of those shortages. He argues that

these findings cannot be relied on to support the determination of misconduct and must therefore be disregarded by this Court, and that once these findings are disregarded there is no substantial evidence to support the district court's conclusion.

Even if Sanchez were correct in arguing that the findings are irrelevant, and even if they were incorrect, this would not, as he contends, require reversal. Erroneous findings of fact not necessary to support the judgment of the trial court are not grounds for reversal. *Specter v. Specter*, 85 N.M. 112, 114, 509 P.2d 879, 881 (1973). However, the findings challenged by Sanchez are relevant because they deal with the circumstances surrounding the company policy. The reason for the policy is relevant in determining its reasonableness and the possible effect on the business of a violation of that policy.

At the hearing, the Furr's district manager stated that Sanchez was terminated for violating company policy, not because he was suspected of stealing. In order to hold that this incident rose to the level of misconduct the district court had to conclude that the conduct constituted a willful and wanton violation of a reasonable and known rule. In support of this conclusion the court found that it was company policy that managerial employees not open or close a store alone and that Sanchez was aware of this rule. This finding is supported in the record by a copy of the company's written policy signed by Sanchez. The conclusion is further supported by testimony of the security officer that he witnessed Sanchez entering the store alone at 3:26 a.m. The reasonableness of the policy is shown by other findings indicating why such a policy was instituted. These findings are based on testimony at the hearing.

Sanchez also argues that the district court erred in not making a specific finding that his entering the store adversely affected his employer's interests. This was unnecessary. "[F]indings are to be liberally construed in support of a judgment, and such findings are sufficient if a fair consideration of all of them taken together justifies the trial court's judgment." *State ex rel. Goodmans v. Page & Wirtz Constr. Co.*, 102 N.M. 22, 24, 690 P.2d 1016, 1018 (1984). Under the totality of the circumstances in this case, once it was shown that the employer instituted a reasonable rule in an attempt to stem an ongoing theft problem and that Sanchez violated the rule, it may be inferred that the violation significantly infringed on legitimate employer interests. In entering the store alone and failing to sign the log, Sanchez frustrated the employer's attempt to deal with the theft problem by setting up a system of accountability. Further, when Sanchez disconnected the burglar alarm and did not reconnect it upon leaving the store he left the employer vulnerable to theft. An adverse impact on the employer's interests can result from the creation of an unreasonable risk as well as from actual demonstrated harm. The increased vulnerability to theft and the interference with the attempt to provide accountability are sufficient to constitute a significant adverse impact on the employer's interests.

Even though the Department incorrectly stated the definition of "misconduct," the district court applied the correct law to the facts in this case. One incident of violating a reasonable known rule significantly affecting the employer's interests may constitute misconduct. Substantial evidence in the record as a whole supports the findings of the district court. We therefore affirm.

IT IS SO ORDERED.

SOSA, C.J., and WILSON, J., concur.

786 P.2d 680

STATE of New Mexico,
Plaintiff–Appellee,

v.

Thomas ALTGILBERS,
Defendant–Appellant.

No. 10071.

Court of Appeals of New Mexico.

Dec. 7, 1989.

Certiorari Denied Jan. 22, 1990.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Appellate Defender, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HARTZ, Judge.

Defendant appeals his convictions on eighty-three counts of criminal sexual penetration (CSP) and criminal sexual contact (CSC) perpetrated on children under thirteen years of age, in violation of NMSA 1978, Sections 30–9–11(A) and –13(A) (Repl. Pamp.1984). The offenses occurred between 1980 and 1985. Two of defendant's daughters, ages twelve and nine at the time of trial in 1987, were the victims of these crimes.

Defendant makes the following contentions on appeal: (1) the district court erred by admitting prior statements by his children which identified him as their abuser; (2) defendant was denied his constitutional right to confront the witnesses testifying against him because the state, rather than calling his children to testify at trial, used videotapes of depositions during which the children testified without being able to see defendant; (3) the district court erred by denying defendant's motion for a mistrial based on the state's nondisclosure of allegedly exculpatory evidence; (4) for a variety of interrelated reasons arising out of the children's inability to be precise as to the time of most of the offenses, (a) the indictment was defective in charging one count of each offense for every period of two or three months and (b) guilt was not proved beyond a reasonable doubt for seventy-two of the eighty-three counts; and (5) the district court erred by admitting testimony concerning defendant's physical abuse of the children and physical and sexual abuse of their older sister.

We affirm defendant's convictions.

1. ADMISSION OF CHILDREN'S STATEMENTS

A therapist, a pediatrician, and a psychologist each testified that the two children had identified defendant as their abuser. The district court admitted the statements to the therapist pursuant to SCRA 1986, 11–801(D)(1)(b) as pretrial consistent statements which rebutted charges of improper influence or motive. The statements to the pediatrician and psychologist were admitted pursuant to SCRA 1986, 11–803(D), as statements made for purposes of diagnosis or treatment. Defendant contends that this testimony constituted inadmissible hearsay and violated defendant's constitutional right of confrontation.

A. *Pretrial Consistent Statements*

We affirm the district court's admission of the testimony of the therapist, Ms. Flavill, pursuant to Rule 11–801(D)(1)(b). This rule states:

D. * * * A statement is not hearsay if:

(1) * * * The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

* * * * * *

(b) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive * * * *

Defendant attacked the credibility of his children's testimony by suggesting that the mother induced the children to fabricate the accusations against him in order to assist her in bitter divorce proceedings. To rebut this contention, the state offered Ms. Flavill's account of both the circumstances in which the children first made their accusations and the mother's reaction to the accusations.

Ms. Flavill testified that her first contact with the children was in August 1985 when the family was referred to her by the state Department of Human Services. Ms. Flavill was asked to provide therapy aimed at improving the mother's parenting skills and helping the children communicate with each other without physical violence. Successful therapy depended on determining the cause of the tension and stress apparent in the family.

When she first met the two children who testified against defendant, Ms. Flavill suspected from their behavior and appearance that they had been sexually abused. She felt, however, that it was best to wait for them to disclose any such information when they felt able to do so. She did broach the subject with the mother, but to no avail. Ms. Flavill testified:

> The first time I asked Mrs. Altgilbers about possible sexual contact with her children was at the end of January [1986] * * * I asked her at the time during one of our therapy sessions, I asked her if it was possible that the girls have ever been touched by anybody. And I used that word, I didn't use "sexual contact," I used the word "touch," and she kind of offhandedly said no, kind of surprised and kind of just no investment at all, just no. And I just left it there. And I just wanted to see if she had any information, which she didn't seem to.

It was only after approximately eight months of therapy, in April 1986, that the two children disclosed that their father had sexually abused them. Ms. Flavill described the disclosure as follows:

> I have a book on body, just body images, that is used with young children. It's designed with children in fourth and down to talk about how wonderful our bodies are and how great we feel about ourselves. At the end there is a section on sexual reproduction and very simple drawings. And I placed the book—and we'd gone through many chapters. This was like the third and fourth week on body image, and they started to look through the book, and then [the younger child] began—[the older child] began to become very upset in the picture of reproduction and, again, very simple line drawing, and that's when I asked what is upsetting about this picture. She said, "Those are things my dad has done to me."

Ms. Flavill testified that the younger child then left the house, while the older child described in detail the sexual contact she had with her father. When this disclosure was finished, Ms. Flavill started to leave. At that point the younger child stopped her and indicated that she wished to talk. While the older child was in another room, the younger child proceeded to relate in detail the sexual contact with her father. During the younger child's disclosure, the children's mother came home. Ms. Flavill continued as follows:

> [W]hen the girls were crying when she came in, I said to her right there, I said, "You know, the girls are talking about sexual contact with their father"? And she said "No, that can't be." At the same time she's saying it can't be, she has tears rolling down her cheeks. So she was acknowledging on an emotional level, but on an intellectual level, she was saying, this can't be, "It's not true." And as she is crying, she is telling me that.

Ms. Flavill's testimony was undeniably relevant to rebut the contention that the children's accusations were instigated by their mother: The disclosures were prompted by the book on body images; the original disclosures were made separately by each child while their mother was not present; their mother declined the opportunity offered in January to accuse defendant of sexually abusing his children and even denied the sexual contact after the children's initial disclosure. The statements of the children were an integral part of this rebuttal and therefore admissible under Rule 11–801(D)(1)(b).

Defendant contends that the children's statements were inadmissible because they did not predate the alleged improper influence by the mother. Defendant argued that the mother had caused the children to make even their original allegations. Rule 11–801(D)(1)(b) does not, however, explicitly set forth any requirement concerning the timing of the consistent statements. To be sure, ordinarily a pretrial consistent statement will not rebut a charge of "improper influence or motive" unless the statement predates the influence or motive. Nevertheless, as this case illustrates, occasionally a statement made after the alleged influence or motive may tend to rebut the allegation. *See generally* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(1)(b)[01], at 801–154 to –156 (1989) (collecting federal cases that consider whether consistent statements must antedate alleged existence of motive to fabricate). We see no reason to require exclusion of evidence that satisfies the terms of Rule 11–801(D)(1)(b). *See State v. Lucero,* 109 N.M. 298, 784 P.2d 1041 (Ct.App.1989). Admission of Ms. Flavill's testimony was within the district court's discretion.

Defendant also contends that the prior statements were not admissible under Rule 11–801(D)(1)(b) because the declarants were not "subject to cross-examination concerning the statement[s]," as required by the rule. The children testified via videotaped depositions conducted before trial. Defendant claims that prior to Ms. Flavill's courtroom testimony he was unable to cross-examine the children regarding their statements to her. Yet defendant took a statement from Ms. Flavill prior to the videotaped depositions; so he knew that the children had made statements to her. Defendant had the opportunity to, and did, cross-examine the children about the substance of their testimony. He does not suggest any reason why he could not have cross-examined them concerning their statements to Ms. Flavill. He could have preserved any objection to the admissibility of the statements by making his videotaped cross-examination concerning the statements subject to the admission of the statements. *Cf. Sanderson v. Steve Snyder Enters., Inc.,* 196 Conn. 134, 491 A.2d 389 (1985) (party may object at trial to testimony from discovery deposition offered by opposing party even though objecting party asked the objectionable questions or elicited the objectionable answers); *Osborn v. Massey–Ferguson, Inc.,* 290 N.W.2d 893 (Iowa 1980) (same); 26A C.J.S. *Depositions* § 100 (1956) (same). Moreover, defendant made no request to the court to continue the depositions after trial was underway for the purpose of cross-examining the children concerning their prior statements. Nor did defendant raise a specific objection that Rule 11–801(D)(1)(b) was not satisfied because of the failure of the children to be examined at their depositions concerning their prior statements. Therefore, defendant waived any claim he had that the witnesses were not subject to cross-examination about their prior statements. *See United States v. Maultasch,* 596 F.2d 19, 24 (2d Cir.1979).

B. *Statements for Medical Diagnosis or Treatment*

We uphold the district court's admission of the testimony of the pediatrician, Dr. Geil, and the psychologist, Dr. Lockwood, under Rule 11–803(D). The rule provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * * * *

> (D) * * * Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

This rule is identical to Federal Rule of Evidence 803(4).

Controversy concerning this rule often arises in litigation involving accusations of child sexual abuse. In these cases such statements are often of great importance, yet they press against the limits of the hearsay exception. Former United States Supreme Court Justice Powell (a member of the Court when it prescribed Rule 803(4), *see* 409 U.S. 1132, 93 S.Ct. 3073, 34 L.Ed.2d lxv (1972)), sitting with a panel of the Fourth Circuit Court of Appeals, has authored a separate opinion summarizing the background, rationale, and content of this exception. *Morgan v. Foretich,* 846 F.2d 941, 950–53 (4th Cir.1988). The exception is derived from a common law exception:

> At common law, this exception traditionally was based on a dual rationale. First, the declarant's purpose in making the statement normally assures its trustworthiness because diagnosis and treatment may depend on what the patient tells the physician. Secondly, a fact reliable enough to serve as a basis for a physician's diagnosis or treatment generally is considered sufficiently reliable to escape hearsay proscription. Thus, if the declarant's motive in making the statement is consistent with the purpose of promoting treatment, and the content of the statement is reasonably relied on by a physician in formulating a diagnosis or mode of treatment, then the statement presumptively is admissible.

Id. at 951.

Some courts have read these two bases of the common law exception into the requirements of the codified rule. In the leading case of *United States v. Iron Shell,* 633 F.2d 77, 84 (8th Cir.1980), *cert. denied,* 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981) the court imposed a two-part test for admissibility of hearsay under Federal Rule 803(4): "first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in diagnosis or treatment." Applying this test, several courts have upheld the admission of statements made by a child to a physician or psychologist which identify a sexual assailant. *See, e.g., United States v. Renville,* 779 F.2d 430 (8th Cir.1985); *State v. Robinson,* 153 Ariz. 191, 735 P.2d 801 (1987) (En Banc); *State v. Maldonado,* 13 Conn.App. 368, 536 A.2d 600 (1988); *State v. Nelson,* 138 Wis.2d 418, 406 N.W.2d 385 (1987). *See also Stephens v. State,* 774 P.2d 60 (Wyo.1989) (following *Renville* but holding that state did not lay proper foundation). *Cf. Stallnacker v. State,* 19 Ark.App. 9, 715 S.W.2d 883 (1986) (admitting child's identification of perpetrators under equivalent of Rule 11–803(4)); *People v. Oldsen,* 697 P.2d 787 (Colo.App.1984) (same); *State v. Red Feather,* 205 Neb. 734, 289 N.W.2d 768 (1980) (same); *State v. Aguallo,* 318 N.C. 590, 350 S.E.2d 76 (1986) (same); *State v. Vosika,* 85 Or.App. 148, 735 P.2d 1273 (1987) (same); *State v. Garza,* 337 N.W.2d 823 (S.D.1983) (same); *Goldade v. State,* 674 P.2d 721 (Wyo.1983), *cert. denied,* 467 U.S. 1253, 104 S.Ct. 3539, 82 L.Ed.2d 844 (1984) (same); J. Myers & N. Perry, *Child Witness Law and Practice* § 5.36, at 360 (1987) ("growing majority" allows statements identifying abuser). *But see People v. Pluskis,* 162 Ill.App.3d 449, 113 Ill.Dec. 671, 515 N.E.2d 480 (1987) (statement of identity not admissible under counterpart of Rule 11–803(4)); *People v. LaLone,* 432 Mich. 103, 437 N.W.2d 611 (1989) (same); *State v. Bellotti,* 383 N.W.2d 308 (Minn.Ct. App.1986) (same); *Hall v. State,* 539 So.2d 1338 (Miss.1989) (same); *State v. Fitzgerald,* 39 Wash.App. 652, 694 P.2d 1117 (1985) (same).

Justice Powell, however, would not impose the two-part test. He agrees with *O'Gee v. Dobbs Houses, Inc.,* 570 F.2d 1084, 1089 (2d Cir.1978), which held that Federal Rule 803(4) applies "so long as the statements made by an individual were relied on by the physician in formulating his

opinion * * * *" *Morgan v. Foretich,* 846 F.2d at 952. Thus, the rule does not require inquiry into the motive of the declarant. Justice Powell found support for this interpretation in the Advisory Committee Note to the federal rule, which points out that Federal Rule of Evidence 703 (the equivalent of SCRA 1986, 11–703) permits an expert to testify to statements upon which he bases his opinion and that Rule 803(4) merely permits such statements to be admitted also for substantive purposes, a use of the statement which the jury would likely make in any event:

> These Notes explain that, at common law, statements made to a physician consulted only for the purpose of enabling him to testify were not admissible as substantive evidence. Rule 803(4) rejects this limitation because a physician, as an expert, is allowed to state the basis of his opinion, including statements of this kind. This calls for a distinction that juries are unlikely to make, and therefore the limitation has been abolished.

Id. at n. 2. *See* 4 J. Weinstein & M. Berger, *supra,* ¶ 803(4)[01], at 803–146 ("the test for statements made for purposes of medical diagnosis under Rule 803(4) is the same as that in Rule 703—is this particular fact one that an expert in this particular field would be justified in relying upon in rendering his opinion?"). Justice Powell recognizes that hearsay that meets Rule 803(4), as he interprets it, may not be as reliable as hearsay meeting the common law rule. He deals with this problem, however, by suggesting that the trial judge scrutinize such hearsay under Federal Rule of Evidence 403 (the equivalent of our Rule 11–403) to determine whether its prejudicial effect outweighs its probative value. Also, he indicates that in a criminal case (*Morgan* was a civil case) the Confrontation Clause may require exclusion of some such hearsay. *See Morgan v. Foretich,* 846 F.2d at 952 n. 2. The analysis under this approach would usually lead to the same results as that recommended in the thorough treatment of this subject in Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment,* 67 N.C.L.Rev. 257 (1989), although Justice Powell's approach may provide greater flexibility to the trial judge by permitting the judge to consider indicia of reliability besides those underlying the Rule 803(4) exception.

Turning to this case, the sole argument made in defendant's appellate briefs against the admissibility of the statements to Drs. Geil and Lockwood pursuant to Rule 11–803(D) is that statements as to fault are not "reasonably pertinent to diagnosis or treatment," and therefore are not admissible under that exception to the hearsay rule. As a general proposition, defendant's argument is correct. A surgeon treating a hip broken in a traffic accident has no need to know who ran the red light. In dealing with child sexual abuse, however, disclosure of the perpetrator may be essential to diagnosis and treatment. A number of courts have recognized this proposition. *See, e.g., United States v. Renville; State v. Robinson; Stallnacker v. State; People v. Oldsen; State v. Maldonado; State v. Aguallo; State v. Nelson; Goldade v. State.* Both Drs. Geil and Lockwood testified to the importance of the identity of the assailant. Dr. Geil testified as follows:

> Q. Dr. Geil, in the course of speaking with the girls for the purpose of your diagnosis and any follow-up treatment, what information is necessary to you?
>
> A. Information that the girls or the children state about what's—what happened to them, and usually when children talk about what has happened to them, they will talk about who was involved in making it happen to them. So that information is included in the history that I record in the chart.
>
> Q. Would that be important to you in making your diagnosis and evaluation of the girls?
>
> A. It would be important that they name or they be able to name the specific individual involved, yes, it would.

Dr. Lockwood testified:

> Q. Doctor Lockwood, as part of your evaluation, you discovered in talking with the girls, the girls' perception as

to the identity of the offender in this case?

A. That's correct.

Q. Did you feel that was important to know in terms of your evaluation?

A. Yes, I did.

Q. Why would it be important to know?

A. Because their perception of the offender has to be looked at relative to the descriptions of their own behavior in relationship to their experiences; has to be looked at relative to the psychological test data and kinds of emotions, kinds of stresses, kinds of anxieties, the kinds of self-perceptions and perceptions of other people that are included in and derived from the clinical test data.

It has to be looked at in terms of the probability that the experiences that they described are likely to have happened in the way they described them relative to their chronological age, developmental age. There are a variety of factors, then, that come into play once you are aware of the child's perception of the offender as well as other adults as other people who are supposed to be in positions of trust and authority.

Thus, the statements of the children to Drs. Geil and Lockwood meet the requirements of Rule 11–803(D). We need not consider the state of mind of the children in making the statements to the two doctors. We agree with Justice Powell that Rule 11–803(D), unlike the common law rule, does not require inquiry into the patient's motive in making the statement. In any event, defendant has not argued on appeal that the statements were inadmissible because the children lacked the required motive in making them. The trial judge properly acted within his discretion in admitting the testimony.

C. *The Confrontation Clause*

Although defendant contends that admissibility of the prior statements of the children violated his constitutional right to confront the witnesses against him, the argument in defendant's appellate briefs went no further than to claim that the evidence was not admissible under any hearsay exception. In any case, unlike in *Morgan* (in which Justice Powell suggested a possible Confrontation Clause problem with such hearsay), here both children testified and were subject to cross-examination concerning their allegations against defendant. Ordinarily, when the declarant is subject to effective cross-examination under oath about the extra-judicial statement, the Confrontation Clause is satisfied. *See* Weinstein & Berger, *supra,* ¶ 800[04], at 800–23 to –25. "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. Tafoya,* 105 N.M. 117, 122, 729 P.2d 1371, 1376 (Ct.App.1986) (emphasis in original), *vacated and remanded on other grounds,* 487 U.S. 1229, 108 S.Ct. 2890, 101 L.Ed.2d 924 (1988). *See State v. Hensel,* 106 N.M. 8, 738 P.2d 126 (Ct.App.1987). Defendant had such an opportunity at the children's depositions. Moreover, he could have sought to re-depose the children during trial. *Cf. United States v. Maultasch.* Thus, if the depositions were a constitutionally-adequate substitute for the testimony of the children at trial, the prior statements pose no Confrontation–Clause problem. In other words, the Confrontation–Clause issue with respect to the children's prior consistent statements reduces to the question of whether the use of the children's depositions at trial satisfied the Confrontation Clause. We address that issue in the next section.

2. VIDEOTAPED DEPOSITIONS

Defendant contends that because his daughters' testimony was introduced at trial through videotaped depositions, his constitutional right to confront the witnesses against him was violated. Defendant asserts that *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) requires reversal. *Coy* held that the use of videotaped depositions in that case violated the defendant's right to confrontation. We have, however, interpreted *Coy* to apply only when the district court fails to make

individualized findings that the particular witnesses require protection against testifying at trial face-to-face with the defendant. *See State v. Tafoya,* 108 N.M. 1, 765 P.2d 1183 (Ct.App.1988), *aff'g,* 105 N.M. 117, 729 P.2d 1371 (Ct.App.1986), *cert. denied,* — U.S. —, 109 S.Ct. 1572, 103 L.Ed.2d 938 (1989). *Accord State v. Vincent,* 159 Ariz. 418, 768 P.2d 150 (1989) (En Banc); *State v. Eaton,* 244 Kan. 370, 769 P.2d 1157 (1989); *State v. Conklin,* 444 N.W.2d 268 (Minn.1989).

The district court in this case made individualized findings that the children needed such protection. After hearing testimony of the victims' long-time therapist, Ms. Flavill, and of a psychologist, Dr. Lockwood, who had conducted a clinical interview and psychological tests of the victims, the district court made detailed oral findings as to why each child would suffer harm from having to testify in front of defendant.

Both Ms. Flavill and Dr. Lockwood expressed grave concern for the mental health of both victims if required to testify in the presence of defendant. Dr. Lockwood's testimony was:

> Q. * * * Dr. Lockwood * * * what is your opinion * * * as to the affect that the presence of Mr. Altgilbers will have on [the older child's] psychological make-up and her ability to testify?
>
> A. I think it would be devastating on both counts and I would be very concerned that the trauma she would suffer would be such that she might require hospitalization.
>
> * * * * * *
>
> Q. And in reference to [the younger child] and Mr. Altgilbers['] presence during testimony?
>
> A. I think there's a high probability she would regress to earlier and much less viable motion [stet] of functioning and intellectual functioning. So I think we would have marked increase in anxiety which would result in bizarre and infantile and self-destructive—not in the terms of suicidal—but in terms of the extremes of poor judgment in behavior that might have occurred earlier.

Ms. Flavill agreed with Dr. Lockwood. She went so far as to say that the older child "would just as soon die" as have her father present for the deposition; the child "would kill herself first, run away and then kill herself." Such testimony is sufficient to support a finding that these particular witnesses needed protection.

In addition, we observe that the trial judge in this case, now a member of our supreme court, was the same judge who presided at the trial in *Tafoya.* In *Tafoya* we noted that the trial judge had refused to allow a videotaped deposition of one child he believed to be capable of withstanding a face-to-face confrontation. In the present case the judge initially stated that defendant should be present at the depositions of the children. He changed his position only after a motion by the state and an evidentiary hearing. At the hearing the state called Dr. Lockwood and Ms. Flavill; defendant presented no witnesses. Clearly, the trial judge considered the issues on an individualized basis and did not presume that all child victims should be protected by the use of videotaped depositions outside the presence of the defendant. Such careful consideration distinguishes this case from *Coy.*

Also, the procedure used in videotaping the depositions was similar to that in *Tafoya.* In *Tafoya* the defendant sat in a separate room, where he could view the proceedings on a television monitor. The witnesses could not see him, but were aware that he could see them. Defense counsel, the prosecutor, and the trial judge were in the room with the witnesses. The defendant and his attorney could communicate through microphones and headsets.

During videotaping in this case defendant sat in a glass booth, where the witnesses could not see him. He was in contact through headphones with his attorneys, who were in the room with the judge, the prosecutors, and the witnesses. Each child was allowed to be accompanied by a supportive adult. Of course, each child was subject to cross-examination. Because the procedure was substantially similar to that in *Tafoya,* we reject defendant's con-

tention that the allowance of videotaped depositions violated his right to confront the witnesses against him.

3. NONDISCLOSURE OF ALLEGED EXCULPATORY EVIDENCE

Defendant contends that the district court erred in refusing to grant him a mistrial on the ground that the prosecutor failed to disclose exculpatory evidence to him, thus violating his right to due process. The undisclosed evidence was the statement by the children's therapist, Ms. Flavill, that one of the children had temporarily recanted her earlier accusations that defendant had sexually abused her. This evidence first came to defendant's attention during Ms. Flavill's trial testimony, after the jury had viewed the victims' videotaped depositions. Because of a number of factors we find no violation of due process in the state's failure to disclose Ms. Flavill's statement prior to trial.

One critical factor is that the evidence was disclosed at trial. The leading case in which the United States Supreme Court found that suppression of evidence by the prosecution violated due process is *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Yet in that case, and the later Supreme Court cases applying its principles, the defendant learned of the undisclosed evidence only after trial. Indeed, the Court has noted, "The rule of *Brady* * * * arguably applies in three quite different situations. Each involves the discovery, *after trial,* of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (emphasis added). In this case, unlike the *Brady* line of cases, the jury heard the previously undisclosed testimony. The damage to defendant therefore must lie in any impairment to his tactical use of the evidence because of delayed disclosure. At least one court has suggested that due process requires only that all available material exculpatory evidence be presented to the trier of fact, not that defendant have that evidence in time to make a tactical decision. *State v. Roussel,* 381 So.2d 796, 799–800 (La.1980). We need not go so far. Delaying disclosure of evidence to the defendant could affect the trial. Nevertheless, in general, imposition of a barrier to more effective use of evidence would have substantially less impact than total deprivation of use.

The United States Supreme Court has not established a standard to apply in evaluating whether delayed disclosure requires reversal of a conviction. The Supreme Court's test for a *Brady* violation is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). The language in *Agurs* restricting "[t]he rule of *Brady*" to evidence undisclosed until *after* trial suggests, however, that a different test applies to delayed disclosure such as in this case.

In order to decide the present case we need not establish precisely how to weigh any particular factor in determining whether delayed disclosure violates due process. A number of features here compel the conclusion that delayed disclosure did not deprive defendant of fundamental fairness, which is the essence of due process: The evidence was only arguably exculpatory; the evidence was cumulative; the witness who provided the evidence had been available to defense counsel for interview; defense counsel had been alerted to the possibility that the witness might have such evidence; the prosecution had in no sense intentionally deprived defendant of pretrial disclosure; and defense counsel did not seek an opportunity at trial to try to use the evidence more effectively. In short, the delayed disclosure almost certainly did not alter the result of the trial and defense counsel was at least as responsible as the prosecution for his not learning of the evidence prior to trial. We discuss each feature in turn.

The state contends that the child's recantation was not exculpatory. The prosecutor elicited Ms. Flavill's testimony concerning the recantation during her direct testimony in order to buttress the state's case.

Ms. Flavill testified that a temporary recantation fits the profile of a sexually-abused child. In addition, the child's recantation was so incredible that it reinforced the accusations. Ms. Flavill testified:

> The next therapy session that I came, she said, "You know, none of this happened to me," and I said, "can you tell me more about that, instead?" and she said, "you know, I've lied about all these incidents" and in great detail, "I've lied about this and I lied about dad and the bed, and I lied about the wooden bed and I lied about being four."
>
> I said, "You were never four?" and she said, "no, I was never four." Just a complete denial. She said she lied about wetting the bed * * * *

Of course, defendant is entitled to argue that the recantation was the true statement. Indeed, if the prosecution has a prior inconsistent statement of a material witness, it should disclose that statement to defendant. In this case, however, we question whether the prior statement would substantially impeach the credibility of the child.

Moreover, testimony that the child recanted to Ms. Flavill was cumulative evidence. The child had followed a similar course in relating her accusations to Dr. Geil: first implicating her father, then recanting the whole story, and then returning to her original account. Before trial the state disclosed to defendant the recantation of the child to Dr. Geil. Defense counsel cross-examined the child about that recantation during her deposition, although the child testified that she could not remember recanting. If defense counsel had known at that time of the recantation to Ms. Flavill, she undoubtedly would have questioned the child about that recantation also. But after learning at trial of the recantation to Ms. Flavill, defense counsel did not request an opportunity to re-depose the child for possible use at trial. Apparently defense counsel felt that only marginal benefit could be gained by additional cross-examination.

In addition, we would not characterize the state's failure to disclose the recantation as a typical "suppression" of evidence. Defendant does not contend that the state withheld from defendant some written document it possessed which reported the child's recantation. The undisclosed information was simply knowledge by the state of the probable testimony of a witness, Ms. Flavill, who was not in any sense withheld from the defense. On the contrary, defense counsel twice interviewed Ms. Flavill prior to trial. Ms. Flavill's knowledge of the recantation was as available to the defense as it was to the prosecution. In such a circumstance, other courts have held that the state has no obligation of disclosure. In *United States v. Campagnuolo,* 592 F.2d 852, 861 (5th Cir.1979), the court wrote: " '[T]he government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.' " (Quoting *United States v. Prior,* 546 F.2d 1254, 1259 (5th Cir.1977).) *Accord United States v. Pandozzi,* 878 F.2d 1526 (1st Cir.1989); *United States v. Starusko,* 729 F.2d 256 (3rd Cir.1984); 2 W. LaFave & J. Israel, *Criminal Procedure* § 19.5(e) (1984). *See Lewis v. State,* 497 So.2d 1162, 1163 (Fla.Dist.Ct.App.1986) (Jorgenson, J., specially concurring). There may be occasions when the defendant's access to a witness does not provide the defendant with equal access to that witness's knowledge; for example, the witness's knowledge may relate to some matter that is unlikely to be inquired into and the witness is unsympathetic to, and therefore unlikely to volunteer information to, the defendant. Here, however, defendant knew that the child had recanted to Dr. Geil. Therefore, if defendant had believed that evidence of additional recantations could be important to the defense strategy, one would have expected his counsel to inquire of other therapists as to whether the child had recanted to them also.

We also think it significant that the failure of the state to disclose the recantation to defendant was unintentional. The prosecutor so represented to the district court, and defendant has not challenged that representation. Although it is unclear what pertinence the state of mind of the prosecu-

tion has in a matter arising under *Brady*, *see United States v. Bagley*, 473 U.S. at 678–84, 105 S.Ct. at 3381–85 (opinion of Justice Blackmun, in which Justice O'Connor joined), the intent of the state can be dispositive in other circumstances in which a defendant claims that actions of the state unconstitutionally deprived him of evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (state destroyed evidence that might have been scientifically tested to determine identity of rapist).

Finally, we note that defense counsel did not seek a continuance after the disclosure at trial of the recantation to Ms. Flavill. In that circumstance, we believe that defendant has waived any claim that the belated disclosure impaired his ability to cross-examine or rebut Ms. Flavill's testimony effectively. *See* W. LaFave & J. Israel, *supra*, § 19.5(e); *Gorham v. Wainwright*, 588 F.2d 178 (5th Cir.1979); *Timmons v. Commonwealth*, 555 S.W.2d 234 (Ky.1977); *State v. Roussel.*

Thus, a number of factors contribute to the conclusion that delayed disclosure in this case did not deny defendant due process of law. We have not intended to suggest that any factor in itself would suffice to support affirmance. More precise analysis can await a more difficult case. We stress, however, that the best way to avoid reversal for failure to disclose evidence to defendant before trial is for the state to review methodically and diligently the information available to it and to disclose all exculpatory information to defendant, giving defendant the benefit of the doubt on arguable matters. *See State v. Sandoval*, 99 N.M. 173, 655 P.2d 1017 (1982).

4. CLAIMS ARISING FROM THE INABILITY OF THE CHILDREN TO PROVIDE A TIME FRAME FOR MOST OF THE ALLEGED OFFENSES EXCEPT TO SAY THAT DEFENDANT COMMITTED FREQUENT, VIRTUALLY INDISTINGUISHABLE ACTS OVER A LENGTHY PERIOD OF TIME

Defendant's two children testified to repeated sexual abuse over a period exceeding five years. The younger child testified that sexual contact happened every day or every other day. The older child testified that sexual contact occurred two or three times a week. Each count of the indictment alleged that the offense of criminal sexual penetration (CSP) or criminal sexual contact (CSC) occurred on or between one date (usually the first day of a month) and a date two or three months later.

Defendant appears to raise the following specific contentions: (1) the state should not be allowed to prosecute an ongoing offense by indicting on a number of charges; (2) the statute under which defendant was prosecuted is void for vagueness, because it grants unlimited discretion to the state in deciding how many charges to bring for a course of criminal conduct; (3) the indictment constituted overcharging, thereby suggesting to the jury that defendant must be guilty of something; (4) the failure to provide defendant with a description, including the date, of each specific instance of alleged sexual penetration or contact prevented him from formulating any definite defense or alibi; (5) the vagueness of the charges creates double jeopardy problems because defendant cannot tell if he has been convicted of both an offense and a lesser included offense; and (6) the convictions on seventy-two of the counts were not supported by evidence that could establish beyond a reasonable doubt that each charged act occurred sometime within the dates alleged.

Before specifically addressing each contention, we make some general observations, which should assist in resolving these issues. The state faces a dilemma when prosecuting on evidence such as that in this case. On one hand, charging one count for each week, or even a shorter period, throughout a multi-year period can be logistically overwhelming (hundreds of counts and jury instructions), oppressive to defendant, and to no purpose. On the other hand, one count may well seem inadequate to represent a great number of serious criminal offenses. Also, as will be discussed further in later sections of this

opinion, substantial unfairness to a defendant can result when one count, charging one act of misconduct, can be proved by evidence of any one of a multitude of separate acts committed over a lengthy period of time. New Mexico decisions have occasionally found prejudice when a conviction on a single count of an indictment could be sustained by proof of any one of several different acts. *See State v. Rodman,* 44 N.M. 162, 99 P.2d 711 (1940); *State v. Foster,* 87 N.M. 155, 530 P.2d 949 (Ct.App. 1974); *State v. Salazar,* 86 N.M. 172, 521 P.2d 134 (Ct.App.1974). *Cf. State v. Gurule,* 90 N.M. 87, 92, 559 P.2d 1214, 1219 (Ct.App.1977) (defendant's argument rejected because only one offense charged). Such concerns are often considered under the rubric of "duplicity"—"the joinder of two or more distinct and separate offenses in the same count [of an indictment]." *State v. Peke,* 70 N.M. 108, 114, 371 P.2d 226, 230, *cert. denied,* 371 U.S. 924, 83 S.Ct. 293, 9 L.Ed.2d 232 (1962).

Recognizing this dilemma, courts have deferred to the prosecutor's charging pattern in such circumstances. As expressed in *United States v. Shorter,* 608 F.Supp. 871, 876 (D.D.C.1985), *aff'd,* 809 F.2d 54 (D.C.Cir.1987), *cert. denied,* 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 35 (1987):

> [I]t is well established that two or more acts, each of which would constitute an offense standing alone and which therefore could be charged as separate counts of an indictment, may instead be charged in a single count if those acts could be characterized as part of a single, continuing scheme.
>
> The grand jury, presumably under the guidance of the prosecutor, may charge few or many counts depending upon a variety of factors, and, absent oppression or impermissible duplicity, the decision with respect thereto is within the realm of grand jury and prosecutorial discretion. [Citations omitted.]

Accord United States v. North, 708 F.Supp. 372 (D.D.C.1988). For several acts to be charged in one count, it is not necessary that the acts constitute a continuing offense. Several decisions relied upon by *Shorter* dealt with multiple discrete offenses. *See, e.g., United States v. Robin,* 693 F.2d 376 (5th Cir.1982) (threats on the President); *United States v. Girard,* 601 F.2d 69 (2d Cir.1979) (sale of government records relating to four different individuals). The proposition stated in *Shorter* is not restricted to federal courts. *See State v. Hunt,* 49 Md.App. 355, 359, 432 A.2d 479, 481–82 (1981) ("Another exception to the rule that only one offense may be charged in a single count is where the property is systematically stolen from one owner over a period of time * * * *"). *Cf. State v. Pedroncelli,* 100 N.M. 678, 675 P.2d 127 (1984) (whether series of embezzlements is one offense or multiple offenses is question of fact).

Unfortunately, the pattern of sexual misconduct alleged in this case is not rare. Prosecutors all too often face the charging problem presented here. Courts almost uniformly grant prosecutors discretion in how they frame the charges. As expressed in *State v. Petrich,* 101 Wash.2d 566, 571, 683 P.2d 173, 178 (1984) (En Banc):

> Multiple instances of criminal conduct with the same child victim is a frequent, if not the usual, pattern. Note, *The Crime of Incest Against the Minor Child and the States' Statutory Responses,* 17 J.Fam.Law 93, 99 (1978–79). Whether the incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion. Many factors are weighed in making that decision, including the victim's ability to testify to specific times and places. * * * The criteria used to determine that only a single charge should be brought, may indicate that the election of one particular act for conviction is impractical.

One jurisdiction that has held otherwise is New York. New York appears to require that indictments for sodomy and sexual abuse must provide separate counts for separate acts, *see People v. Keindl,* 68 N.Y.2d 410, 509 N.Y.S.2d 790, 502 N.E.2d 577 (1986), although the court may permit an exception when the victims cannot identify the acts with particularity. *See id.* at

420, 509 N.Y.S.2d at 794, 502 N.E.2d at 582. Other courts have not been so restrictive, although they may require measures during trial to prevent possible prejudice to the defendant from duplicity. *See State v. Covington,* 711 P.2d 1183 (Alaska Ct.App. 1985) (state may charge one count when multiple acts of child sexual offenses over lengthy period of time, but "either/or" rule applies: *either* (1) state must elect the act upon which it relies for conviction *or* (2) court must instruct jury that to convict it must agree unanimously on act constituting the offense); *People v. Jeff,* 204 Cal. App.3d 309, 251 Cal.Rptr. 135 (5th Dist. 1988) (counts embrace periods of time in which multiple offenses occurred; but court may need to instruct jury on need for unanimity as to specific criminal act); *People v. Long,* 55 Ill.App.3d 764, 13 Ill.Dec. 288, 370 N.E.2d 1315 (1977) (indictment charged monthly acts of incest for 15 months; testimony showed acts took place once or twice a month); *Bonds v. State,* 51 Md.App. 102, 442 A.2d 572 (1982) (one count for sexual offenses against 11-year-old girl occurring over 9-month period); *Commonwealth v. King,* 387 Mass. 464, 441 N.E.2d 248 (1982) (count charged defendant with unlawful intercourse with child "on divers dates and times" during 21-month period); *State v. Hoban,* 738 S.W.2d 536 (Mo.Ct.App.1987) (evidence on one count of sodomy with a child showed multiple incidents over 15-month period); *State v. Kitchen,* 110 Wash.2d 403, 756 P.2d 105 (1988) (En Banc) (follows the "either/or" rule). *See also State v. Mulkey,* 73 Md.App. 501, 534 A.2d 1374 (1988) (discussing cases from various jurisdictions upholding indictments, but remanding for bill of particulars to determine whether indictment stated with "reasonable particularity").

We now address defendant's specific contentions.

A. *The Decision as to How Many Counts to Charge*

Defendant's first contention appears to be that the state has split one course of conduct into too many counts. As we understand defendant, each ongoing offense (for example, the CSC offenses against the younger child) should be the subject of only one charge. We disagree.

We recognize that in most of the above-cited child sexual abuse cases one count of the indictment covered the entire period during which the alleged misconduct occurred. Still, we see no reason why the choice for the prosecution must be between either one count in toto or one count for each act. *See United States v. North* (three counts of obstruction of justice, each encompassing multiple acts); *Delcher v. State,* 161 Md. 475, 158 A. 37, 41 (1932) (series of embezzlements grouped by month). The charging pattern that best reconciles the community's interest in proper enforcement of the laws and the interest (shared by the community and the defendant) in fairness to the defendant may well be a charging pattern fitting between the two extremes. Once one departs from the alternatives of (1) charging one count for the entire period of time or (2) charging a count for every possible infraction, the prosecutorial decision is somewhat arbitrary; but the absence of a principle determining precisely where to draw lines does not mean that the drawing of a line is unfair or oppressive. Indeed, in the present case dividing the multi-year period of the alleged infractions into two- or three-month intervals advances the public interest in having the number of charges reflect the magnitude of the conduct while reducing potential problems (discussed at greater length later) with respect to notice to defendant, double jeopardy, and jury unanimity that would arise from a single count encompassing several years. In short, we reject defendant's contention that the indictment must charge only one count (encompassing the entire time period of the alleged violations) for each type of alleged offense.

B. *Void for Vagueness*

We also do not agree with defendant that problems of statutory vagueness forbidden by the Due Process Clause arise from permitting the state discretion in se-

lecting a charging pattern. The void-for-vagueness doctrine relied upon by defendant is directed at statutes whose language is so vague that (1) persons do not have fair warning as to what the law forbids and (2) law enforcement officers, judges, and juries have excessive discretion in deciding whether a particular person's conduct should be subjected to criminal sanctions. *See Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). In contrast, defendant has no claim that the CSP and CSC statutes are too vague to inform defendant or others what conduct is criminal. What is involved in the present case is not discretion to decide what acts are criminal but discretion to decide how to prosecute criminal acts. Such prosecutorial discretion is well-recognized in the law. Due process does not impose strict limits on that discretion. *See Bordenkircher v. Hayes,* 434 U.S. 357, 365, 98 S.Ct. 663, 669, 54 L.Ed.2d 604 (1978). No void-for-vagueness problem is presented in this case.

C. *Claim that Excessive Number of Counts Impermissibly Implies Prejudice*

There is no merit to defendant's contention that the indictment was improper because the number of counts compelled the jury to believe that defendant must have done something wrong. We have ruled before that the number of counts alone does not constitute prejudice. *See State v. Burdex,* 100 N.M. 197, 203, 668 P.2d 313, 319 (Ct.App.1983); *State v. Montano,* 93 N.M. 436, 439–40, 601 P.2d 69, 72–3 (Ct.App.1979). Given the nature of the evidence against defendant, we see nothing oppressive or otherwise improper in the number of counts in the indictment.

D. *Notice*

Defendant contends that the failure to inform him of each specific instance of sexual contact and the date prevented him from formulating any definite defense or alibi. Defendant cannot, however, raise lack of notice for the first time on appeal, particularly since he did not request a statement of facts before trial. *See State v. Martin,* 94 N.M. 251, 609 P.2d 333 (Ct. App.1980). At no time before or during trial did defendant claim that he had insufficient information to prepare his defense. Indeed, before trial, defense counsel had interviewed or deposed the children and the professionals who had examined them. Defendant knew the gist, perhaps even the totality, of the accusations against him. He never suggested that if he had received sufficiently precise allegations he could have presented an alibi defense for the multi-month counts of the indictment. On the contrary, he testified that he could not remember whether he was or was not home on particular days.

In any case we know of no principle of law that requires the state to rely only on evidence that lends itself to an alibi defense. If the record indicated that the state could have been more specific as to time, defendant's argument would have more force. The circumstances here, however, did not oblige the state to provide greater specificity. Notice need be only specific enough to enable the accused to prepare his defense and to protect against double jeopardy. *See State v. Naranjo,* 94 N.M. 407, 611 P.2d 1101 (1980); *State v. Mankiller,* 104 N.M. 461, 722 P.2d 1183 (Ct.App.1986). We note that when the state's evidence is imprecise as to time, the very vagueness of the allegations that handicaps an alibi defense can also cast doubt on the veracity, or at least the reliability, of the allegations. In a similar case the Maryland Court of Appeals wrote:

> The defendant who is charged with committing a crime, although the State cannot specify its exact date, is still protected by the requirement that the trier of fact must find him guilty beyond a reasonable doubt. We think that in many cases the trier of fact's determination of whether the defendant is guilty beyond a reasonable doubt will be affected by the witness's inability to specify the exact day and time of the alleged crime and the subsequent inability of the defendant to establish an alibi defense over so long a period of time. However, the inability of the State to be so specific should not be an absolute bar to prosecu-

> tion. Sufficient protections exist such that this lack of specificity does not violate an accused's constitutional right to be apprised of the charges against him.
>
> The crux of this case was who did the trier of fact believe? In many prosecutions the outcome depends on this determination. Here, the court obviously believed the testimony of the prosecutrix and disbelieved that of the appellant.

Bonds v. State, 51 Md.App. at 105–06, 442 A.2d at 575–76. *Accord State v. Hoban,* 738 S.W.2d at 541–42. In most of the child sexual abuse cases referenced earlier in this opinion, the period covered by each count of the indictment was at least as long as the periods covered by each of the counts against defendant here. In the circumstances of the present case we hold that defendant has no valid claim on appeal of inadequate notice.

E. *Double Jeopardy*

The usual double-jeopardy concern arising from duplicitous indictments is that the government may bring new charges, "arguing that the object of the new indictment was not encompassed under the earlier charge." *United States v. Shorter,* 608 F.Supp. at 879. That is not a problem here. Because of the scope of the indictment in this case, the state would not be permitted in the future to charge defendant with any sexual offenses involving his two children during the time encompassed by the counts in the indictment. *See State v. Rudd,* 759 S.W.2d 625, 628 (Mo.Ct.App.1988).

Nevertheless, defendant raises a double jeopardy claim. His contention is that because the charges of CSC are so imprecise, it is possible that the convictions of the crimes of CSC were actually lesser included offenses of the convictions for CSP. The final arguments of counsel at trial, however, establish that there was no confusion as to what alleged conduct formed the basis of the charges of CSC. Although the precise timing of the episodes of CSC and CSP was not provided, there was a clear distinction between which types of conduct constituted CSP and which constituted CSC.[1]

F. *Proof Beyond a Reasonable Doubt*

Defendant concedes that with respect to eleven of the eighty-three counts for which he was convicted there was sufficient evidence tying the alleged criminal act to a specific time (such as the time when the children's mother was visiting her own mother). For the other seventy-two counts, however, defendant claims that the "testimony that the acts occurred frequently within [the dates alleged for each count] does not establish beyond a reasonable doubt that a charged act actually happened within the times alleged in any one count." He relies on *People v. Atkins,* 203 Cal. App.3d 15, 249 Cal.Rptr. 863 (5th Dist. 1988). In *Atkins* the alleged victim of child sexual abuse could not pinpoint dates but testified that the abuse occurred repetitively over a long period of time. The court wrote: "[T]he prosecutor did not meet his burden to prove a specific offense with regard to [the pertinent counts]. Such a failure results in our finding that there is insufficient evidence to support these counts, and the judgment must be reversed as to these counts with retrial barred." *Id.* at 19, 249 Cal.Rptr. at 865. The rationale of *Atkins* was identical to that in *People v. Van Hoek,* 200 Cal.App.3d 811, 246 Cal.Rptr. 352 (5th Dist.1988), from which *Atkins* took several passages verbatim. We quote at length from *Van Hoek* to illustrate what we are rejecting under the facts of this case:

> C.'s testimony consisted of a blur of acts, nonspecific as to a particular occasion. When the victim's testimony is bland and unspecific as to any occasion and yet involves accusations of numerous occasions, it would be impossible for the jury to unanimously agree on one specific act for each charge. The argu-

1. Defendant also advances an argument that the convictions for CSC cannot stand because they may have been based on testimony concerning physical abuse by defendant—such as applying force to the buttocks of one of the children. But final arguments by the prosecutor and defense counsel made clear that defendant was not charged with any offense based on that conduct.

ment that the jury must have believed the victim was credible and believed all the acts occurred is unavailing. As previously discussed, the defendant, by these types of accusations and evidence, is seriously deprived of any defense except to generally attack the victim's credibility.

Implicit in the cases requiring specificity of charges and the charges being supported by specific testimony given at trial is the fundamental due process rule, steeped in antiquity, that the prosecution must prove a specific act and the twelve jurors must agree on one specific act.

Id., 200 Cal.App.3d at 817, 246 Cal.Rptr. at 356. The court concluded:

We too are deeply concerned with the resident child molester and would like very much for each of them to be brought to justice for their appalling behavior. But, this concern should not cloud the issue now before this court, which is that these types of cases, where the victim's unspecific testimony is uncorroborated, proceed in such a manner that the defendant's rights to due process are seriously violated. He is deprived of the right to mount an adequate defense and the prosecution is not required to meet their burden of proving the defendant committed a particular act on a particular and specific occasion. Here, the prosecution neither charged an offense specific as to time, place or other particular, nor did it prove a specific offense with regard to any count.

Id., 200 Cal.App.3d at 818, 246 Cal.Rptr. at 357.

The quotation from *Van Hoek* melds several different concerns: notice, jury unanimity, and "the fundamental due process rule, steeped in antiquity, that the prosecution must prove a specific act." *Id.*, 200 Cal.App.3d at 817, 246 Cal.Rptr. at 356. We have already addressed notice. Although defendant has not raised jury unanimity as an issue on appeal, a brief discussion will assist in treating the final concern of *Van Hoek.*

The principal unfairness that can result from a duplicitous count of an indictment (charging, say, acts A and B) is that some members of the jury may render a guilty verdict because they are convinced beyond a reasonable doubt that the defendant committed act A (but are not so convinced regarding act B) while other jurors convict the defendant because they are convinced that the defendant committed act B (but not act A). In that circumstance the defendant would be convicted improperly, because for neither act did the jurors agree unanimously that the defendant had committed it. To prevent this outcome, several jurisdictions have adopted an "either/or" rule. *See, e.g., State v. Covington* (Alaska); *State v. Kitchen* (Wash.). Under that rule *either* the prosecution selects one act (A or B) as the basis for a possible conviction *or* the court instructs the jurors that they must agree unanimously on one act (either A or B). Defendant in this case, however, did not request an election by the prosecution. Defense counsel did mention the advisability of a unanimity instruction during argument on his motion for a directed verdict at the close of the state's case; but the matter was abandoned because counsel did not submit a written instruction. *See* SCRA 1986, 5–608(D). Thus, our standard unanimity instruction, SCRA 1986, 14–6008, which was given in this case, sufficed. *See United States v. Phillips,* 869 F.2d 1361 (10th Cir.1988); *United States v. Pavloski,* 574 F.2d 933, 936 (7th Cir.1978). Moreover, nothing in the evidence distinguished among the various acts that could have been the basis for conviction on any particular count. Therefore, with respect to a conviction on any count, there would have been no rational basis for some jurors to predicate guilt on one act while other jurors predicated guilt on a different act. In that circumstance even in a jurisdiction that follows the "either/or" rule, failure to instruct the jury on unanimity is harmless error, *see State v. Loehner,* 42 Wash.App. 408, 711 P.2d 377 (1985), *cf. State v. Covington* (not plain error), if error at all, *see People v. Winkle,* 206 Cal. App.3d 822, 830, 253 Cal.Rptr. 726, 730 (2d Dist.1988) ("jury had no basis on which to distinguish between the acts about which [child victim] testified," so no need for una-

nimity instruction). *Cf. United States v. Robin* (no danger that defendant convicted by nonunanimous verdict because defendant admitted the charged acts and sole defense was lack of required mental state).

Our disagreement with *Van Hoek* and *Atkins* is not with their concerns about the need for proper notice of the charges and jury unanimity. Those are proper concerns with which the district court must deal, although not necessarily in the manner required by *Van Hoek* and *Atkins.* Our disagreement is with the statement that the failure of the prosecution to prove a distinct specific act requires dismissal of the charge for failure to prove guilt beyond a reasonable doubt. That proposition has a significantly greater impact than the propositions that the defendant must be provided adequate notice of the charges and that the verdict must be unanimous. Failure of notice or unanimity requires only reversal and remand for a new trial. When the state fails to prove guilt beyond a reasonable doubt, however, retrial is barred. *See Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Van Hoek states that the requirement of proof of a specific act is a "fundamental due process rule, steeped in antiquity." *Id.,* 200 Cal.App.3d at 817, 246 Cal.Rptr. at 356. *Accord People v. Atkins,* 203 Cal. App.3d at 22, 249 Cal.Rptr. at 867. But in the absence of any citation to authority by *Van Hoek,* we are at a loss to understand the exact scope of that "ancient" doctrine. Insofar as it applies to the present case, we reject it. Other districts of the California Court of Appeals have distinguished or rejected the Fifth District decisions in *Van Hoek* and *Atkins. See, e.g., People v. Moreno,* 211 Cal.App.3d 776, 259 Cal.Rptr. 800 (1st Dist.1989); *People v. Obremski,* 207 Cal.App.3d 1346, 255 Cal.Rptr. 715 (2d Dist. 1989); *People v. Slaughter,* 211 Cal.App.3d 577, 259 Cal.Rptr. 437 (3d Dist.), *cert. granted,* 261 Cal.Rptr. 704, 777 P.2d 1138 (1989); *People v. Sanchez,* 208 Cal.App.3d 721, 256 Cal.Rptr. 446 (4th Dist.1989). *But see People v. Jones,* 209 Cal.App.3d 89, 257 Cal.Rptr. 342 (4th Dist.), *cert. granted,* 260 Cal.Rptr. 182, 775 P.2d 507 (1989).

Even other panels in the Fifth District Court of Appeals have ignored *Van Hoek* and *Atkins* or expressed disagreement. *See People v. Jeff; People v. Luna,* 204 Cal.App.3d 726, 250 Cal.Rptr. 878 (1988); *People v. Vargas,* 206 Cal.App.3d 831, 253 Cal.Rptr. 894 (1988). We agree with the dictum in *Vargas* that disputes the holdings of *Van Hoek* and *Atkins. Vargas* argued that the state need only prove all the elements of the offense, and it is not an element of the crime that it have some distinguishing characteristic. The court also stated that the victim's inability to distinguish the individual acts did not render her testimony so inherently suspect as to be insufficient to support a conviction. The court concluded:

> Finally, we reject the argument that failure to provide evidence that would permit a distinction between the numerous acts renders the evidence insufficient or insubstantial as to guilt of a particular act. The essence of this argument is that because the jury cannot unanimously single out a specific act and relate it to the charge, the evidence is not substantial as to guilt and, therefore, insufficient to support the conclusion that defendant committed the charged count. This argument, however, blurs the distinction between substantial evidence that defendant committed the charged act and the due process concerns of [two 1901 California cases]. To infer the inability to single out a particular act necessarily implies a jury could not conclude the defendant committed that act overlooks the very real possibility that the jury believed everything the victim said and thus agreed defendant committed all of the acts to which the victim testified. If the jury agreed defendant did all of the acts testified to, it necessarily agreed he committed the single act or acts charged. Because the victim's testimony was sufficient to establish defendant committed all the elements of all the acts testified to, if believed, it was sufficient to support a conviction on the charged counts within the meaning of *Burks* [*v. United States* (1978) 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1].

Id., 206 Cal.App.3d at 853–54, 253 Cal.Rptr. at 906.

In the present case the victims gave specific accounts of the acts of CSP and CSC, and the locations in which the acts occurred (bedroom, bathroom, etc.). They simply could not provide specific dates, testifying only that the acts occurred two or more times per week. We uphold the verdict on each count because the evidence could convince a reasonable person beyond a reasonable doubt that defendant committed the charged offense during the alleged period. No juror need have a precise day in his or her own mind in order to vote for conviction. *See State v. Mankiller.* We recognize that the unanimity of the jury may be questioned when the evidence at trial in support of one count of the indictment relates to multiple acts at imprecise times. *Cf.* Note, *Right to Jury Unanimity on Material Fact Issues: United States v. Gipson,* 91 Harv.L.Rev. 499, 502 (1977) ("[O]nly common sense and intuition can define the specificity with which the jury must describe the defendant's conduct before it may convict."). That problem, however, is not a matter of the sufficiency of the evidence to prove guilt. Here the evidence was sufficient.

5. ADMISSION OF EVIDENCE CONCERNING OTHER ABUSE BY DEFENDANT

Defendant claims that admission of evidence regarding physical abuse of the two children and physical and sexual abuse of their older sister was extraneous and prejudicial, thereby depriving him of a fair trial.

Defendant objected at trial to testimony regarding defendant's physical abuse of the two children. The district court admitted this evidence pursuant to SCRA 1986, 11–404(B), which permits evidence of other bad acts for purposes other than "to prove the character of [defendant] in order to show that he acted in conformity therewith." A trial court may admit evidence under Rule 11–404(B) if it finds that its probative value outweighs any unfairly prejudicial effect. *See* R. 11–403; *State v. Beachum,* 96 N.M. 566, 632 P.2d 1204 (Ct. App.1981). Absent an abuse of discretion, the district court's decision to admit such evidence will not be disturbed on appeal. *State v. Garcia,* 99 N.M. 771, 776, 664 P.2d 969, 974, *cert. denied,* 462 U.S. 1112, 103 S.Ct. 2464, 77 L.Ed.2d 1341 (1983).

The evidence regarding physical abuse of the two children (and their older sister) was relevant to a disputed issue other than defendant's character. Defendant attempted to impeach the children's accusations by pointing out the long delay between the alleged acts and the children's reporting them. He claimed that the accusations resulted from the bitter divorce pending between the children's mother and defendant. The state responded that the children were fearful of their father. Evidence that the father had injured the children or that the children had knowledge of his injuring others would support the contention that they hesitated to accuse their father because of fear. Also, the evidence of defendant's acts of violence against the members of his family was admissible to prove his criminal intent, because one could infer that his purpose was to dissuade his family from reporting his offenses. Attempts to suppress evidence of crime are admissible to prove intent. *See* SCRA 1986, 14–5006 (uniform jury instruction regarding efforts to suppress evidence). The district court found this evidence to be more probative than prejudicial. We find no abuse of discretion in its ruling and therefore affirm the district court's admission of this evidence.

Defendant concedes that he failed to object at trial to the portions of the testimony relating to defendant's abuse of the children's sister. He asks this court to examine the issues under the fundamental error rule set forth in *State v. Vallejos,* 86 N.M. 39, 519 P.2d 135 (Ct.App.1974). *Vallejos* requires that the error deprive defendant of a fair trial. The only reference at trial to sexual abuse of the older child occurred when Dr. Lockwood was asked on direct examination to identify the materials she had reviewed in preparing to testify. She mentioned the older child's records from a group home and the Children's Psychiatric Hospital "relative to her treatment for the effects on her of physical and sexual abuse." This evidence of sexu-

al abuse was on its face admissible to explain the basis of expert opinion. *See* SCRA 1986, 11–703, –705. Although there may have been a gap in establishing the foundation for admission of the testimony (Dr. Lockwood did not explicitly state that the information regarding the older child formed part of the basis of her opinion), defendant failed to alert the prosecution to any possible failure in establishing the foundation. Such matters preliminary to admissibility are often omitted by trial counsel, because they expect opposing counsel to concede admissibility. We would be loath to permit counsel to sandbag an opposing party by withholding until appeal objections on such a matter. Moreover, we note that the testimony regarding sexual abuse of the older child was extremely brief; no details were provided; the abuser was not even named. That testimony did not deprive defendant of a fair trial.

CONCLUSION

Defendant's convictions and sentences are affirmed.

IT IS SO ORDERED.

DONNELLY and CHAVEZ, JJ., concur.

786 P.2d 699

In the Matter of the Termination of Parental Rights with Respect to KENNY F., a Child.

HELEN F., Respondent–Appellant,

v.

STATE of New Mexico, ex rel. HUMAN SERVICES DEPARTMENT, Petitioner–Appellee.

No. 11069.

Court of Appeals of New Mexico.

Jan. 4, 1990.

Frederick H. Sherman, Sherman and Sherman, P.C., Deming, for respondent-appellant.

Kent J. Cooper, Jeffreys, Cooper & Associates, Deming, Guardian Ad Litem.

Dale S. Morritz, Asst. Gen. Counsel, Human Services Dept. Office of Gen. Counsel, Albuquerque, for petitioner-appellee.

OPINION

HARTZ, Judge.

Mother appeals the district court's judgment terminating her parental rights to Kenny F. She contends that venue was improper, that she was denied due process and equal protection, and that the state failed to prove the statutory requisites for termination. Issues listed in her docketing statement but not briefed are deemed abandoned. *See State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985). We affirm.

I. FACTS

Kenny is the second oldest of mother's four children. In February 1983 the Human Services Department (the Department) filed a neglect action (CH 83–04) against mother in Hidalgo County as to all four children. After mother entered a plea of no contest to the allegations in the neglect petition, the Department obtained custody of the children. Kenny has been in foster care continuously since February 1983. The oldest child was returned to mother's custody in April 1984.

The Department filed a petition (SA 86–02) in Hidalgo County in August 1985 to terminate mother's parental rights to her three youngest children. In its December 1986 judgment the district court found that mother had failed to furnish proper parental care, control, or subsistence to the children and that the causes and conditions leading to the neglect were "unlikely to change in the foreseeable future despite reasonable efforts of the Department ... or other agency to assist [mother] in trying to adjust the psychological and emotional conditions which have rendered her unable to properly care for her children." The district court terminated mother's parental rights to her two youngest children, but did not terminate her parental rights to Kenny because there was no plan or probability that he would be adopted. The district court did, however, continue legal custody of Kenny in the Department. Both parties appealed the judgment to this court. We summarily affirmed when neither party responded to our initial calendar notice. *State ex rel. Human Servs. Dep't v. Helen F.*, Ct.App.No. 9749 (Memorandum Opinion filed February 24, 1987) (*Termination Hearing I*). We intimate no view with respect to the merits of the issues raised in that appeal.

In its March 1987 order on periodic review of the negligence case (CH 83–04) the district court, noting that mother had made no effort to maintain contact with Kenny, approved a treatment plan providing that the Department would seek termination of her parental rights with respect to Kenny. The order also denied her visitation rights to Kenny, continuing a denial instituted by order in October 1985, when the district court ruled that visitation was harmful to the children not in her custody. The district court later entered two more orders, one in January 1988 and the other in June 1988, providing that mother could request the Department to allow her to visit Kenny. Mother never requested such visitation.

In June 1988 the Department filed in Hidalgo County another application in SA 86–02 to terminate mother's parental rights to Kenny on the grounds of neglect and disintegration of the parent-child relationship. *See* NMSA 1978, § 32–1–54(B)(3), (4) (Repl.Pamp.1989). The district court conducted the hearing on this application in Grant County on August 30, 1988. On November 4, 1988, the district court ordered termination of mother's parental rights to Kenny. From this order mother appeals.

II. VENUE

Mother claims that venue for the termination hearing was improper in Grant County and that the hearing should have been held in Hidalgo County. Grant and Hidalgo Counties are part of the same judicial district. *See* NMSA 1978, § 34–6–1(F) (Repl.Pamp.1981). The courthouses in the two counties are less than fifty miles apart. Mother claims that venue for the termination hearing in Grant County was improper because Kenny and mother both resided in Hidalgo County. *See* NMSA 1978, § 32–1–55(A) (Repl.Pamp.1989) (venue for proceeding to terminate parental rights shall be in the court for the county in which the child is physically present or in the county from which the child was placed).

Whatever the merits of mother's legal argument, she waived her claim of improper venue. Although mother asserts that she orally objected to venue in Grant County prior to the periodic review hearing in CH 83–04 on July 12, 1988, and the termination hearing in SA 86–02 on August 30, 1988, the transcripts from those hearings show that no claim was made that the hearing in Grant County would violate a

venue statute. The thrust of the arguments at these hearings was that holding the hearings in Grant County violated mother's due process rights, a claim we consider below. Ordinarily, we will not reverse the district court on a ground that the district court was not asked to consider. *See State v. Aguilar*, 98 N.M. 510, 650 P.2d 32 (Ct.App.1982). This is not a technical matter, but a matter of sound policy. If mother's counsel had specifically pointed to the venue statute in arguing against holding the hearing in Grant County, any error could have been corrected promptly. The trial judge may have vacated the hearing and set a new hearing shortly thereafter in Hidalgo County. In contrast, if we were now to reverse the judgment below because of the venue argument that has been raised for the first time on appeal, we would inordinately delay a resolution of the merits of this case. Uncertainty in matters of custody and parental rights can only harm the child, whose interests are paramount in these disputes. That uncertainty should be resolved as soon as possible. For that reason, children's court matters receive the highest priority before this court. Because of mother's failure to raise her venue-statute objection at a time when any error could have been cured promptly, we refuse to consider the argument on appeal.

III. DUE PROCESS

The essence of procedural due process in this context is a fair opportunity to be heard and present a defense. *See In re Miller*, 88 N.M. 492, 498, 542 P.2d 1182, 1188 (Ct.App.1975). Mother claims first that her right to due process was violated because her poverty prevented her from attending the hearing in Grant County to present her case. Mother's brief contends that the Department never contacted her to make arrangements for her to be at the termination hearing. She asserts that the Department did no more than make several unsuccessful attempts to contact her by telephone, and that such efforts were insufficient. The transcript from the termination hearing does not support this contention. The Department's social worker testified that she informed mother of the hearing and offered to provide her with a ride or with money to make other arrangements. Mother never recontacted the social worker to seek assistance in attending the hearing. The social worker later telephoned mother (who had no telephone of her own) where she worked and at the homes of her mother and brother to make arrangements for her to be at the hearing, but no one answered the calls. Due process did not require the Department to do more.

Second, mother claims a violation of due process because her counsel did not receive prior to the hearing the report of an expert witness called by the Department, Dr. Caplan. Yet the district court could properly have found that her counsel had received the report. At the hearing the Department's counsel and social worker represented that the report had been mailed to mother's counsel and to the guardian ad litem; the guardian ad litem stated that he had received the report. A properly mailed document is presumed to have been received. *See Garmond v. Kinney*, 91 N.M. 646, 579 P.2d 178 (1978). Moreover, mother has failed to demonstrate how she was prejudiced by the Department's alleged failure to produce Dr. Caplan's report. *See State v. Tomlinson*, 98 N.M. 337, 648 P.2d 795 (Ct.App.), *rev'd in part on other grounds*, 98 N.M. 213, 647 P.2d 415 (1982). She claims an inability to cross-examine Dr. Caplan effectively with respect to the effect on Kenny of the sexual abuse committed against him by one of the other foster children in the home of the foster parents who hoped to adopt him. Mother's counsel, however, cross-examined Dr. Caplan and makes no showing of how that cross-examination was impeded by the alleged delayed disclosure of the report. Mother did not request a continuance because of the delayed disclosure. She sought only to strike all of Dr. Caplan's testimony. It is not reversible error to refuse to impose such a drastic sanction even though a less severe remedy, such as a continuance, may have been warranted if requested. *See id. Cf. Khalsa v. Khalsa*,

107 N.M. 31, 751 P.2d 715 (Ct.App.1988) (abuse of discretion to permit critically important undisclosed expert witness to testify after denying opposing party's request for opportunity to depose the expert).

Mother's final due process argument is that she should have been provided an expert witness to rebut Dr. Caplan. Yet her brief fails to point to anything in the record establishing that she made a request to the district court for such an expert witness. Therefore, her claim has been waived.

IV. EQUAL PROTECTION

Mother also contends that she was denied equal protection of the laws because the district court terminated her parental rights based on her indigency. This claim is frivolous. The district court's findings and conclusions were founded on considerations other than mother's indigency. The conduct of mother that led to termination of her parental rights was not necessitated by her lack of income.

V. INSUFFICIENCY OF THE EVIDENCE

Mother argues that the evidence at the hearing would not support termination of her parental rights under either Subpart (3) or (4) of Section 32–1–54(B).

A. *Section 32–1–54(B)(3)—Neglect*

Section 32–1–54(B)(3) provides that parental rights should be terminated with respect to a minor child when:

> (3) the child has been a neglected or abused child as defined in Section 32–1–3 NMSA 1978 and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the conditions which render the parent unable to properly care for the child[.]

Mother claims that she could not be a neglectful parent because one of her children continues to live with her. Kenny, however, is younger than the child in mother's custody and was developmentally delayed. Mother's capacities and attitudes with respect to the two children could be very different. The only question before the district court was whether termination was proper as to Kenny, not as to the other child.

Mother also contends that the district court's judgment cannot be affirmed under this section because there is no evidence that after our decision in *Termination Hearing I* the Department made reasonable efforts to remove the conditions of neglect in mother's home. The reasonable-efforts requirement is a central feature of recent legislation governing the protection of children. The federal Adoption Assistance and Child Welfare Act of 1980 (Public Law No. 96–272) requires states receiving federal assistance to adopt plans providing that "reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home[.]" 42 U.S.C. § 671(a)(15) (1982). To provide guidance to trial judges and others on the meaning of "reasonable efforts"—which is not defined by either federal or New Mexico statute—the National Council of Juvenile and Family Court Judges, the Child Welfare League of America, the Youth Law Center, and the National Center for Youth Law have produced *MAKING REASONABLE EFFORTS: Steps for Keeping Families Together* (hereinafter "Guidelines").[1]

The Department does not seriously dispute that it made no real effort to preserve the family after *Termination Hearing I.* Its actions were directed toward placing Kenny for adoption. The reasonable-efforts requirement does not, however, compel unreasonable efforts. When it becomes clear that preserving the family is not compatible with protecting the child, further efforts at preservation are not required.

1. The booklet can be obtained by sending a self-addressed mailing label to: Office of Communications, Edna McConnell Clark Foundation, 250 Park Avenue, New York, New York 10177–0026.

The Guidelines acknowledge this possibility by recommending that each state and local child welfare agency develop written guidelines articulating "[c]riteria for determining when efforts to reunify a family are no longer appropriate." *Id.* at 101. Our prior decisions also have suggested that further efforts to assist the parents are not required when there is a clear showing that they would be futile. *See State ex rel. Dep't of Human Servs. v. Peterson,* 103 N.M. 617, 622–23, 711 P.2d 894, 899–900 (Ct.App.1985); *In re Doe,* 97 N.M. 69, 71, 636 P.2d 888, 890 (Ct.App.1981). *Cf.* NMSA 1978, § 32–1–38.1(F)(4) (Repl.Pamp. 1989) (at periodic review hearing for neglected or abused child, court may continue legal custody in the Department *without* parental involvement in a treatment plan). Nothing in our mandate in *Termination Hearing I* contradicts this proposition.

The judgment in *Termination Hearing I* contained the following finding:

> 5. The conditions and causes leading to the neglect [of mother's three youngest children] are unlikely to change in the foreseeable future despite reasonable efforts of the Department of Human Services or other agency to assist [mother] in trying to adjust the psychological and emotional conditions which have rendered her unable to properly care for her children.

Given such a finding, the statute would not require the Department to make any further efforts to assist mother in an attempt to reunite her with Kenny. Mother might at a later time show a change in her circumstances from which the court could conclude that reasonable efforts might succeed, *cf. State ex rel. Dep't of Human Servs. v. Natural Mother,* 96 N.M. 677, 634 P.2d 699 (Ct.App.1981) (change in circumstances required the Department to provide current evidence of parent's neglect); but a court could properly assume that in the absence of evidence of such a change the situation set forth in finding No. 5 would continue.[2] *Cf. State ex rel. Human Servs. Dep't v. Dennis S.,* 108 N.M. 486, 775 P.2d 252 (Ct.App.1989) (distinguishing *Natural Mother* because no significant change in circumstances).

Mother does not point to any evidence showing a change since *Termination Hearing I* that would indicate greater prospects for success of the Department's efforts to improve her parenting skills with respect to Kenny. Nor does she challenge the sufficiency of the evidence in *Termination Hearing I* to support finding No. 5. She does, however, appear to challenge the use of that finding in this proceeding. We need not decide in what circumstances a court may or must adopt a finding of fact from an earlier proceeding in the same case or a related case. *See Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 157, 89 S.Ct. 935, 942, 22 L.Ed.2d 162 (1969); *National Fire Ins. Co. v. Thompson,* 281 U.S. 331, 336–37, 50 S.Ct. 288, 290–91, 74 L.Ed. 881 (1930); *Bradley v. Milliken,* 620 F.2d 1141, 1147–50 (6th Cir.1980); *In re Castillo,* 73 N.C.App. 539, 327 S.E.2d 38 (1985); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 799–800 (1981) ("Other issues may seem particularly unsuited to reconsideration. Questions of fact, absent significant new evidence, are primary examples." (Footnote omitted.)). The district court's adoption of findings from *Termination Hearing I* was invited by mother's attorney. When the Department called a witness to testify to matters predating the prior hearing, mother's attorney objected to "rehashing" the evidence and stated that he was not prepared to meet evidence from that time. The Department's attorney, pointing to his obligation to prove reasonable efforts, re-

2. We emphasize that there is a difference between (1) presuming that the mother's psychological and emotional condition is stable, so that there is a continuation of the absence of a duty to make further efforts, and (2) presuming that the efforts being made by the Department continue to be reasonable. We will not recognize the latter presumption. The Department's having made reasonable efforts during one period in the past does not imply that it continued to do so after that period. So long as the parent is a suitable candidate for reunion with the child, the Department must prove that it has continued to make reasonable efforts since the latest hearing at which the district court made a finding as to reasonable efforts.

quested a stipulation to the judgment in *Termination Hearing I.* Although mother's counsel did not explicitly stipulate, the judge announced that he would adopt findings from that proceeding—specifically mentioning finding No. 5—and mother's counsel did not object; the comments of mother's counsel were restricted to the weight such findings should have in the present proceeding. Thus, if mother had a valid objection to the district court's adoption of finding No. 5, she waived it. Reversal of the termination of parental rights in *State ex rel. Department of Human Services v. Perlman,* 96 N.M. 779, 635 P.2d 588 (Ct.App.1981) is distinguishable, because there (1) the parent preserved her objection and (2) the termination decree was based on a prior *void* neglect decree.

While the district court could draw the appropriate inferences from finding No. 5, it was not bound by the finding in *Termination Hearing I* that termination of parental rights as to Kenny was not in his best interests. That finding was explicitly predicated on the absence of any "plan or probability of this child being adopted"; yet by the time of the second termination hearing there was a clear opportunity for adoption of Kenny. In other words, the evidence at the hearing showed precisely the change in circumstances requiring a different result.

B. *Section 32-1-54(B)(4)—Disintegration of Parent-Child Relationship*

The district court's decision is also affirmable under Section 32-1-54(B)(4), which provides for termination of parental rights when:

> (4) the child has been placed in the care of others, including care by other relatives, either by a court order or otherwise and the following conditions exist:
>
> (a) the child has lived in the home of others for an extended period of time;
>
> (b) the parent-child relationship has disintegrated;
>
> (c) a psychological parent-child relationship has developed between the substitute family and the child;
>
> (d) if the court deems the child of sufficient capacity to express a preference, the child prefers no longer to live with the natural parent; and
>
> (e) the substitute family desires to adopt the child.

The district court's finding No. 31 supports termination pursuant to this provision. It reads:

> Kenny has lived in the same foster home since January, 1987, and has developed a psychological parent-child relationship with his foster parents. Kenny does not desire to visit with [mother], and the parent-child relationship with her has disintegrated. The foster parents wish to adopt Kenny. [sic] and they are capable of furnishing a good home for him and to give him a permanent relationship of loving, caring parents.

Mother challenges those portions of the finding that state that Kenny does not desire to visit mother and that the parent-child relationship has disintegrated.

The Department's social worker testified that mother had never requested visitation with Kenny since the decision in *Termination Hearing I* and that mother had not contacted the Department regarding Kenny for more than two years. Dr. Caplan testified regarding Kenny's positive bonding with the foster parents, his desire to be adopted by them, and his lack of attachment to mother. Kenny's foster mother testified that Kenny was reluctant to talk about mother and that he never asked to see her. This testimony is adequate to support those portions of finding No. 31 challenged by mother. *See In re R.W.,* 108 N.M. 332, 772 P.2d 366 (Ct.App.1989).

Mother argues that the lack of bonding could not be considered by the district court because the department was responsible for the lack of bonding by preventing mother from visiting Kenny. She cites *In re Adoption of Doe,* 89 N.M. 606, 618, 555 P.2d 906, 918 (Ct.App.1976) for the proposition that " 'evidence of the relationship's destruction is of no consequence if it cannot be established that there was parental conduct which caused it.' " (Quoting *Adoption of V.M.C.,* 528 P.2d 788, 795

(Alaska 1974).) *Doe,* however, was concerned solely with abandonment. Its holding was only that destruction of the parent-child relationship does not in itself establish abandonment; disregard of parental obligations is also required. *Doe* did not hold that termination of parental rights is inappropriate when the parent's neglect of the child leads to severance of custody, which in turn damages parent-child bonding. Even assuming that termination pursuant to Section 32–1–54(B)(4) would be barred if the state had damaged the parent-child bond by improperly depriving mother of custody and the right of visitation (an issue that we do not decide), mother does not identify any error in the district court's orders denying custody and visitation. The statutory provisions favoring parental custody and visitation, e.g., NMSA 1978, Sections 32–1–2(A), –2(C), –34(D) (Repl.Pamp. 1989), are all conditional, not absolute, contrary to what mother appears to contend. Although mother argues that the Department's refusal to allow her to visit Kenny violated the mandate in *Termination Hearing I,* nothing in that mandate required the Department to provide visitation.

Mother also claims that her failure to request visitation cannot support a finding of lack of bonding. After *Termination Hearing I* the district court initially determined that visitation would not be in Kenny's best interests, *see* § 32–1–34(D), but later ruled in two orders that mother could request visitation should she so desire. At the present termination hearing the district court found that mother had never requested visitation. Mother claims, however, that she relied on the district court's March 1987 order denying visitation and had no reason to believe that she could request visitation. This contention is without merit. Mother's counsel signed his approval to both orders providing that mother could request visitation. Moreover, for the purpose of proving the lack of a parent-child bond, her attitude toward Kenny was sufficiently established by her failure during two years to communicate with the Department concerning Kenny's status.

Thus, the district court's ruling complies with Section 32–1–54(B)(4).

C. *Irrelevant Doctrine and Statute*

Finally, mother appears to challenge termination of her parental rights under Section 32–1–54(B)(3) and (4) because of the failure to meet various requirements not found in those provisions. For example, mother complains that she was not proved "unfit," as required by *Shorty v. Scott,* 87 N.M. 490, 535 P.2d 1341 (1975). *Shorty,* however, involved the application of the "parental right" doctrine in a family custody dispute. The statutory scheme for termination of parental rights does not require proof that a parent is "unfit" (although the term might be an apt appellation for a parent whose rights with respect to a child are terminated pursuant to Section 32–1–54(B)(3)). Similarly, NMSA 1978, Section 40–7–34 (Repl.Pamp.1989), a provision of the Adoption Act, is irrelevant to the termination of mother's parental rights.

CONCLUSION

We affirm the district court's judgment terminating mother's parental rights to Kenny.

IT IS SO ORDERED.

BIVINS, C.J., and ALARID, J., concur.

786 P.2d 1214

Larry KINCAID, Claimant–Appellant,

v.

WEK DRILLING CO., INC., Employers Casualty Insurance Company, Employer and Insurance Carrier, and Fabian Chavez, Superintendent of Insurance for the State of New Mexico, and the New Mexico Subsequent Injury Fund, Respondents–Appellees.

No. 11124.

Court of Appeals of New Mexico.

Dec. 28, 1989.

Michael E. Dargel, McCormick, Forbes, Caraway & Tabor, Carlsbad, for respondents-appellees WEK Drilling Co. and Employers Cas. Ins. Co.

Thomas D. Haines, Jr., Hinkle, Cox, Eaton, Coffield & Hensley, Roswell, for respondents-appellees Fabian Chavez and New Mexico Subsequent Injury Fund.

OPINION

MINZNER, Judge.

Claimant Larry Kincaid (Kincaid) appeals from a compensation order awarding him benefits for 10% permanent partial disability, contending that he should have been awarded benefits for permanent total disability. Kincaid was injured on April 7, 1987. Due to the date of the accident, this case arises under transient provisions of the Workmen's Compensation Act. *See* NMSA 1978, §§ 52-1-1 to -68 (Orig.Pamp. & Cum.Supp.1986) (Interim Act). This appeal is another in a series of cases arising under the Interim Act and presenting this court with a question concerning the meaning of permanent total disability under that Act. *See Varela v. Arizona Pub. Serv.*, 109 N.M. 306, 784 P.2d 1049 (Ct.App.1989) *cert. applied for* December 4, 1989; *Barela v. Midcon of N.M., Inc.*, 109 N.M. 360, 785 P.2d 271 (Ct.App.1989) *cert. applied for* November 27, 1989. In this case, the dispositive issue is whether the hearing officer properly applied the definition of "comparable wage" under Section 52-1-24(A). We affirm.

Background.

At the time of his injury, Kincaid was employed as a floorhand digging a trench line by respondent WEK Drilling Co. (WEK). After his injury, he was temporarily totally disabled until October 1, 1987. The parties stipulated at trial that Kincaid's maximum compensation rate was $211.69 a week. After reaching maximum medical improvement, he worked at a convenience store in Roswell, but ultimately he

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Kevin J. Hanratty, Kevin J. Hanratty, P.C., Artesia, for claimant-appellant.

obtained a position in Alamogordo as the store manager at Broadway Fashions.

Prior to his injury at WEK, Kincaid suffered another work-related injury to his lower back, while employed as a carpenter in Missouri. Kincaid was compensated $10,000 for this disability, through a claim filed with the state of Missouri. At the time of this injury, Kincaid's weekly wage was $240.00.

The hearing officer found that as a result of these two injuries, Kincaid had sustained a permanent body impairment of 10%. Although Kincaid sought benefits for total disability, the hearing officer concluded that Kincaid was entitled to a compensation rate of $21.17 for 536 weeks, to be apportioned 90% to WEK and 10% to the New Mexico Subsequent Injury Fund. There was no dispute as to medical bills.

Kincaid is currently employed as the store manager of Broadway Fashions in Alamogordo, New Mexico. He makes approximately $213.46 per week. In addition, he is entitled to 10% of the gross profits of the store and to a 30% discount on all items purchased at Broadway Fashions.

WEK contends on appeal that Kincaid failed to preserve the issues he has raised. Thus, we first address the question of preservation.

Preservation.

On appeal Kincaid has briefed three issues: (1) the hearing officer erred in failing to make findings of fact on the issue of whether Kincaid is able to earn comparable wages or salary; (2) the hearing officer erred in considering certain benefits in calculating Kincaid's future earning capacity; and (3) the hearing officer erred in failing to determine that Kincaid was wholly unable to earn comparable wages or salary. We address the question of preservation with respect to each of these issues.

WEK argues that Kincaid failed to preserve his first issue because he did not request a specific finding as to comparable wages. *See generally Goldie v. Yaker*, 78 N.M. 485, 432 P.2d 841 (1967) (by failing to request findings concerning stock's actual or represented value, or the difference between the two values, plaintiff waived findings as to this ultimate issue). It is true that Kincaid did not request a finding of fact that he was unable to earn comparable wages. Nevertheless, he requested findings that his pre-injury wage was $393.12 and that he is able to earn only 54% of his prior salary. In addition, he requested conclusions of law that he is wholly unable to earn comparable wages and that he therefore is entitled to total disability.

The supreme court has noted that in many instances the ultimate facts to be properly found by a trial court are indistinguishable from and identical to the conclusions of law that are necessary to support the judgment. *See Goodwin v. Travis*, 58 N.M. 465, 272 P.2d 672 (1954). This court has observed that occasional intermixture of matters of fact and conclusions of law does not constitute error where the court can see enough, upon a fair construction, to justify the judgment of the court. *Gough v. Famariss Oil & Ref. Co.*, 83 N.M. 710, 496 P.2d 1106 (Ct.App.1972).

In this case, the question is whether Kincaid alerted the hearing officer to the issue he seeks to raise on appeal. *See* SCRA 1986, 12–216(A). Taking Kincaid's requested findings and conclusions as a whole, we think it should have been clear to the hearing officer that Kincaid was requesting a determination on the issue of whether he is unable to earn comparable wages. Thus, we conclude Kincaid's first issue was preserved for appellate review.

WEK also argues that Kincaid failed to specifically challenge the hearing officer's findings in his brief-in-chief. As noted by WEK, a generalized attack is not sufficient on appeal. SCRA 1986, 12–213(A)(3). Rule 12–213(A)(3) states that the argument must set forth "a specific attack on any finding, or such finding shall be deemed conclusive."

Rule 12–213 also states that a contention that a finding of fact is not supported by

substantial evidence is deemed waived unless the party includes in the summary of proceedings the substance of the evidence bearing upon the proposition. Case law interprets this section of the rule to mean that a party must set forth *all* evidence bearing upon the proposition of fact. *Blake v. Blake,* 102 N.M. 354, 695 P.2d 838 (Ct.App.1985). In his summary of proceedings, Kincaid does not comply with this rule. Failure to comply with this section of the rule precludes Kincaid from seeking a review of the sufficiency of the evidence to support the findings. However, his arguments on appeal are primarily legal arguments. Thus, we address his second and third issues as well.

Kincaid's brief initially characterizes the first issue as a claim that the hearing officer's decision is not supported by the facts, and his arguments concerning the second and third issues are at times indistinguishable from arguments that the hearing officer's findings are not supported by substantial evidence. However, at oral argument it became clear that the essential dispute among the parties is whether the hearing officer properly applied Section 52–1–24(A). WEK's brief in fact concedes that Kincaid's brief raises a "legal issue," which is "the definition of permanent total disability under the Interim Workmen's Compensation Act." Thus, we have reframed Kincaid's three appellate issues and will address (1) the definition of permanent total disability under the Interim Act, and (2) whether the hearing officer's findings and conclusions are sufficient to support his decision.

The Definition of Permanent Total Disability Under the Interim Act.

Section 52–1–24(A) of the Interim Act provides as follows:

> As used in the Workmen's Compensation Act, "permanent total disability" means a permanent physical impairment to a workman resulting by reason of an accidental injury arising out of and in the course of employment whereby a workman is wholly unable to earn comparable wages or salary. In determining whether a workman is able to earn comparable wages and salary, the hearing officer shall consider the benefits the worker is entitled to receive under Section 52–1–43 NMSA 1978. If the benefits to which the workman is entitled under Section 52–1–43 NMSA 1978 and the wage he is able to earn after the date of maximum medical improvement and vocational rehabilitation as provided in this act is comparable to the wage the worker was earning when he was injured, he shall be deemed to be able to earn comparable wages or salary. "Physical impairment" does not include impairment of function due solely to psychological or emotional conditions, including mental stress. [Citation omitted.]

WEK has argued that with the Interim Act the legislature has returned to the impairment of earning capacity theory in providing a definition for permanent total disability. *See generally Varela v. Arizona Pub. Serv.* WEK contends that the legislature intended a three-part inquiry. First, the hearing officer is to compare the worker's pre-injury earnings with his or her post-injury earnings. Second, the hearing officer is to consider the factual question of whether the figures included in the initial comparison are reliable and whether the comparison produces "an honest approximation of claimant's probable future earning capacity." *Cf.* 2 A. Larson, *The Law of Workmen's Compensation* § 60.11(d) at 10–614 (1989) (reviewing the catch-all section of the wage-basis formula); *see* § 52–1–20(C). If the hearing officer determines the numbers are unreliable and unrepresentative, then the hearing officer must determine from all of the available evidence what impact the injury has had on the worker's true earning capacity in order to determine the difference resulting from the injury.

This court has accepted WEK's argument that Section 52–1–24(A) is based on an impairment of earning power theory.

See Varela v. Arizona Pub. Serv. The legislature initially describes permanent total disability in the first sentence of that section as "a permanent physical impairment * * * whereby a workman is wholly unable to earn comparable wages or salary." § 52-1-24(A). The phrase "wholly unable to earn" describes an impairment of earning capacity.

This court has previously interpreted the second sentence of the section as requiring the hearing officer to consider the benefits to which a worker is entitled under Section 52-1-25, for permanent partial disability. *See Barela v. Midcon of N.M., Inc.* The same interpretation affects the third sentence.

Both respondents contend that in interpreting the third sentence, the hearing officer is not confined to the worker's average weekly wage in considering his or her pre-injury earnings. WEK argues that the phrase "the wage the worker was earning when he was injured" does not restrict the hearing officer to the average weekly wage, if there is evidence that wage is not representative of the worker's usual earnings. WEK notes that the evidence showed Kincaid's earnings as a carpenter or in retail were more representative of his pre-injury capacity than his work in the oilfields. Respondent New Mexico Subsequent Injury Fund has argued, similarly, that the average weekly wage Kincaid was earning at the time of his injury should be discounted to reflect the fact that he was not employed in the oilfields during the winter months.

We recognize that we suggested in *Barela* that the Interim Act presented a unique interpretative difficulty. There, we noted that the legislature had intended "to establish certain benchmarks and to leave to the courts the task of 'rationalizing' the provisions of the statute." Slip op. at 6. Nevertheless, we are not persuaded that the language used by the legislature in the third sentence of Section 52-1-24(A) to define comparable wage presents the same interpretative difficulties this court faced in *Barela* and *Varela.*

Here, the legislature clearly required a comparison between the wage the worker was earning when he or she was injured and the wage he or she "is able to earn after the date of maximum medical improvement." This language expressly mandates comparison between an actual wage and a potential wage. We see no reason to interpret the language contrary to its ordinary sense. Thus, we equate, as we believe the legislature intended us to do, the phrase "the wage the worker was earning when he was injured" with "the average weekly wage" calculated under Section 52-1-20.

The other half of the comparison the hearing officer must make is supplied by evidence as to the worker's earning capacity after maximum medical improvement. The phrase used by the legislature in Section 52-1-24 indicates an intent to permit the fact finder to consider a wide variety of evidence. We agree with WEK that the phrase "the wage he is able to earn" does not necessarily mean the wage a worker is earning at the time of the hearing but rather depends upon the hearing officer's factual determination of a worker's capacity. *See generally* 2 A. Larson, *supra,* § 57.21(a) (earning capacity distinguished from actual earnings). This determination may be based not only on actual post-injury earnings but all other relevant evidence.

Kincaid contends the hearing officer erred in finding that Kincaid expects to earn a bonus of 10% of the gross profits of the store, which could be between $2,000 and $3,000, and also that Kincaid is entitled to a 30% discount on items purchased in the store. He claims that neither of the above should be considered as wages for the purpose of computing comparable wages. Kincaid argues that the profits and the discount are gratuitous and speculative. Kincaid cites *Gilliland v. Hanging Tree, Inc.,* 92 N.M. 23, 582 P.2d 400 (Ct.App. 1978), for the proposition that speculative future wages should not be considered in

determining average weekly wage. However, in the *Gilliland* case, the worker was not earning any wage at all, and future wages were dependent on improvement of the business to the "satisfaction" of the owner; the case is therefore distinguishable.

As indicated earlier, Kincaid did not challenge the findings made by the hearing officer as not supported by substantial evidence. The only appellate issue he has preserved is whether the hearing officer erred as a matter of law in considering the percentage of profits and the clothing discount. In our view, it was not error to consider either element in attempting to determine earning capacity because each element is relevant in identifying the salary Kincaid could command. A percentage of profits and a clothing discount both are intended to supplement wages and provide an incentive for the worker to take a particular position. Depending on the evidence, neither factor necessarily involves speculation.

WEK has argued that the legislature did not intend to adopt an actual wage-loss comparison because it did not adopt periods of time before and after injury within which actual wages are to be calculated for purposes of comparison. We agree that the legislature has provided a definition of permanent total disability within Section 52–1–24(A), which compares actual earnings before injury with earning capacity after injury. To the extent Kincaid has argued for an actual wage-loss comparison, that argument is rejected. Although the statutory definition is based generally on an impairment of earning power theory, it expressly requires a comparison between actual wages at the time of injury and post-injury earning capacity. It provides a clear beginning point for the hearing officer's analysis but requires comparison with a more theoretical element. The theoretical element affords the hearing officer flexibility. Apparently, degree of disability is calculated under most workers' compensation acts by comparing actual earnings with earning capacity after the injury. *See* 2 A. Larson, *supra,* § 57.21(a). Consequently, we see no reason to read words in or out of the statute. *Cf. Barela v. Midcon of N.M., Inc.* Because the choice the legislature has made seems clear, it is not a situation we are prepared to remedy. *See Varos v. Union Oil Co. of Cal.,* 101 N.M. 713, 688 P.2d 31 (Ct.App. 1984).

Sufficiency of the Findings and Conclusions.

Findings of fact entered by a district court judge shall consist only of such ultimate facts as are necessary to determine the issues of a case, as distinguished from evidentiary facts supporting them. *See* SCRA 1986, 1–052(B)(1)(b). We have held that the same principle presently applies to hearing officers within the Workers' Compensation Division. *See Griego v. Bag 'N Save Food Emporium,* 109 N.M. 287, 784 P.2d 1030 (Ct.App.1989), *certs. applied for* November 29 and December 15, 1989.

Generally, it is sufficient that a finding is made that a worker is, to a stated percentage, partially or totally permanently disabled. *McCleskey v. N.C. Ribble Co.,* 80 N.M. 345, 455 P.2d 849 (Ct.App.1969); *Marcus v. Cortese,* 98 N.M. 414, 649 P.2d 482 (Ct.App.1982). Under the Interim Act, however, the hearing officer first must make a determination of permanent partial disability before making a determination of permanent total disability. *See Varela v. Arizona Pub. Serv.* Consequently, under the Interim Act, a finding that a worker is to a stated percentage permanently partially disabled does not necessarily resolve the issue of whether that worker is entitled to benefits for permanent total disability. *Id.*

Kincaid requested a determination that he was not able to earn a comparable wage, and his findings and conclusions were rejected. One who seeks relief under a statute has the burden of proving that he comes within its terms. *Baca v. Bueno Foods,* 108 N.M. 98, 766 P.2d 1332 (Ct.App.

1988). "[W]here a party has the burden of proof on an issue and requests findings on that issue, which are refused, the legal effect of the refusal of the requested findings is a finding against that party." *H.T. Coker Constr. Co. v. Whitfield Transp., Inc.*, 85 N.M. 802, 804, 518 P.2d 782, 784 (Ct.App.1974) (*quoting Tabet Lumber Co. v. Chalamidas*, 83 N.M. 172, 175, 489 P.2d 885, 888 (Ct.App.1971)). Another rule concerning findings is that, when properly requested, the trial court must find one way or another on a disputed issue that is material. *See id.* (*citing Sanchez v. Sanchez*, 84 N.M. 498, 505 P.2d 443 (1973) as well as *Tabet*). Kincaid relies on the second rule, but his reliance is misplaced. *Cf. id.* (findings are to be liberally construed in support of a judgment, and such findings are sufficient if a fair consideration of all of them, taken together, justifies the judgment).

In the case of uncertain, doubtful, or ambiguous findings, an appellate court is bound to indulge every presumption to sustain the judgment. *Ledbetter v. Webb*, 103 N.M. 597, 711 P.2d 874 (1985). Where the denial of a requested finding and the adoption of others will support a decision that in fact the trial court has ruled on all material issues, the case need not be remanded for additional findings. We conclude that the hearing officer did not err in failing to make a finding as to comparable wages, if the findings and conclusions he made indicate that he ruled against Kincaid on the issue of permanent total disability.

The hearing officer found that Kincaid's maximum compensation rate, if totally disabled, would be $211.69. Because the compensation rate was $211.69, we know that Kincaid's average weekly wage at the time he was injured was $317.85.

The hearing officer found that Kincaid presently earns $213.46 per week and expects to earn 10% of the gross profits, which may result in a $2,000 to $3,000 bonus. The hearing officer also found that Kincaid has past job experience working in the retail trade and by his own admission will be very successful in the retail clothing store business. The hearing officer made no finding as to the value of the clothing discount, but he noted that Kincaid was entitled to it.

These findings establish that the hearing officer considered important factors that enter into a determination of whether Kincaid was capable of earning a comparable wage. They also provide a basis for the hearing officer to find that Kincaid had not satisfied his burden of proving that he could not earn a comparable wage. To show this, we make an elementary computation. Kincaid did not convince the hearing officer that his bonus would be less than $3,000, which would be approximately $60 per week. Added to Kincaid's base wage, Kincaid would earn the equivalent of $273.46 a week, or more than 85% of his actual pre-injury wage. Particularly in light of Kincaid's right to a clothing discount—whose value was not established by Kincaid—and Kincaid's bright prospects in the retail clothing business, the hearing officer could readily have been unconvinced that Kincaid was incapable of earning a comparable wage. Thus, we conclude that the hearing officer ruled on the issue of whether Kincaid was able to earn a comparable wage and on that issue ruled in respondents' favor.

Conclusion.

The hearing officer's findings and conclusions resolved the question of whether Kincaid is capable of earning a comparable wage under Section 52-1-24(A). They resolved the question against him. Thus, we affirm the compensation order awarding him benefits for permanent partial disability.

IT IS SO ORDERED.

BIVINS, C.J., and HARTZ, J., concur.

786 P.2d 1221

PHILLIPS MERCANTILE COMPANY, Appellant,

v.

The NEW MEXICO TAXATION AND REVENUE DEPARTMENT, Appellee.

No. 10650.

Court of Appeals of New Mexico.

Jan. 16, 1990.

Charles L. Saunders, Jr., Colin L. Adams, Kemp, Smith, Duncan & Hammond, P.C., Albuquerque, for appellant.

Hal Stratton, Atty. Gen., Carolyn A. Wolf, Sp. Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

ALARID, Judge.

Taxpayer, Phillips Mercantile Company (Phillips), appeals a decision and order of the Secretary of the Taxation and Revenue Department of the State of New Mexico (the department) upholding the assessment of compensating tax on the value of catalogs and newspaper inserts purchased by Phillips. On appeal, Phillips contends: (1) contracting for the distribution of the catalogs and newspaper inserts is not a taxable use of them: (2) purchase of the newspaper inserts would not have been subject to gross receipts tax had it occurred in New Mexico: (3) the correct tax base for the compensating tax is 77% of the amount taxpayer was billed: and (4) assessment of a negligence penalty is improper. We affirm.

FACTS

This matter was before the department's hearing officer on stipulated facts and the

briefs of the parties. Phillips, doing business as Value House, retails a variety of consumer goods at stores in Santa Fe and Albuquerque and by mail order. During the audit period, Phillips used the services of what are known in the trade as coordinators. In 1981, Phillips used Mutual Merchandising Coop. of New York City, and between 1982 and 1986, the coordinator used was Paul Schultz Catalogues of Louisville, Kentucky. All of these coordinators' activities occurred outside of New Mexico.

Essentially, the coordinator solicits manufacturers and produces an annual trade show for retailers like Phillips. After attending the trade show, retailers decide what goods to offer for sale. The coordinator then develops a program to promote retail sales through catalogs, mailers, and newspaper inserts, which the coordinator designs, produces, and ships via common carrier. Retailers determine the quantity of catalogs and inserts they require and how those printed materials should be distributed.

Phillips contracted with the *Albuquerque Journal/Tribune* and the *Santa Fe New Mexican* to distribute newspaper inserts, and the inserts were shipped directly to those newspapers from the printer. The inserts bore the legend, "Supplement to the Albuquerque Journal/Tribune and Santa Fe New Mexican." Phillips contracted with a mailing service in Albuquerque to address and mail the catalogs and other mailing pieces to New Mexico residents. Phillips had approximately 90% of the catalogs and mailing pieces shipped to the Albuquerque mailing service and approximately 99.35% of the newspaper inserts shipped to the three New Mexico newspapers. Phillips had the remainder of the catalogs and inserts shipped to its retail stores in New Mexico for use in those stores.

Phillips paid the coordinators for their activities on the basis of a fixed price per catalog or insert. Paul Schultz Catalogues has stated that 77% of its charges were attributable to printing and manufacturing the catalogs and inserts and that 23% was for related services. There was no information providing a similar breakdown for Mutual Merchandising Coop.

DISCUSSION

1. Whether Phillips' contracting for the distribution of the catalogs and newspaper inserts was a taxable use of them.

Phillips contends that it did not "use" the catalogs, mailers, and newspaper inserts within the meaning of NMSA 1978, Section 7–9–7 (Repl.Pamp.1988), which imposes a compensating tax for the privilege of using property in New Mexico under certain circumstances. For the purposes of Section 7–9–7, " 'use' or 'using' includes use, consumption or storage other than storage for subsequent sale in the ordinary course of business or for use solely outside this state[.]" NMSA 1978, § 7–9–3(L) (Repl.Pamp.1988).

Phillips concedes "using" the catalogs shipped to and used in its stores, within the meaning of the statute. However, Phillips contends it did not use the remaining catalogs or inserts because it never had physical possession of those printed materials. Phillips offers no New Mexico authority for the proposition that "use" requires actual physical possession and control of the property. Further, the cases Phillips relies on are distinguishable because in those cases, the in-state retailer had the advertising material shipped directly from the out-of-state seller or printer to the in-state recipient, and those materials were never in possession, in the taxing state, of a third party having a contractual relationship with the retailer. *See District of Columbia v. W. Bell & Co.*, 420 A.2d 1208 (D.C.App.1980); *Bennett Bros., Inc. v. State Tax Comm'n*, 62 A.D.2d 614, 405 N.Y.S.2d 803 (1978); *Modern Merchandising, Inc. v. Department of Revenue*, 397 N.W.2d 470 (S.D. 1986).

Phillips had a contractual relationship with the Albuquerque mailing service used to address and mail the catalogs to New Mexico residents. Additionally, Phillips

had a contractual relationship with the New Mexico newspapers through which it directed the manner and timing for the distribution of its newspaper inserts to New Mexico residents. Thus, Phillips exercised control over the catalogs and inserts through its contractual relationship with the mailing service and newspapers in New Mexico. By exercising control over its distribution contractors in New Mexico, Phillips has used the advertising materials distributed in the state within the meaning of Section 7–9–7. *See K Mart Corp. v. Idaho State Tax Comm'n,* 111 Idaho 719, 727 P.2d 1147 (1986), *appeal dismissed,* 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784 (1987); *Deere & Co. v. Allphin,* 49 Ill. App.3d 164, 7 Ill.Dec. 130, 364 N.E.2d 117 (1977); *Wisconsin Dep't of Revenue v. J.C. Penney Co.,* 108 Wis.2d 662, 323 N.W.2d 168 (Ct.App.1982).

2. Whether purchase of the newspaper inserts would have been subject to gross receipts tax had it occurred in New Mexico.

Phillips argues that the newspaper inserts were not acquired in transactions that, had they occurred in New Mexico, would have been subject to gross receipts tax because of the deductions allowed by NMSA 1978, Sections 7–9–63 and 7–9–64 (Repl.Pamp.1988). Phillips concludes it is not then subject to compensating tax under Section 7–9–7(A)(2). Sections 7–9–63 and 7–9–64 allow deductions from gross receipts for receipts from publication or sale of newspapers. Thus, if the inserts Phillips purchased from the coordinators constitute newspapers, the imposition of compensating tax was improper.

While no New Mexico case defines "newspaper," G.R. Regulation 64:1 provides:

> As used in Section 7–9–63 and 7–9–64, the term "newspaper" is limited to those publications which are commonly understood to be newspapers and which are printed and distributed periodically at daily, weekly, or other short intervals for the dissemination of news of a general character and of a general interest. The term does not include handbills, circulars, flyers or the like, unless printed and distributed as part of a publication which otherwise constitutes a newspaper within the meaning of this paragraph. Neither does the term include any publication which is issued to supply information on certain subjects of interest to particular groups, unless such publication otherwise qualifies as a newspaper within the meaning of this paragraph. Advertising is not considered to be news of a general character and of a general interest.

The last sentence of the regulation is the clearest indication that the inserts do not constitute newspapers. The inserts Phillips purchased are advertising, which the last sentence of the regulation states is not considered news of a general character and interest.

The exemptions on which Phillips relies refer to "[r]eceipts from publishing newspapers or magazines, except from selling advertising space" and "[r]eceipts from selling newspapers, except from selling advertising space." *See* §§ 7–9–63, 7–9–64. The coordinators sold inserts to Phillips. At the moment the inserts were sold to Phillips, they were circulars or flyers, which the regulation specifically excludes from the definition of a newspaper. The coordinators did not sell newspapers within the meaning of Section 7–9–64.

Although G.R. Regulation 64:1 provides that "[t]he term [newspaper] does not include handbills, circulars, flyers or the like, unless printed and distributed as part of a publication which otherwise constitutes a newspaper within the meaning of this paragraph[,]" this portion of the regulation does not mean that Phillips' inserts are newspapers subject to the deductions provided for in Sections 7–9–63 and 7–9–64. We agree with the suggestion of the state that whatever the language "unless printed and distributed as part of a publication which otherwise constitutes a newspaper . . ." means, that language was not intended to exempt Phillips' use of the inserts

from imposition of the compensating tax. For these purposes, the focal point is the transaction in which Phillips acquired the insert. *See* § 7–9–7(A)(2).

The focal transaction then is the sale of the inserts to Phillips by the coordinators. The only material the coordinators sold to Phillips was the inserts. The advertising was not inserted into a newspaper by the coordinators. This was accomplished by Phillips itself under its contractual relationship with the newspapers. At the moment of the relevant transaction, when the newspaper inserts were sold to Phillips, the inserts were circulars or flyers which the first portion of the sentence excludes from the definition of newspaper. Therefore, the deductions found at Sections 7–9–63 and 7–9–64 cannot operate to shield Phillips from the imposition of compensating tax under the facts of this case.

3. Whether the correct tax base for the compensating tax is 77% of the amount the coordinator billed Phillips.

The parties stipulated that in Phillips' transactions with Paul Schultz Catalogues, 77% of the amount charged was for printing and manufacturing the catalogs, mailing pieces, and inserts, and 23% was for services. Phillips argues that since compensating tax is not assessed on services rendered outside of New Mexico, the correct tax base should not include the 23% specified as charges for services and that the correct tax base is 77% of the total charges, which reflects the amount charged for printing and manufacturing the inserts and catalogs. Phillips cites no authority supporting a breakout of the value of services which are incidental to and incorporated in the total value of the tangible personal property Phillips purchased.

New Mexico has adopted the predominant ingredient test in determining whether an activity is a service or the sale of tangible property. *E G & G, Inc. v. Director, Revenue Div. Taxation & Revenue Dep't,* 94 N.M. 143, 607 P.2d 1161 (Ct.App. 1979). In *E G & G,* the court compared the "relative inputs of services and tangible property." *Id.* at 146, 607 P.2d at 1164. Since the cost of tangible property was a small percentage of the contract price, the court concluded the purchaser bought services.

The department argues that the services provided by the coordinators were incidental to the sale of tangible personal property. We agree. There were no services provided that were not related to the ultimate purpose of creating catalogs or inserts that were sold to retailers. Phillips was billed on a per-copy basis by the coordinators, and there was no breakout in the billing for services incorporated in producing the advertising material. On these facts, we find the coordinators were engaged in activities predominantly involving the sale of tangible personal property in the form of catalogs and newspaper inserts, rather than the sale of services. Accordingly, the department properly identified the appropriate tax base as the full amount the coordinators charged Phillips.

4. Whether assessment of a negligence penalty was proper.

The department's assessment included a penalty under NMSA 1978, Section 7–1–69(A) (Repl.Pamp.1988), which imposes a civil penalty of 10% of the assessed tax when the failure to pay a tax is "due to negligence or disregard of rules and regulations[.]" Phillips argues it was not negligent or in disregard of the department's rules and regulations because it had a good faith doubt as to whether it was subject to compensating tax. This court recently discussed the concept of negligence in Section 7–1–69(A). *See El Centro Villa Nursing Center v. Taxation & Revenue Dep't,* 108 N.M. 795, 779 P.2d 982 (Ct.App.1989). There we noted that negligence is defined by regulation [1] and that definition includes inadvertent error. *Id.*

1. T.A. Regulation 69:3—Negligence
Taxpayer "negligence" under Subsection A of Section 7–1–69 means:

a. Failure to exercise that degree of ordinary business care and prudence which reasonable

The stipulated facts in this case lend no support to Phillips' contention that it maintained a good faith doubt concerning the taxability of its transactions with the coordinators. The record does not indicate whether Phillips was even aware of any of the controversy concerning this tax prior to receipt of the assessment. We find nothing in the record reflecting Phillips' failure to pay the compensating tax was the result of " 'diligent protest' * * * based on informed consultation and advice." *C & D Trailer Sales v. Taxation & Revenue Dep't,* 93 N.M. 697, 699–700, 604 P.2d 835, 837–38 (Ct.App.1979). Phillips failed to present any competent evidence negating the inference that it was negligent in failing to pay the compensating tax assessed. *Id.* Accordingly, assessment of a negligence penalty pursuant to Section 7–1–69(A) was proper.

CONCLUSION

In conclusion, we hold that compensating tax on the value of catalogs and newspaper inserts purchased by Phillips and a negligence penalty were properly assessed. We therefore affirm the decision and order of the department.

IT IS SO ORDERED.

MINZNER and APODACA, JJ., concur.

taxpayers would exercise under like circumstances:

b. Inaction by taxpayers where action is required;

c. Inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

"Negligence" is equated with the federal standard of "lack of reasonable cause" as set forth in 26 U.S.C. § 6651(a). *Gathings v. Bureau of Revenue,* 87 N.M. 334, 533 P.2d 107 (Ct.App.1975).

787 P.2d 411

GATHMAN-MATOTAN ARCHITECTS AND PLANNERS, INC., a New Mexico corporation, Plaintiff-Appellant,

v.

STATE of New Mexico, DEPARTMENT OF FINANCE AND ADMINISTRATION, PROPERTY CONTROL DIVISION, Defendant-Appellee.

No. 18361.

Supreme Court of New Mexico.

Feb. 6, 1990.

As Amended on Denial of Rehearing March 7, 1990.

Paul A. Phillips, Albuquerque, for plaintiff-appellant.

Hal Stratton, Atty. Gen., Bruce Charles, G.T.S. Khalsa, Asst. Attys. Gen., Santa Fe, for defendant-appellee.

OPINION

MONTGOMERY, Justice.

New Mexico law permits suits against the state for breach of contract, but provides a fairly short statute of limitations (two years) on such claims. NMSA 1978, § 37-1-23(B). In 1984, plaintiff brought such an action against the Department of Finance and Administration (DFA) a few days before the statute ran, and then took no sufficient action to prosecute its claim until the district court dismissed it without prejudice for failure to prosecute. On appeal to this Court, the dismissal was upheld as an exercise of the inherent power of the court to dismiss stale cases. *Gathman-Matotan v. State,* 107 N.M. 113, 753 P.2d 892 (1988).

While the appeal was pending, plaintiff filed a second complaint, identical to the first, contending that the statute of limitations did not bar a new action because it was a continuation of the first and that the statute had been tolled during the pendency of the first action, which was still on appeal. Unpersuaded by these contentions, the district court dismissed the second suit as well, this time with prejudice, holding that the statute of limitations had run. Plaintiff appeals, and we affirm.

I.

Plaintiff first attempts to invoke NMSA 1978, Section 37-1-14, which provides:

> If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit is commenced within six months thereafter, the second suit shall, for the purposes herein contem-

plated, be deemed a continuation of the first.

Plaintiff argues straightforwardly that Section 37-1-23 does not bar its claim because this case was filed within six months after dismissal of the first case and the first was not dismissed for negligence in its prosecution. To this the DFA responds: (a) The first case was indeed dismissed for "negligence in its prosecution"; and (b) Section 37-1-14, which extends the statute of limitations for an additional six months, does not apply to breach of contract suits against the state under Section 37-1-23 because Section 37-1-17 makes 37-1-14 inapplicable to 37-1-23.

Section 37-1-17 reads:

> None of the preceding provisions of this chapter shall apply to *any action or suit which, by any particular statute of this state, is limited to be commenced within a different time,* nor shall this chapter be construed to repeal any existing statute of the state which provides a limitation of any action; but in such cases the limitation shall be as provided by such statutes. (emphasis added)

Section 37-1-23(B) provides: "Every claim permitted by this section shall be forever barred unless brought within two years from the time of accrual." Therefore, under the express terms of Section 37-1-17, the limitations period is that provided in Section 37-1-23(B)—two years. Section 37-1-14 does not apply to lengthen this period. *See Estate of Gutierrez v. Albuquerque Police Dep't,* 104 N.M. 111, 114, 717 P.2d 87, 90 (Ct.App.) (Section 37-1-14 inapplicable to Tort Claims Act statute of limitations), *cert. denied,* 103 N.M. 798, 715 P.2d 71 (1986), *overruled on other grounds; Bracken v. Yates Petroleum Corp.,* 107 N.M. 463, 760 P.2d 155 (1988); *Ortega v. Shube,* 93 N.M. 584, 587, 603 P.2d 323, 326 (Ct.App.1979) (Section 37-1-14 inapplicable to Workmen's Compensation Act statute of limitations), *overruled on other grounds, Bracken v. Yates Petroleum Corp.; Perry v. Staver,* 81 N.M. 766, 769, 473 P.2d 380, 383 (Ct.App.1970) (Section 37-1-14 inapplicable to Wrongful Death Act statute of limitations).

This holding is sufficient to thwart plaintiff's attempt to invoke Section 37-1-14. Nevertheless, we shall briefly consider plaintiff's contention that its earlier suit was not dismissed "for negligence in its prosecution."

Plaintiff's argument on this point is that there is a difference between a dismissal for failure to prosecute and a dismissal for negligence in prosecution, and that in order for the exception in Section 37-1-14 to apply there must be some sort of finding, by some court, of negligence causing the dismissal. Since no express finding on this score has ever been made with respect to plaintiff's prosecution of the earlier suit, the argument runs, the court below could not properly apply the exception in Section 37-1-14. As support for the asserted distinction between a dismissal for failure to prosecute and a dismissal for negligence in prosecution, plaintiff cites *Benally v. Pigman,* 78 N.M. 189, 429 P.2d 648 (1967).

We find plaintiff's proffered distinction to be without merit. It is true that in *Benally* the Court drew a distinction between the two defendants with respect to the circumstances surrounding the dismissal of the first case as to each of them. We noted that the trial court had expressly found that the dismissal as to defendant Rudder was accompanied by a finding of negligence in prosecution, whereas the dismissal as to defendant Pigman was based on no such finding, even though both dismissals apparently were entered on the court's own motion for failure to prosecute. In dictum, this Court said that the second suit, which was initiated within six months after dismissal of the first suit, was, insofar as Pigman was concerned, "a continuation thereof and not barred by the Statute of Limitations." 78 N.M. at 193, 429 P.2d at 652.

Thus, while plaintiff's suggested distinction between a dismissal for failure to prosecute and a dismissal for negligence in prosecution finds some support in a previous decision of this Court, that distinction defies common sense and would contravene the purpose of the exception provided in Section 37-1-14. The statute is a tolling statute, which operates to suspend the run-

ning of an otherwise applicable statute of limitations when an action is timely commenced and later dismissed, except when the dismissal is based on a failure to prosecute the action with reasonable diligence. In the recent case of *United States Fire Ins. Co. v. Aeronautics, Inc.*, 107 N.M. 320, 322, 757 P.2d 790, 792 (1988), we commented that Section 37-1-14

> provides that the statute of limitations on a cause of action is tolled if a new suit setting forth essentially the same cause of action between the same parties is commenced within six months after a dismissal *except when the dismissal was based on the plaintiff's failure to pursue his claim.* (emphasis added)

This dictum, contrary to the dictum in *Benally*, indicates that a dismissal for failure to prosecute is functionally the same as a dismissal for negligence in prosecution.

II.

Apparently cognizant of the foregoing difficulties with its position that Section 37-1-14 should permit its second suit to be treated as a continuation of the first suit, plaintiff seeks to invoke a nonstatutory tolling theory which would suspend the limitations period in Section 37-1-23(B) during the pendency of plaintiff's first suit, including the subsequent appeal. This nonstatutory tolling theory is the same as, or similar to, the "equitable tolling" principle discussed in *Estate of Gutierrez*, 104 N.M. at 116, 717 P.2d at 92. In that case, the court of appeals ruled, as we do in this case, that Section 37-1-14 did not extend a special statute of limitations (specifically, the two-year limitations period under the Tort Claims Act) and that an "equitable tolling" doctrine also would not avoid the bar of the statute. In *Gutierrez* the first action had been filed in federal court as a pendent claim to a civil rights suit; when the pendent claim was dismissed without prejudice, the claimant's attempt to refile in state court was dismissed because the statute had run. Speaking for the court, Judge Garcia noted the harshness of a rule which refuses to interrupt the running of the statute when the claim is asserted in another court, but felt constrained by *Swallows v. City of Albuquerque*, 61 N.M. 265, 266, 298 P.2d 945, 946-47 (1956), and *Diebold Contract Services, Inc. v. Morgan Drive Away, Inc.*, 95 N.M. 9, 617 P.2d 1330 (Ct.App.1980) (quoting 51 Am.Jur. *Limitations of Actions* § 311) to apply the law as "it is" rather than as it "ought to be." *Gutierrez*, 104 N.M. at 115, 717 P.2d at 91.

In *Bracken v. Yates Petroleum Corp.* this Court overruled *Gutierrez, Diebold,* and *Ortega* to the extent that those cases enunciate a rule which would refuse to toll the statute of limitations on a claim asserted in a case dismissed for improper venue. Although not expressly considering a nonstatutory doctrine such as the "equitable tolling" principle discussed in *Gutierrez,* the Court in *Bracken* clearly applied the principle that, contrary to *Swallows* and Am.Jur., the filing of an action later dismissed without prejudice for reasons such as improper venue or a federal court's discretionary refusal to entertain pendent jurisdiction tolls the statute of limitations applicable to the claim. *See Bracken,* 107 N.M. at 465-66, 760 P.2d at 157-58.

Plaintiff argues that, since *Bracken v. Yates Petroleum Corp.* overruled not only *Gutierrez, Diebold,* and *Ortega,* but also "any precedent of this Court [which] enunciates a different rule," 107 N.M. at 466, 760 P.2d at 158, cases like *Swallows* and *King v. Lujan,* 98 N.M. 179, 646 P.2d 1243 (1982) have also "met their well-deserved demises." While *Swallows* does indeed appear to have expired, the same is not necessarily true of *King v. Lujan.* In that case, this Court held that an action dismissed without prejudice for failure to prosecute did not interrupt the running of the statute of limitations. In so holding, the Court did not throughout its opinion uniformly characterize the dismissal without prejudice in that case as having been based on a failure to prosecute. In saying that "a dismissal without prejudice operates to leave the parties as if no action had been brought at all," 98 N.M. at 181, 646 P.2d at 1245, the Court was perhaps speaking more broadly than the occasion required. The opinion in *Bracken* may indeed modify the broad rule which might otherwise be read to flow from *King v. Lujan.*

However, based on the facts in *King* and the Court's reference, at least twice in the

opinion, to the dismissal as one "for lack of prosecution," it is clear that plaintiff's reading of *King* is too broad and that the narrower rule which emerges from the case is still good law. That rule is this: Where an action is dismissed without prejudice because of a failure to prosecute, the action will be deemed not to interrupt the running of an otherwise applicable statute of limitations, and a subsequent suit filed on the same claim as the first after the statute has run will be barred.

King v. Lujan recognizes the general principle that the filing of a complaint ordinarily tolls the applicable limitations period. *Id.* at 180, 646 P.2d at 1244, citing *Prieto v. Home Educ. Livelihood Program,* 94 N.M. 738, 616 P.2d 1123 (Ct.App.1980). In this respect, New Mexico has adopted an "equitable" or nonstatutory tolling principle alongside the statutory tolling provisions in NMSA 1978, Sections 37-1-14, 37-1-9 and 37-1-12. This nonstatutory tolling doctrine, however, should be subject to the same exception or limitation as applies in the statutory situations: Where an action is dismissed for failure to prosecute (negligence in its prosecution), the limitations period will not be interrupted. As we said in *King* in language fully applicable to the claim asserted by plaintiff in the present case:

> A plaintiff who files near the end of the limitations period benefits from being able to prosecute his claim after the period has expired, but if he fails to take advantage of that opportunity, and suffers dismissal for failure to prosecute, there is no reason to let him have an extended period in which to sue.

98 N.M. at 181, 646 P.2d at 1245.

The district court's order dismissing plaintiff's complaint with prejudice is affirmed.

IT IS SO ORDERED.

BACA and WILSON, JJ., concur.

787 P.2d 414

E.W. RICHARDSON and Richardson Properties, Inc., d/b/a Richardson Ranch, Plaintiffs-Appellees and Cross-Appellants,

v.

Roger RUTHERFORD, Glenda Rutherford and Randall Rutherford, Defendants-Appellants and Cross-Appellees.

No. 17673.

Supreme Court of New Mexico.

Feb. 8, 1990.

Rehearing Granted Feb. 19, 1990.

Taylor, Gaddy, Rakes & Hall, Brad D. Hall, Albuquerque, for defendants-appellants and cross-appellees.

Paul R. Caldwell, Linda Martinez-Palmer, Santa Fe, Foy, Foy & Jollensten, Silver City, for plaintiffs-appellees and cross-appellants.

OPINION

RANSOM, Justice.

E.W. Richardson, an absentee ranch owner, and Richardson Properties, Inc., doing business as Richardson Ranch, brought suit against the manager of their ranch on sixty-one counts of conversion of property, fraud, and for misuse, abuse or neglect of buildings and equipment. (Unless otherwise indicated, E.W. Richardson and Richardson Properties, Inc., are referred to

herein jointly as "Richardson.") Joined as defendants with the ranch manager, Roger Rutherford, were his wife Glenda and their son Randall. The complaint, first filed in Bernalillo County for $2,000,000 compensatory plus punitive damages, and then dismissed on grounds of forum non conveniens, was refiled for $3,000,000 in Grant County. (Richardson's counsel of record on this appeal and at trial were not his counsel prior to or at the time his lawsuit was filed and then refiled.)

Preceding the filing of these complaints, however, Mr. Richardson personally had confronted Rutherfords, accusing them of various acts of theft and embezzlement. Rutherfords alleged at trial that Richardson threatened them with physical violence. Although, Rutherfords contend, they protested to Richardson that his allegations of wholesale corruption were unfounded, Richardson nevertheless forced them to accompany him to a motel in Silver City, New Mexico, and forced them to enter into a "debt settlement agreement" by which Glenda and Randall conveyed to Richardson 636 unencumbered and 1200 encumbered acres of Arizona ranch land. In return, Richardson promised to pay $183,000 to secure the land from foreclosure and to forego legal action on his various allegations of impropriety in the management of Richardson Ranch. Richardson also promised to split with Glenda and Randall any net profit from the resale of the Arizona land, after deducting Richardson's expenses and the value of anything "missing" from Richardson Ranch. Rutherfords were to cooperate in determining the value of missing or damaged ranch property.

After the agreement was signed, Richardson terminated Rutherfords' employment and ejected them from Richardson Ranch. Rutherfords, apparently penniless, spent the next several months living in their car. Although Roger Rutherford did admit responsibility for the removal of some timber from ranch property, Rutherfords did not admit to any further improprieties nor help to compile a list of missing or damaged property subsequent to the signing of the agreement.

Richardson's complaints were filed within six months after the debt settlement agreement was signed. Roger and Glenda Rutherford counterclaimed for assault and false imprisonment, and all three Rutherfords counterclaimed for conversion of personal property and abuse of civil process. Also, Roger sought damages for defamation, and Glenda sought damages for intentional infliction of emotional distress. Rutherfords additionally claimed that Richardson used duress to obtain real property interests from Glenda and Randall.

The jury awarded $3,000 compensatory damages to Richardson as against Roger only, for conversion of property; $10,000 compensatory damages to Roger as against Richardson, plus $50,000 in punitive damages as against each plaintiff, Richardson and Richardson Properties, Inc.; $25,000 in compensatory damages to Glenda, plus $37,500 in punitive damages as against each plaintiff; and $10,000 in compensatory damages to Randall, plus $25,000 in punitive damages as against each plaintiff. Each of the Rutherfords were specially awarded their attorney's fees and expenses for defending the action. With respect to the claim of duress to obtain real property, the jury found that the fair market value of the Arizona land in question was $508,-800. The jury's awards of compensatory and punitive damages in favor of Roger were lump sums unspecified as to whether for defamation *or abuse of process.* The jury's awards of compensatory and punitive damages in favor of Glenda were lump sums unspecified as to whether for assault, false imprisonment, intentional infliction of emotional distress, *or abuse of process.* The jury's awards of compensatory and punitive damages in favor of Randall were lump sums unspecified as to whether for conversion of personal property *or abuse of process.*

On Rutherfords' respective claims of abuse of process, the trial court granted to Richardson a judgment notwithstanding the verdicts (j.n.o.v.). On the claims of Glenda and Randall that Richardson was liable for duress to obtain real property, a set-off of $183,000 was granted to Richardson for trust fees, expenses and other pay-

ments made to get clear title. The fair market value of $508,800 reduced by $183,000 amounted to $325,800, or $162,900 each for Glenda and Randall. On his jury verdict of $25,000 in punitive damages against each plaintiff, Randall accepted a remittitur in the amount of $25,000 from the $50,000 total. With respect to Roger's claim of defamation, a new trial was granted to Richardson.

Richardson has fully and completely satisfied the judgment in favor of Glenda and Randall.[1] Although it would appear that Glenda and Randall have joined with Roger in claiming that it was error to grant j.n.o.v. on the Rutherfords' respective claims of abuse of process, satisfaction of the judgment in favor of Glenda and Randall has made moot their claim to error in that regard, unless we were to grant a new trial on the cross-appeal. As discussed below, we affirm the court on all cross-appeal issues. The determinative point on appeal, therefore, is Roger's claim of error in the grant of j.n.o.v. on abuse of process. First, however, we address Richardson's cross-appeal.[2] Richardson seeks a new trial based upon allegations that opposing counsel was guilty of improper conduct that inflamed the jury, and because evidence was presented through leading questions.

■ *Trial court did not abuse discretion in allowing argument as to relative wealth of the parties.* As specifically acknowledged by Rutherfords in their answer brief, the issue of wealth and poverty was

1. Richardson did not object to the court's entry of judgment on the jury's single award of compensatory and punitive damages under all claims, including the abuse of process claims on which the court granted j.n.o.v. When a j.n.o.v. is granted on one or more of multiple claims for relief, judgment for damages cannot be entered on the remaining claim or claims unless the jury has specified the damage award for the remaining claim or claims. *See Jackson v. Deming Ice and Elec. Co.,* 26 N.M. 3, 189 P. 654 (1919) (submission of false issue to jury assumes a state of facts not supported by evidence and requires reversal); *Salinas v. John Deere Co.,* 103 N.M. 336, 707 P.2d 27 (Ct.App.1984) (fact that other evidence supports a general verdict does not allow appellate court to affirm that verdict if an erroneous instruction was given), *cert. quashed,* 103 N.M. 287, 705 P.2d 1138 (1985); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Smith,* 406 So.2d 913 (Ala.Civ.App.) (reversible error when instruction on mental anguish as an element of damages was improper and jury has rendered general verdict making it impossible to determine from record the basis of the award), *writ denied, ex parte Smith,* 406 So.2d 916 (Ala.1981) *Olmstead v. Miller,* 383 N.W.2d 817 (N.D.1986) (error in instructing on future damages required reversal when it was impossible to determine from general verdict the amount attributed to property damage, personal injury up to the time of trial, and future damages). Although no error has been preserved for appeal, the problem is alluded to under Randall's point that it was error to order remittitur on the punitive damages. He argues, "The District Court reduced Randall's punitive damages by 50%, presumably because half was for abuse of process and half for conversion. The jury could easily have awarded all $50,000.00 for Richardson's malicious conversion." Actually, no presumption is possible for allocation of an unspecified award.

2. Although not raised by Rutherfords in their answer brief to the cross-appeal, we note that in some instances, but by no means in all instances, satisfaction of the judgment by an appellant may operate to cut off that party's right of appeal. The majority rule appears to be that voluntary satisfaction of judgment renders an appeal moot. *See, e.g., Lytle v. Citizen's Bank,* 4 Ark.App. 294, 630 S.W.2d 546 (1982); *Paulu v. Lower Arkansas Valley Council of Gov'ts,* 655 P.2d 1391 (Colo.Ct.App.1982); *International Business Mach. Corp. v. Lawhorn,* 106 Idaho 194, 677 P.2d 507 (Ct.App.1984); *Vap v. Diamond Oil Producers, Inc.,* 9 Kan.App.2d 58, 671 P.2d 1126 (1983); *First Sec. Bank v. Income Props., Inc.,* 208 Mont. 121, 675 P.2d 982 (1984). *But see Briarcliffe West Townhouse Owners Ass'n v. Wiseman Constr. Co.,* 118 Ill.App.3d 163, 73 Ill.Dec. 503, 454 N.E.2d 363 (1983), *appeal after remand,* 134 Ill.App.3d 402, 89 Ill.Dec. 351, 480 N.E.2d 833 (1985). In *Culp v. Sandoval,* 22 N.M. 71, 159 P. 956 (1916), this Court held that satisfaction of a judgment subsequent to posting of a supersedeas bond by appellant showed that appellant had acquiesced in the judgment and thus precluded the appeal. We concluded that since the filing of the supersedeas bond effectively removed the possibility of any legal compulsion on the appellant to satisfy the judgment pending appeal, the appellant's subsequent satisfaction of the judgment was voluntary. *Culp,* 22 N.M. at 83, 159 P. at 960–61. We reaffirm our holding in *Culp* that certain circumstances exist in which an appellant's satisfaction of the judgment demonstrates an acquiescence in that judgment that is inconsistent with the right of appeal. Additionally, equities may intervene after satisfaction of the judgment, militating against the maintenance of an appeal. However, absent proper presentation of this issue by the parties, we decline to address this point further.

used to argue to the jury that Richardson's motive in filing a three million dollar lawsuit was to gain clear title to Glenda and Randall's land in Arizona by coercing them to settle. Indeed, Rutherford's attorneys *had commented* on the relative wealth and poverty of the parties prior to a ruling by the trial court that it would allow the introduction of *evidence* of Richardson's wealth *on the issue of punitive damages.* Richardson contends that these comments improperly inflamed the passions of the jury, and, therefore, that the court erred in refusing to grant a new trial. We disagree.

Even Richardson cites authority for the unquestioned proposition that reference to wealth or poverty is proper when relevant to the issues in a particular case. Richardson fails, however, to acknowledge what we see as the relevance of wealth and poverty to Rutherfords' counterclaim. We conclude the trial court did not err in this regard.

Use of leading questions generally within the trial court's discretion. Richardson also argues the court abused its discretion in allowing leading questions by Rutherfords' counsel. With cursory analysis, Richardson's brief in chief sets forth numerous examples of the use of leading questions. Rutherfords argue in their answer brief that many of these examples are from cross-examination, some involve matters already raised in previous testimony, some were questions as to which no objection was made, and, in some instances, the district court sustained the objection. It lay within the trial court's discretion, Rutherfords argue, to allow the use of leading questions. *See Jim v. Budd,* 107 N.M. 489, 760 P.2d 782 (Ct.App.), *cert. denied,* 106 N.M. 95, 739 P.2d 509 (1987); *Jojola v. Baldridge Lumber Co.,* 96 N.M. 761, 635 P.2d 316 (Ct.App.1981); SCRA 1986, 11-611(C).

Moreover, as Rutherfords point out, by agreement of the parties, Rutherfords presented their case in chief on the counterclaims simultaneously with their defense. It is true that a party should not by means of leading questions on cross-examination present its case in chief or substitute its words for those of a witness. *Jojola,* 96 N.M. at 764, 635 P.2d at 319; *State v. Orona,* 92 N.M. 450, 589 P.2d 1041 (1979). However, it is also true that, when the issues relevant to the opposing party's theory of the case overlap significantly with the issues relevant to cross-examination, it may be difficult to distinguish between permissible cross-examination and impermissible use of leading questions to present new evidence. *Jojola,* 96 N.M. at 764, 635 P.2d at 319. We cannot say on the basis of the portions of the record cited by Richardson that the trial court abused its discretion in most of the instances in which leading questions were used. Absent specific analysis by Richardson as to why these questions were improper, we conclude the trial court did not act improperly in these instances.

References to value of golf course and admission of documents of value of other properties was harmless error. One of the leading questions asked at several points by Rutherfords' counsel, however, was improper. Several of Richardson's witnesses were asked if they were aware that property "just across the road" from Glenda and Randall's land had been sold for $1000 per acre for use as a golf course. Rutherfords never properly established that this land was comparable for valuation purposes.

The trial court also allowed the introduction of several documents purporting to show the price received for other pieces of property in the same area. The only expert testimony on these properties was given by Richardson's expert on cross-examination, and he denied that the properties were comparable. Richardson timely objected to the introduction of these documents on grounds of relevance. Rutherfords offered no expert testimony to rebut that of Richardson's expert.

Rutherfords assert that use of the documents for purposes of cross-examination was not error, even absent a foundation to show they were comparable to Glenda and Randall's property. We disagree. Although the question of whether a foundation to establish relevance must be laid

prior to the introduction of evidence lies within the discretion of the trial court, see SCRA 1986 11-104(B) and -401, we believe the court acted improperly here in allowing this evidence to go to the jury without a showing that the properties were comparable.

However, under the facts of this case we conclude that Richardson has failed to show he was prejudiced by admission of this evidence. The jury valued the unencumbered portion of Glenda and Randall's property at $800 per acre. Evidence properly was admitted that this was the value placed on the estate by Richardson himself in response to an inquiry. *See City of Albuquerque v. Ackerman,* 82 N.M. 360, 482 P.2d 63 (1971) (owner of real property is presumed to have special knowledge as to its value by reason of ownership and therefore is competent to testify to value). Although Richardson's expert testified that the land was worth only $300 per acre, the jury was not obligated to accept this estimate as final. Moreover, the only testimony heard by the jury regarding the evidence that had been admitted improperly was that of Richardson's expert, who denied that each of the properties was comparable. We conclude Richardson has failed to show that he was prejudiced by admission of this evidence.

■ *Remarks by Rutherfords' attorneys not shown to necessitate a new trial; no cumulative error.* Richardson argues that various remarks by Rutherfords' attorney (other than those that concerned relative wealth or poverty) were inflammatory, constituted attorney misconduct, and required the trial court to order a new trial. Although Richardson acknowledges that attorney misconduct does not require a new trial unless "glaringly improper or unethical", *Wirth v. Commercial Resources, Inc.,* 96 N.M. 340, 347, 630 P.2d 292, 299 (Ct.App.), *cert. denied,* 96 N.M. 543, 632 P.2d 1181 (1981), he again fails to present a specific argument showing that the comments at issue violate this standard. Instead, Richardson simply posits that the comments were "glaringly unethical" and that they influenced the jury's verdict. Absent an explication of why the comments were improper, and a showing of prejudice, we do not reach this issue. Given our resolution of the above issues, we also conclude that Richardson failed to show the existence of cumulative error. *See State v. Martin,* 101 N.M. 595, 686 P.2d 937 (1984).

Trial court erred in granting j.n.o.v. on abuse of process claim. On the claim of abuse of process on the part of Richardson, the jury was instructed that Rutherfords had the burden of proving that Richardson filed the lawsuit with an ulterior motive, using the complaint for reasons other than the regular prosecution of his charge. It was further explained that an abuse of process arises when there has been a perversion of the court processes to accomplish some end which the process was not intended by law to accomplish, or which compels the party against whom it has been used to perform some collateral act which he legally and regularly would not be compelled to do.

Rutherfords argue that "[t]he filing of the suit itself, under the circumstances of this case, is an attempt to misuse process for collateral purposes * * *. The attempt completes the tort * * *. The attempts to misuse the process in this case include filing suit under such circumstances, the nature of the suit, the parties named, the parties not named, misusing exhibits [attached to the complaint], and the amounts sought, all of which lead to the conclusion that the suit itself was the improper act." *See Myers v. Cohen,* 5 Haw.App. 232, 687 P.2d 6 (attempt to achieve improper collateral objective completes tort of abuse of process), *overruled on other grounds,* 67 Haw. 389, 688 P.2d 1145 (1984).

Richardson requested an instruction that, in order to prove their claim of abuse of process, Rutherfords had to prove specifically that Richardson committed some act outside the regular and legitimate use of process resulting in interference with either the person or the property of Rutherfords. The trial court refused this request. "Some act outside the regular and legitimate use of process" and "interference with either the person or the property"

have been referred to in the brief-in-chief as "subsequent acts" and "special damages," [3] respectively. In granting the j.n.o.v., the trial court held that the misuse of process must be *subsequent* to issuance of process. It is because of failure to instruct on such an element or elements of abuse of process, and the absence of substantial evidence to support a showing of such element or elements, that the trial court granted j.n.o.v. The trial court specifically found that *subsequent* misuse of process was not established by the evidence.

Consistent with the trial court's instruction in this case, we held in *Farmer's Gin Co. v. Ward,* 73 N.M. 405, 407, 389 P.2d 9, 11 (1964), that "[i]n order to sustain an action for abuse of process two elements are essential, (1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge." Similarly, the *Restatement (Second) of Torts* § 682 (1976) provides:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

In ruling that a "subsequent act" was necessary for an abuse of process claim, the court relied on Arizona case law. See, e.g., *Morn v. City of Phoenix,* 152 Ariz. 164, 730 P.2d 873 (Ct.App.1986); *Joseph v. Markovitz,* 27 Ariz.App. 122, 551 P.2d 571 (1976); *see also* W.P. Keeton, D.B. Dobbs, R.E. Keeton, & D.G. Owen, *Prosser and Keeton on the Law of Torts* § 121 (5th ed. 1984) [hereinafter *Prosser and Keeton*]. Although *Markovitz* does hold that abuse of process requires an overt act other than the initiation of a lawsuit, other authority relied upon by the district court does not support its ruling. Moreover, we find persuasive the reasoning of those courts that hold a claim for abuse of process may be maintained in some cases when the only overt act is the initiation of litigation.

Although closely related to the tort of malicious prosecution, abuse of process serves to protect different interests. Prosser writes:

> The action for malicious prosecution, whether it be permitted for criminal or civil proceedings, has failed to provide a remedy for a group of cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an

3. The phrase "an interference with either the person or property of the plaintiff" appears in a number of New Mexico cases on abuse of process. *See, e.g., Farmer's Gin Co. v. Ward,* 73 N.M. 405, 407, 389 P.2d 9, 11 (1964); *Hertz Corp. v. Paloni,* 95 N.M. 212, 215, 619 P.2d 1256, 1259 (Ct.App.1980). The parties' debate concerning the necessity of proving "special damages" centers around this phrase, with Richardson equating it with the necessity of showing the "arrest of the person or seizure of property" required in malicious prosecution cases.

Although some authority exists requiring the plaintiff in abuse of process cases to make the latter showing, other courts have rejected this requirement as inconsistent with the approach of the *Restatement of Torts (Second). See, e.g., Nienstedt v. Wetzel,* 133 Ariz. 348, 651 P.2d 876 (Ct.App.1982); *cf., Mills County State Bank v. Roure,* 291 N.W.2d 1 (Iowa 1980) (loss of income sufficient to satisfy any special injury rule in abuse of process cases). We do not agree with the parties that our courts have used "interference with the person or property" and "arrest of the person or seizure of property" synonymously. In *Farmer's Gin Co.,* we distinguished between those two phrases. 73 N.M. at 407, 409, 389 P.2d at 11, 12. In fact, we gave the second situation as merely one example of the first. *Id.* at 407, 389 P.2d at 11. In *Paloni,* the court of appeals held that the counterplaintiff had not been damaged by Hertz' repossession of the car held by the counterplaintiff in constructive bailment. The decision, however, did not rest on the fact that the counterplaintiff's property had not been subjected to seizure, but rather on the fact that he had suffered no injury at all. The court also described the "interference" standard simply as resulting damages. 95 N.M. at 215, 619 P.2d at 1259; *see also Datacom Interface, Inc. v. Computer World, Inc.,* 396 Mass. 760, 489 N.E.2d 185, 195 (1986).

We do not reach, however, the question of whether "special damages" had to be shown in the present case. Richardson acknowledged to the district court that, absent a requirement for a "subsequent act," evidence existed from which the jury could have found damages. The argument for special damages was raised only in the context of the contention that there was no evidence of a subsequent act that gave rise to such damages. Since we conclude in the body of the opinion that a subsequent act is not required, we do not address this issue further.

> ulterior purpose for which it was not designed. In such cases, a tort action has been developed for what is called abuse of process.

Prosser and Keeton, supra, § 121, at 897. Prosser goes on to note:

> Some definite *act* or threat not authorized by the process, or *aimed at an objective not legitimate in the use of the process, is required;* and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions * * *. Some of the decisions have said that there must be an improper act, such as an extortion attempt, after the process has been issued and that an act committed beforehand is not enough. Most of these cases probably stand for the narrower proposition that there must be an overt act and that bad purpose alone is insufficient. Thus a demand for collateral advantage that occurs before the issuance of process may be actionable * * *.

Id. at 898 (emphasis added). Similarly, another commentator has written:

> [I]nitiation of litigation itself can constitute a misuse of the system if * * * sufficiently illegitimate * * *. It should not matter that the only 'process' that has been issued is a complaint. It is the abuse of the legal system that is at issue, not of writs * * *. The actor whose perversity is so proved, and who, by initiating litigation, is in fact doing more than merely initiating that litigation, does not deserve the protection of the prophylactic barriers to the malicious prosecution action, which were designed to assure that liability is imposed only on the perverse.

1 F.V. Harper, F.J. James & O.S. Grey, *The Law of Torts* § 4.9 (2d ed. 1986).

Notwithstanding the different interests being protected by recognition of the tort of malicious prosecution and by recognition of the tort of abuse of process, Rutherfords acknowledge that assuring continued access to the courts is an important consideration limiting the expansion of liability for abuse of process. We agree. We believe this policy is served adequately by requiring proof that (1), as set out in the *Restatement (Second),* the defendant's *primary motive* was to accomplish an illegitimate end, and (2), as emphasized by Prosser, *an overt act* was committed designed to effect this end.

While a subsequent act may suffice to prove an abuse of process which was appropriate when issued, it is not an essential element. The initial use of process itself may constitute the required overt act under the facts. *See Mills County State Bank v. Roure,* 291 N.W.2d 1 (Iowa 1980); *Fishman v. Brooks,* 396 Mass. 643, 487 N.E.2d 1377 (1986). We believe the trial court's instruction, drawn from *Farmer's Gin Co.,* effectively stated this requirement. We thus are in agreement with the court in *Mills,* when it wrote:

> The existence of this cause of action recognizes that even in meritorious cases the legal process may be abused. That abuse involves using the process to secure a purpose for which it was not intended. We can see no reason why there must be subsequent activity to support the cause of action. *Such activity may be very probative in determining the intent to abuse; however, there need not be such a subsequent action to commit the tort.* To rule otherwise would protect the tortfeasor when the abuse is most effective—where the issuance of the process alone is sufficient to accomplish the collateral purpose.

Mills, 291 N.W.2d at 5 (emphasis added).

Richardson acknowledged after trial that evidence existed from which the jury could find the existence of an ulterior motive. At issue in this case, therefore, is whether the filing of a three million dollar lawsuit for an improper ulterior motive was an act upon which the jury could find abuse of process, not whether such a motive existed.[4] From the lack of investigation rea-

4. In cases in which the identification of the defendant's primary motive for filing suit is disputed, the best procedure may be, once the plaintiff has presented prima facie evidence of improper motive, to then shift the burden of producing evidence to the defendant to show

sonably necessary to identify the probable extent of the alleged injury, a damage claim upon refiling of the complaint that exceeded the total value of the Richardson Ranch, and the excessive, unreasonable attachment of the exhibits to the complaint, the jury could have concluded that the filing of the lawsuit was itself an overt act designed to intimidate Rutherfords into a settlement. *Cf. Nienstedt v. Wetzel,* 133 Ariz. 348, 651 P.2d 876 (Ct.App.1982) (filing of "counter-counterclaim" that repeated essence of original complaint and other pretrial activities were evidence that supported inference of an intent to make litigation so extensive and tiresome that other party would settle); *Fishman v. Brooks,* 396 Mass. 643, 487 N.E.2d 1377 (1986) (the fact that defendant knew or had reason to know of groundlessness of suit was evidence tending to show the filing of the claim was used for ulterior purpose); *Bull v. McCuskey* 96 Nev. 706, 615 P.2d 957 (1980) (failure to investigate suit adequately and total absence of expert testimony on medical malpractice claim constituted evidence supporting inference that attorney intended to coerce nuisance settlement from doctor), *overruled in part on other grounds, Ace Truck and Equip. Rentals, Inc. v. Kahn,* 103 Nev. 503, 746 P.2d 132 (1987).

We therefore conclude the trial court erred in granting j.n.o.v. *See generally Bookout v. Griffin,* 97 N.M. 336, 639 P.2d 1190 (1982) (j.n.o.v. proper only when jury could not have reached verdict based on evidence or permissible inference). Accordingly, we remand Roger's claim of abuse of process for a new trial.[5]

Issue of error in ordering a remittitur or, in the alternative, a new trial, not reached on appeal. With regard to Randall's appeal of the remittitur, it has long been the law of this state that the trial court may require a remittitur as an alternative to the grant of a new trial to the unsuccessful party. *Henderson v. Dreyfus,* 26 N.M. 541, 556–57, 191 P. 442, 448 (1919). Cases of unliquidated damages, and likewise cases where exemplary or punitive damages have been awarded, are included in the rule. *Id.* In *Montgomery v. Vigil,* 65 N.M. 107, 113, 332 P.2d 1023, 1027 (1958) (quoting *Hall v. Stiles,* 57 N.M. 281, 285, 258 P.2d 386, 389 (1953)), we stated:

> [T]he findings of the jury should not be disturbed as excessive, except in extreme cases, as where it results from passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive where palpable error is committed by the jury, or where the jury has mistaken the measure of damages. However, the mere fact that a jury's award is possibly larger than the court would have given is not sufficient to disturb a verdict.

When the evidence, viewed in the light most favorable to the verdict, does not support the amount of damages awarded by the jury, but there is no indication that passion or prejudice existed such as would vitiate the verdict on the question of liability, a court in its discretion may order remittitur as an alternative to a new trial. *Id.; Chavez-Rey v. Miller,* 99 N.M. 377, 379, 658 P.2d 452, 454 (Ct.App.), *cert. denied,* 99 N.M. 358, 658 P.2d 433 (1983). In determining whether a jury verdict is excessive, the court does not weigh the evidence, but determines the excessiveness as a matter of law. *See Transwestern Pipe Line Co. v. Yandell,* 69 N.M. 448, 367 P.2d 938 (1961); *Chavez-Rey,* 99 N.M. at 379, 658 P.2d at 454.

the existence of another, proper motive that was the primary reason for the decision to file suit. If the defendant produces such evidence, a court then would afford the plaintiff an opportunity to rebut the proffered explanation. *See, e.g., Chavez v. Manville Products Corp.,* 108 N.M. 643, 648, 777 P.2d 371, 376, n. 2 (1989) (shifting burden of production in retaliatory discharge cases). We do not, however, reach this question here.

5. As explained elsewhere in this opinion in the context of the claims of Glenda and Randall, since the jury returned a general verdict in favor of Roger, we cannot determine whether they found liability based on the abuse of process claim that was properly before them, or on the defamation claim, as to which the court granted a new trial. Thus, a new trial on the abuse of process claim also is in order. *See* n. 1.

In *Hudson v. Otero,* 80 N.M. 668, 459 P.2d 830 (1969), however, this Court held that appeals by a party accepting a remitted judgment are disallowed, thus encouraging both offers and acceptances of remittitur and tending to terminate litigation. *Accord, Chavez-Rey,* 99 N.M. at 379, 658 P.2d at 454. In this case, Randall accepted the remitted judgment, and that judgment since has been satisfied by Richardson. We conclude that the propriety of the remittitur is not before us on appeal.

This case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, Chief Justice, and BACA, J., concur.

787 P.2d 423

In the Matter of a Petition by MOUNTAIN BELL for a Determination that Public Telephone Services are Subject to Competition.

The MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation, Appellant,

v.

NEW MEXICO STATE CORPORATION COMMISSION, Appellee,

and

MCI, Baca Valley Telephone Company, et al., Intervenors-Appellees.

No. 17844.

Supreme Court of New Mexico.

Feb. 14, 1990.

Patrick T. Ortiz, Albuquerque, Montgomery & Andrews, Tom Olson, Rod D. Baker, Santa Fe, for appellant.

Hal Stratton, Atty. Gen., Joseph van R. Clarke, Asst. Atty. Gen., Santa Fe, for appellee Corp. Com'n.

Levin & Vance, Richard H. Levin, Albuquerque, William Levis, Mark N. Jason, Denver, Colo., for intervenor MCI.

James J. Wechsler, Albuquerque, for intervenor Baca Valley Telephone Co., et al.

OPINION

SOSA, Chief Justice.

This proceeding arises under the New Mexico Telecommunications Act (the Act), NMSA 1978, Sections 63–9A–1 to –20 (Cum. Supp.1988, now Repl.Pamp.1989). The Mountain States Telephone and Telegraph Company, d/b/a U S West Communications (U S West), formerly Mountain Bell, appeals from an order of the New Mexico State Corporation Commission (the Commission) denying U S West's petition for detariffing public and semi-public telephone services, both coin and coinless [1]. The order was based on the Commission's determination that the services are not subject to effective competition as defined in the Act. After a public hearing, the Commission issued its final order and findings of fact and conclusions of law. We hold the order was reasonable and just and will be enforced.

Initially, we note the appeal is from the decision of an administrative agency and not a removal case as permitted by Article XI, Section 7 of the New Mexico Constitution. The Act permits review on the record made before the Commission and does not allow the introduction of new evidence addressed to any of the issues presented at the hearing. NMSA 1978, § 63–9A–16. Further, Section 63–9A–18 provides the supreme court with the authority only to affirm or annul and vacate the order, not to modify it.

Our review is limited to determining whether the agency acted within the scope of its authority, whether the order was supported by substantial evidence, whether the decision was made fraudulently, arbitrarily or capriciously, and whether there was an abuse of discretion or show of bias by the agency. *Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n,* 101 N.M. 470, 476–77, 684 P.2d 1135, 1141–42 (1984). In making this determination, we employ the whole record standard of review. *See id.* at 477, 684 P.2d at 1142; *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct.App.), *cert. denied,* 109 N.M. 33, 781 P.2d 305 (1988). This standard has been discussed in *Na-*

1. The services involved were identified in U S West tariffs as public telephone service, coinless public telephone service, and semi-public telephone service. Certain coin telephone installations called "Watrous pay phones," deemed necessary for public safety reasons because of their remote locations, were not included in the request.

tional Council on Compensation Insurance v. New Mexico State Corp. Commission, 107 N.M. 278, 756 P.2d 558 (1988).

In *Duke City Lumber Co. v. New Mexico Environmental Improvement Board,* 101 N.M. 291, 681 P.2d 717 (1984), this Court held that for purposes of reviewing administrative decisions the substantial evidence rule is expressly modified to include whole record review. *Id.* at 294, 681 P.2d at 720. Under whole record review, the court views the evidence in the light most favorable to the agency decision, *Wolfley v. Real Estate Comm'n,* 100 N.M. 187, 668 P.2d 303 (1983), but may not view favorable evidence with total disregard to contravening evidence. *New Mexico Human Servs. Dep't v. Garcia,* 94 N.M. 175, 608 P.2d 151 (1980).

To conclude that an administrative decision is supported by substantial evidence in the whole record, the court must be satisfied that the evidence demonstrates the reasonableness of the decision. No part of the evidence may be exclusively relied upon if it would be unreasonable to do so. The reviewing court needs to find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency.

107 N.M. at 282, 756 P.2d at 562.

The following is a summary of the Commission's findings of fact pertinent to the issues on appeal. On August 12, 1987, U S West filed a petition requesting a determination that its public telephone services were subject to effective competition as defined in the Act, and for detariffing of the service. U S West requested that its entire New Mexico service area be considered the relevant market area, which consists of various wire centers and exchanges. Two witnesses for U S West pre-filed direct testimony and were cross-examined at the hearing held in March 1988.

One witness testified about competition and the other about the requested relief. The Commission found that "[U S West] witnesses testified that the heart of the issue of competition for Public Telephone Service is in the *location* of coin telephones." (Emphasis in original.) The witnesses further testified to the identity of coin-telephone equipment vendors serving various areas within the state and the availability of competing customer owned, coin-operated telephones (COCOTs) in certain wire centers. U S West introduced evidence concerning a decline in the number of public and semi-public coin telephones provided by it during 1984–87, and the corresponding growth in the number of competitive COCOTs. As of September 1987 there were 656 COCOTs served by U S West's public access lines (PAL) [2]. During cross-examination by the Commission, it was established that as of December 1987, U S West controlled 86% of the coin telephone market in the state with the remaining 14% controlled by the competitors.

The findings refer to Staff Exhibit # 2, contained in the record and prepared by U S West personnel for the Commission. The exhibit was found to demonstrate an absence of COCOTs in approximately twenty-one of the sixty-eight wire centers or exchanges, i.e., U S West is the exclusive supplier of public telephone services in these areas. Additionally, this exhibit showed that the high percentage of competitive public telephone service at three military installations in the state is attributable to federal contracts with A T & T. The Commission found that if these market segments were excluded from the total coin telephone market, U S West's relative share of the remaining coin telephone market would be greater than 86%, which, accordingly, results in a smaller share of the market represented by COCOTs.

Section 63–9A–17 places the burden on the appellant to show the unreasonableness or unlawfulness of the order. U S West contends the Commission's ruling lacks

2. A COCOT is purchased by a property owner who must purchase access to the public switched network from U S West. Basically the property owner resells to the public the access he has purchased from U S West.

support in the record and challenges the bases for the Commission's decision, claiming the Commission misconstrued and misapplied the Act's language. Specifically, U S West challenges the Commission's reliance on the market-share analysis for the following reasons: (1) the language of the Act does not specify market share as a factor of effective competition; (2) market-share analysis subverts the purposes of the Act; and (3) such an analysis as an indicator of competition is incorrect from an economic standpoint.

Under the Act, "effective competition" is defined to mean "that customers of the service have reasonably available and comparable alternatives to the service[.]" NMSA 1978, § 63–9A–3(E).

> In determining whether a service is subject to effective competition, the commission shall consider the following:
>
> (1) the extent to which services are reasonably available from alternate providers in the relevant market area;
>
> (2) the ability of alternate providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions; and
>
> (3) existing economic or regulatory barriers.

NMSA 1978, § 63–9A–8(B). In other words, before U S West could succeed on its petition, the three factors must be weighed by the Commission and found to tip the balance in favor of U S West.

The constitution places upon the Commission the duty to regulate telecommunications services to the public. *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n,* 107 N.M. 745, 746, 764 P.2d 876, 877 (1988). "In construing article XI, section 7, we have stated that it is 'difficult to conceive of a more clear and all-inclusive grant of power for a governmental agency.'" *Id.* at 747, 764 P.2d at 878 (quoting *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n,* 90 N.M. 325, 331, 563 P.2d 588, 594 (1977)). Although statutory authority specifically is granted to the Commission to regulate a public telecommunications service, *see id.,* such provisions do not limit its constitutional authority. *Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co.,* 99 N.M. 796, 664 P.2d 994 (Ct.App.), *cert. denied,* 99 N.M. 787, 664 P.2d 985 (1983). Further, we recognize that "courts should accord deference to the interpretation given to a statute by the agency to which it is addressed." *See Public Svc. Co. of N.M. v. New Mexico Pub. Svc. Co.,* 106 N.M. 622, 625, 747 P.2d 917, 920 (1987).

Mindful of the above, we find unpersuasive U S West's statutory-language argument. The Commission, in its discretion, appropriately could consider any relevant factor in making its determination whether to detariff pay telephone services if effective competition was found to exist. *See, e.g., State v. Mountain States Tel. & Tel. Co.,* 54 N.M. 315, 224 P.2d 155 (1950) (commission not limited to any single formula in considering reasonableness of rates). The Commission is vested with broad authority that would permit an examination of the market-share factor in order to make a decision regarding the existence of effective competition. Accordingly, we find the Commission's reliance on this basis for its decision to be reasonable.

U S West also claims the commission's use of the market share analysis contravenes the purpose of the Act. The assertion is made that regulation of rates by the Commission is unnecessary when the means of competition appear.

The purpose of the Act is "to permit a regulatory framework that will allow an orderly transition from a regulated telecommunications industry to a competitive market environment." NMSA 1978, § 63–9A–2. The legislature's use of the term "framework" suggests structure or organization concerning service rates until "a competitive market environment" exists, or, in other words, when "effective competition" is shown to exist. In this regard, the Commission's reliance on the market share analysis again falls within its broad discretion. Because of U S West's dominance in the market, the Commission reasoned that protection of new entrants vis-a-vis the present regulatory framework, is necessary to prevent monopolistic actions

by the dominant provider such as retaliatory pricing schemes. We find this reasoning not inconsistent with the Act's policy "to maintain the availability of access * * * at affordable rates[,] * * * to have comparable * * * service rates, * * * [and] to encourage competition in the telecommunications industry * * *." *Id.*

U S West further contends the relevant market area should not be defined in terms of physically existing alternate services but rather the potential for entry into the market by an alternative supplier. Cited in support is *GTE Sprint Communications Corp. of Virginia v. A T & T Communications of Virginia, Inc.*, 230 Va. 295, 337 S.E.2d 702 (1985), for the proposition that the "threat of competition" is sufficient to cause a provider to act as a competitor. We find the argument, however, to be without merit based upon the plain and ordinary meaning of the statutory language "extent to which services *are* reasonably available." *See* NMSA 1978, § 63–9A–8(B)(1). The statute does not refer to future availability of services or how they *might* be available, but rather focuses on the present set of circumstances. In interpreting statutory provisions, words should be accorded their ordinary meaning. *Schmick v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 216, 704 P.2d 1092 (1985).

The Commission, in its discretion, properly could disagree with U S West's argument that by the mere availability of COCOT telephones from product vendors and sales catalogs, and the possibility of potential competition demonstrated the existence of effective competition. Moreover, we find the Commission reasonably could rule that emphasis should be placed on the consuming public as the customers of the service rather than the COCOT owner. The Commission's conclusion, that with an 86% share of the market U S West was the dominant supplier of public telephone services in the state, is a fact that remained unchallenged. Accordingly, we affirm the commission's determination that the absence of physical evidence or manifestation of competition activity within the wire centers or exchanges without COCOTs demonstrated a lack of effective competition.

On its brief, U S West also asserts that rather than to focus on market share as an indicator of competition, "the key indicator is that no barriers prevent equivalent alternative services from being reasonably available[.]" In the same regard, U S West submits there exists a lack of support in the record for the Commission's finding that an economic barrier is created because COCOT operators must pay PAL charges in order to provide functionally equivalent services. We disagree, noting the record contains direct testimony on this point in support of the Commission's finding. With regard to COCOT owners, U S West's first witness presented testimony that "an individual or a business [must] * * * pay [U S West] a monthly charge plus usage for the use of the Public Access Line * * * and will pay [U S West] for the Public Access Line Service." Deferring to the Commission's interpretation of the Act as we must, we determine that it was reasonable, as well as supported in the record, for the Commission to conclude that the mandatory subscription charges for PAL service creates "an economic barrier and impacts on the ability of alternative providers to make functionally equivalent services readily available at competitive rates, terms and conditions."

Finally, we find U S West's equal protection argument unpersuasive absent a determination by the Commission that effective competition existed among the providers of comparable public telecommunications services. *See* NMSA 1978, § 63–9A–8. We, therefore, uphold the Commission's finding that "[p]arity of regulation is not a consideration unless there is a determination of effective competition."

Based upon the above, the Commission's order is affirmed in its entirety.

IT IS SO ORDERED.

RANSOM and BACA, JJ., concur.

787 P.2d 428

Gemma O. ROSELLI,
Plaintiff–Appellee,

v.

RIO COMMUNITIES SERVICE STATION, INC., a New Mexico corporation, the Estate of Vito Roselli, Deceased, and Vincent R. Roselli, individually, and in his capacity as personal representative of the Estate of Vito Roselli, Defendants–Appellants.

No. 17965.

Supreme Court of New Mexico.

Feb. 14, 1990.

Rehearing Denied March 13, 1990.

Rhodes & Salmon, William C. Salmon, Albuquerque, for defendants-appellants.

Eaves, Darling, Anderson & Porter, Robert D. Gorman, Albuquerque, for plaintiff-appellee.

OPINION

WILSON, Justice.

Rio Communities Service Station, Inc. (Rio), Vito Roselli's Estate (Estate) and Vincent R. Roselli (Vincent), defendants-appellants, appeal the trial court's order and partial final summary judgment in favor of Gemma O. Roselli (Gemma), plaintiff-appellee. We reverse and remand for a trial on the merits.

FACTS

In 1974 Vito Roselli (Vito) married Gemma. At that time, Vito separately owned all Rio's stock and the land beneath Rio, and was Rio's president. Gemma separately owned a personal residence, household furnishings, and a vehicle. The couple later transmuted their separate property into community property, and Gemma became an officer and director of Rio. Vincent, Vito's son from a prior marriage and also a Rio officer and director, began working at Rio in July 1973. He claims that in 1976, Vito orally promised him forty-nine percent of Rio's stock if he worked at Rio for five years. Vincent completed five years' work at Rio in 1981 and later obtained blank stock certificates, for forty-nine percent of Rio's stock, which Vito did not sign. The parties dispute Vito's intent to transfer Rio stock to Vincent. Vito fixed compensation amounts for himself and Vincent, and used Rio funds for personal expenses. Vincent and Gemma knew and approved of Vito's use of Rio funds. On June 18, 1981, Vito and Gemma bought two Northern Life Insurance Company (Northern) policies, totalling $30,351.39, naming Gemma as beneficiary. Vito was the policies' owner and insured, and Rio paid the premiums. In March 1983 Vito named Vincent beneficiary of these policies, without Gemma's knowledge. Vito also directed Northern to mail policy information to his office, rather than his home. In May 1983 Vito began an extra-marital affair, which Gemma discovered at trial. Vincent alleges that Gemma also had an extra-marital affair.

On September 22, 1983, Vito and Gemma executed a warranty deed conveying the land to Rio. Gemma claims she executed the deed in exchange for Vito's oral promise to leave her all his property at his death. She also claims Vito did not intend to transfer the land's title to Rio at that time. The couple kept the deed at home. A few years before his death, Vito gave Vincent the deed and told him to take it home. Vincent kept the deed in his home floor safe, along with personal papers and some corporate insurance papers. Vincent never looked at the deed, and Vito never discussed it with him.

On September 27, 1983, Vito executed a will leaving Gemma all his property, except for $100 bequests to his children. Upon execution, Vito told a testamentary witness that he signed the will only to satisfy Gemma and he intended to make a new will leaving her nothing. That same day Vito bid his accountant to transfer forty-nine percent of Rio's stock to Vincent, claiming the board of directors unanimously approved the transfer. Gemma did not approve the transaction. Corporate books

and subsequent tax returns show Vincent owned forty-nine percent of Rio's stock. In May 1984 Vito gave Vincent title to a Chevy El Camino vehicle, but kept possession. Vincent claims Vito intended him to have the vehicle at Vito's death.

On June 21, 1984, Vito executed a new will leaving twenty-six percent of his Rio stock to Vincent, $100 bequests to his other children, a ring to his brother, and the rest of his estate to Gemma. Also on June 21, 1984, Vito bought a Republic National Life Insurance Company (Republic) policy, totalling $20,057, naming Gemma as beneficiary. Rio also paid this policy's premiums. At some point, the parties discussed an agreement in which Gemma would receive all insurance policy proceeds upon Vito's death, and Vincent would receive all interests in Rio. The parties dispute whether they agreed to this plan. In August 1984 Vito and Gemma renewed their marriage vows.

A few days before his death, Vito retrieved the deed from Vincent and took it to a meeting with his attorney on May 19, 1986. At that meeting, Vito told his attorney that Gemma had renounced all interest in the land. On May 21, 1986, Vito died. That same day, Vito's attorney wrote advising him to record the deed. His attorney recorded the deed on May 25, 1986, six days after Vito's death. At Vito's death the Northern policies paid $5,893.09 in Rio debts. The rest of the proceeds, $24,-458.30, were paid jointly to Gemma and Vincent and deposited in a certificate of deposit pending appeal. Gemma received the Republic policy proceeds at Vito's death.

On October 20, 1986, Gemma filed an eight-count complaint against the defendants seeking: (1) a declaratory judgment entitling Gemma to one-half the Northern policies' proceeds and seventy-four percent of Rio's stock; (2) quiet title to the land or, if the deed was valid, a lien on Rio's stock equal to her community property interest in the land; (3) remedies for fraud and breach of contract not to revoke the 1983 will; (4) reimbursement of $10,000 insurance proceeds paid on Rio's behalf; and (5) costs and attorney fees. Gemma twice amended her complaint, additionally alleging slander of title and a community property interest in Rio stock registered in Vincent's name.

The defendants denied Gemma's claims and counterclaimed for declaratory judgment that: (1) Rio owns the land; (2) Vincent owns seventy-five percent of Rio's stock, or may recover forty-nine percent of Rio's stock for breach of contract; (3) Vincent and Rio are each entitled to one-half the insurance policies' proceeds; (4) Vincent and Rio are each entitled to one-half the value of Rio funds Vito used for personal expenses, plus a lien on the couple's community property for that amount; (5) Vincent is entitled to the 1979 El Camino vehicle, its reasonable rental value and damages; and (6) defendants are entitled to costs and attorney fees. Gemma denied these counterclaims.

On May 2, 1988, the defendants moved for judgment on the pleadings or partial summary judgment as to Gemma's claims of slander of title, quiet title, fraud, and breach of contract to make or not revoke a will. On June 3, 1988, Gemma moved for summary judgment as to these claims plus the deed's invalidity or Gemma's lien against the land, entitlement to the insurance proceeds, reimbursement of proceeds paid on Rio's behalf, and dismissal of defendants' claims for reimbursement and title to the vehicle. On August 2, 1988, the trial court entered a partial final summary judgment in Gemma's favor as to quiet title to the land, entitlement to insurance policy proceeds, and ownership of the vehicle. The trial court dismissed with prejudice defendants' claims for vehicle ownership and reimbursement. The trial court found genuine issues of material fact existed as to slander of title and Rio's stock ownership, and denied summary judgment on those claims. The defendants appeal the trial court's judgment, which was stayed pending appeal.

ISSUES

On appeal, the defendants claim: (1) the deed was delivered and had consideration; (2) entitlement to the Northern

and Republic policies' proceeds; and (3) the trial court erred by granting partial final summary judgment for Gemma. Defendants abandoned their claim of vehicle ownership, listed in the docketing statement, by failing to brief the issue on appeal. *State v. Doe,* 93 N.M. 621, 623, 603 P.2d 731, 733 (Ct.App.1979). Defendants also claim a right to reimbursement for Rio funds Vito used for personal expenses; however, they cite no authority for this argument as required by SCRA 1986, 12–213. "We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority. We therefore will not do this research for counsel." *In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (citations omitted). We will not review this issue since it was briefed without cited authority. *See id.*

Summary judgment is proper as a matter of law when no genuine issues of material fact exist. SCRA 1986, 1–056(C) (Cum.Supp.1989); *Westgate Families v. County Clerk of Inc. County of Los Alamos,* 100 N.M. 146, 148, 667 P.2d 453, 455 (1983). The trial court may enter a final judgment as to less than all claims presented, "only upon an express determination that there is no just reason for delay." SCRA 1986, 1–054(C)(1). The trial court has discretion to determine whether just reason for delay exists and its decision will not be disturbed, absent an abuse of discretion. *Navajo Ref. Co. v. Southern Union Ref. Co.,* 105 N.M. 616, 617, 735 P.2d 533, 534 (1987); *Banquest/First Nat'l Bank v. LMT, Inc.,* 105 N.M. 583, 585, 734 P.2d 1266, 1268 (1987). A trial court abuses its discretion when its decision is contrary to logic and reason. *Three Rivers Land Co. v. Maddoux,* 98 N.M. 690, 694, 652 P.2d 240, 244 (1982), *reversed on other grounds, Universal Life Church v. Coxon,* 105 N.M. 57, 59, 728 P.2d 467, 469 (1986); *Newsome v. Farer,* 103 N.M. 415, 420, 708 P.2d 327, 332 (1985). As a matter of policy this court disfavors adjudicative fragmentation of related legal and factual issues, and piecemeal appeals. *Navajo Ref. Co.,* 105 N.M. at 617, 735 P.2d at 534; *Banquest/First Nat'l Bank,* 105 N.M. at 585, 734 P.2d at 1268.

Issues remaining at trial include ownership of Rio's stock, Gemma and Vincent's breach of contract claims, and slander of title. The remaining appellate issues are: (1) delivery of the deed; and (2) ownership of the Northern and Republic policies' proceeds.

I. *Delivery of the Deed*

In our view, genuine issues of material fact exist as to delivery of the deed. The record contains conflicting evidence regarding this issue. There is evidence that Gemma executed the deed to Rio in exchange for Vito's promise to leave her all of his property at his death. The record also indicates that Vito executed the 1983 will to fraudulently induce Gemma to sign the deed. In contrast, there is evidence that the parties orally agreed that Vincent would receive all Rio interests and Gemma would receive all insurance proceeds. There is evidence that Vito gave the deed to Vincent, who was at that time an officer and director of Rio. There is also evidence that Vito physically gave the deed to an attorney and made contemporaneous statements that Gemma no longer had any interest in the real estate, which he claimed belonged to the corporation. A question of fact exists as to whether the deed was delivered.

Gemma further asserts that her execution and delivery of the deed to Vito was part of an agreement that Vito would not revoke his 1983 will, leaving Gemma all of his property. Gemma asserts Vito breached that contract, by revoking his 1983 will and giving the deed to Vincent and his attorney.

We note that the law in New Mexico clearly requires that a contract not to revoke a will: (1) have its material provisions stated in the will, (2) be expressly referred to in the will, or (3) be evidenced in a writing signed by the decedent. NMSA 1978, § 45–2–701(A) (Repl.Pamp.1989); *In re Estate of Vincioni,* 102 N.M. 576, 698 P.2d 446 (Ct.App.), *cert. denied,* 102 N.M. 613, 698 P.2d 886 (1985). Before the al-

leged breach of contract not to revoke a will can be considered, the statutory requirements must be satisfied. Given these facts, summary judgment as to delivery of the deed was improper.

II. *Ownership of the Insurance Policies' Proceeds*

We also find that genuine issues of material fact exist as to ownership of the insurance policies' proceeds. As stated, the record contains evidence that the parties may have agreed that Gemma would accept the Republic and Northern policies' proceeds, and in exchange, Vincent would own all Rio's stock. The Republic proceeds were paid to Gemma upon Vito's death. This possible agreement, combined with the other appellate issues presented, raises a question of fact which would preclude summary judgment on this issue.

Gemma claims a community property interest in the Northern policies' proceeds, while Vincent claims those proceeds as Vito's named beneficiary. Before ownership of the proceeds can be determined, we must decide whether one spouse may give community property to a third party, without the other spouse's consent. We must also examine spousal management rights concerning community property.

While we find no New Mexico case directly on point, we are persuaded to adopt the rule that payment of life insurance policy premiums with community funds results in a community property interest in policy proceeds. *See Aetna Life Ins. Co. v. Bunt,* 110 Wash.2d 368, 754 P.2d 993 (1988). In New Mexico either spouse alone has the power to manage, control, or dispose of the entire community personal property, unless one spouse is otherwise designated. NMSA 1978, § 40–3–14 (Repl.Pamp.1989). However, the statute alone does not answer the question of whether one spouse alone may give that community property to a third party. This question was examined in *Barela v. Barela,* 95 N.M. 207, 619 P.2d 1251 (Ct.App. 1980). In *Barela* the husband acquired an insurance policy, prior to his marriage, and named his mother as beneficiary. He later married and then died. His wife claimed a one-half interest in the policy's proceeds as community property, on grounds that community funds paid most of the policy's premiums. The *Barela* court noted that New Mexico law allowed Barela, as manager of community personal property, to dispose of community personal property, both before and after the Community Property Act of 1973 was enacted. *See* NMSA 1978, § 40–3–6 et seq.; NMSA 1978, § 40–3–14(A) or (B)(1). That court concluded that Barela's marriage and the community property law did not invalidate his power to designate his mother as the policy's beneficiary.

Other community property jurisdictions impose a fiduciary duty upon spouses managing community property. The Washington state statute controlling management of community property is similar to New Mexico's, giving either spouse the power to manage and dispose of all personal community property. *See* Wash.Rev.Code § 26.16.030 (1987). In applying its management statute, Washington courts have held that each spouse owes a fiduciary duty to the other in the management of the community assets. *In re Marriage of Matson,* 107 Wash.2d 479, 730 P.2d 668 (1986). Similarly, in *Compton v. Compton,* 101 Idaho 328, 335, 612 P.2d 1175, 1182 (1980), the Idaho court imposed a fiduciary duty upon spouses managing community assets, based on Idaho community property law and the confidential relationship between spouses.

The state of Texas has also concluded that disposal of community property by the husband in violation of the wife's community property interest is a constructive fraud. In *Carnes v. Meador,* 533 S.W.2d 365, 371 (Tex.Ct.App.1975), the Texas court stated,

> If a spouse disposes of community property in fraud of the other spouse's rights, the aggrieved spouse has a right of recourse first against the property or estate of the disposing spouse; and, if that proves to be of no avail, then the aggrieved spouse may pursue the proceeds to the extent of her community interest

into the hands of the party to whom the funds have been conveyed.

The Texas courts have further observed that a husband may not give his and his wife's interest in community property to a third person to work a fraud upon the wife. A husband's exercise of dominion and control over a community asset, in fraud of the wife's interests, is in effect a gift of the community property to himself. *Martin v. Moran,* 11 Tex.Civ.App. 509, 32 S.W. 904 (1895). "The husband can give *his* interest in the community property to another, but he cannot give his wife's interest to himself." *Id.* at 511, 32 S.W. at 906. (Emphasis added).

It appears to be well-settled in California that when life insurance premiums are paid with community property funds, the resulting policy is a community asset. *Life Ins. Co. of N. Am. v. Cassidy,* 35 Cal.3d 599, 676 P.2d 1050, 200 Cal.Rptr. 28 (1984). The interest of the surviving spouse may not be defeated by a gift of the policy proceeds to a third party beneficiary without the spouse's consent. A spouse who is placed in this position may recover his or her community share in the proceeds. *Id.* at 602, 676 P.2d at 1053, 200 Cal.Rptr. at 31.

Summarizing the law from other community property jurisdictions, we determine the best rule to be:

(1) each spouse has the power to manage and dispose of the community's personal property;

(2) subject to a fiduciary duty to the other spouse; and

(3) absent intervening equities, a gift of substantial community property to a third person without the other spouse's consent may be revoked and set aside for the benefit of the aggrieved spouse.

In this case, Vito had the power to designate a beneficiary other than his wife pursuant to his management powers. However, he could not exercise that power in violation of his fiduciary duty to Gemma, in fraud of her rights or to give community property to himself. We find that material issues of fact exist which the trial court must determine in light of the law discussed above. Summary judgment was improper on this issue.

We also find these issues inseparably intertwined with those remaining at trial. The parties' breach of contract claims are inseparable from the ownership claims to the land, Rio's stock, and the insurance proceeds. Resolving these issues separately would conflict with our policy against fragmenting issues and piecemeal appeals. We conclude the trial court had good reason to delay entry of judgment, and it abused its discretion by entering a partial final summary judgment on these issues. Accordingly, we reverse and remand for a trial on the merits.

IT IS SO ORDERED.

SOSA, C.J., and RANSOM, J., concur.

787 P.2d 433

Alvin SMITH, Plaintiff-Appellee,

v.

FDC CORPORATION, Defendant-Appellant,

v.

Roger COX, Intervenor-Appellant.

No. 18126.

Supreme Court of New Mexico.

Feb. 15, 1990.

F. Douglas Moeller, Farmington, for defendant-appellant FDC.

The Payne Law Firm, P.C., H. Vern Payne, Marcia E. Lubar, Albuquerque, for intervenor-appellant Cox.

Mettler & LeCuyer, P.C., Earl Mettler, Albuquerque, for plaintiff-appellee.

OPINION

BACA, Justice.

Following a bench trial for damages based on claims of age and race discrimination in employment in violation of the New Mexico Human Rights Act, NMSA 1978, Sections 28–1–1 to –7, 28–1–9 to –14 (Repl. Pamp.1987), before the District Court of San Juan County, FDC Corporation (FDC), defendant below, and Roger Cox, intervenor, appeal the judgment of the court in favor of plaintiff Smith and the award of damages of $54,134 to be assessed against Cox for violation of a post-judgment discovery order. We affirm in part and reverse in part.

FACTS

Smith, a Navajo Indian, worked at FDC's concrete factory and had been employed there for approximately ten years prior to his discharge in December 1983. At that time, Smith was fifty-nine years old; he was the only Native American employed at the plant, and fewer than five percent of the plant's employees were over age fifty. Although the job involved physical labor, Smith was qualified and physically and mentally able to perform the tasks required of him.

Smith was fired purportedly for being disrespectful to his supervisor and for operating a machine in an unsafe manner. A machine upon which Smith was working evidently was accidentally started up, threatening the foreman with physical injury. However, evidence indicated that the machine was under the control of the supervisor, not Smith, at the time of the

incident and that the foreman was operating the machine contrary to prudent safety measures. Additionally, although other incidents of unsafe operation of machinery had occurred at the plant, only Smith was terminated purportedly for unsafe practices; the other unsafe incidents all involved younger and non-Indian employees who were not discharged, although the accidents were at least of equal severity.

Several incidents indicate that age and race-based animus was directed toward Smith. The factory work force consisted mainly of young Hispanic employees. On several occasions, Smith's foreman called him "old man" and intimated a desire that Smith retire soon.

Smith was hired in 1973 at a wage of $4.00 per hour. After his termination, Smith attempted to find other work; however he was unable to locate full-time employment, although he occasionally hauled wood. He also received public assistance payments and social security.

Smith, after a judgment in his favor, initiated further discovery in aid of its execution. Cox, allegedly the sole shareholder of FDC but not a named party in this suit, was subpoenaed, and he was asked to produce certain documents. FDC was also issued a subpoena duces tecum. When Cox failed to comply with the discovery requests in a timely manner, the court sanctioned him by ordering him to personally satisfy the judgment.

Appellants have presented the following issues for our consideration: (1) whether there is substantial evidence to support the trial court's finding of discrimination and award of damages; (2) whether the court should have set off plaintiff's earnings from hauling wood, public assistance, and social security in determining damages; (3) whether the award of attorney fees was reasonable; and (4) whether the court improperly assessed the judgment against a nonparty as sanctions for noncompliance with discovery requests.

I. WERE THE TRIAL COURT'S FINDINGS OF DISCRIMINATION AND DAMAGES SUPPORTED BY SUBSTANTIAL EVIDENCE?

The New Mexico Human Rights Act, NMSA 1978, Section 28–1–7, which tracks the language of the federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e–2, makes it unlawful for an employer to discriminate against an individual on the basis of age or race.

In this suit based on NMSA 1978, Section 28–1–7, for Smith to prevail he was required to demonstrate that FDC discriminated against him in terminating his employment because of his race or age. Although the burdens of proof and methodology for proving employment discrimination under the New Mexico Human Rights Act have not previously been addressed by this court, the United States Supreme Court has considered this question in interpreting the Civil Rights Act of 1964, *see McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[1] The evidentiary methodology adopted therein provides guidance for proving a violation of the New Mexico Human Rights Act. Our reliance on the methodology developed in the federal courts, however, should not be interpreted as an indication that we have adopted federal law as our own. Our analysis of this claim is based on New Mexico statute and our interpretation of our legislature's intent, and, by this opinion, we are not binding New Mexico law to interpretations made by the federal courts of the federal statute.

1. The *McDonnell Douglas* methodology allows proof of discriminatory intent absent direct proof by creating a presumption of discrimination. Initially, a plaintiff bears the burden of showing a prima facie case by "eliminat[ing] the most common nondiscriminatory reasons" for the employer's actions. *Burdine,* 450 U.S. at 254, 101 S.Ct. at 1094. The burden then "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason" for his actions. *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824. Then, the plaintiff has the opportunity to show that the articulated reason is pretextual. *Id.* at 804–05, 93 S.Ct. at 1825–26. This burden merges with the plaintiff's ultimate burden of proof of intentional discrimination. *Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095.

The *McDonnell Douglas* methodology, whereby the burden of persuasion shifts in intermediate stages, was developed because often direct proof of discrimination is not available. The analysis allows proof of discriminatory intent absent direct proof. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981). This framework, however, is not a required method of proof; it is only a tool to focus the issues and to reach the ultimate issue of whether the employer's actions were motivated by impermissible discrimination. *See id.* at 253 n. 6, 101 S.Ct. at 1094 n. 6; *Hagelthorn v. Kennecott Corp.,* 710 F.2d 76, 81 (2d Cir.1983).[2]

A prima facie case of discrimination may be made out by showing that the plaintiff is a member of the protected group, that he was qualified to continue in his position, that his employment was terminated, and that his position was filled by someone not a member of the protected class. *Hawkins v. CECO Corp.,* 883 F.2d 977, 982 (11th Cir.1989); *Haskell v. Kaman Corp.,* 743 F.2d 113, 119 n. 1 (2d Cir.1984).[3] A prima facie case may also be made out through other means; not all factual situations will fit into any one type of analysis, although unlawful discrimination may nevertheless be present. For example, a prima facie case can be shown absent a demonstration that the plaintiff was replaced by someone not in the protected class if he can show that he was dismissed purportedly for misconduct nearly identical to that engaged in by one outside of the protected class who was nonetheless retained. *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 282–84, 96 S.Ct. 2574, 2579–81, 49 L.Ed.2d 493 (1976); *Nix v. WLCY Radio/Rahall Communications,* 738 F.2d 1181, 1185–86 (11th Cir.1984). This prima facie case may then be rebutted by evidence that the plaintiff was dismissed based on a nondiscriminatory motivation. However, the entire *McDonnell Douglas* framework may be bypassed through a showing of intentional discrimination; the purpose of the test is to allow discriminated-against plaintiffs, in the *absence* of direct proof of discrimination, to demonstrate an employer's discriminatory motives. *See Loeb v. Textron, Inc.,* 600 F.2d 1003, 1018–19 (1st Cir.1979). When direct evidence of discriminatory motive exists, each element of the *McDonnell Douglas* test need not be proved—the New Mexico Human Rights Act prohibits discrimination based on age and race, and if a plaintiff, such as Smith, can show through direct evidence that he was discriminated against because of an impermissible categorization, that is all that is required for him to prevail. *See Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613, 621, 83 L.Ed.2d 523 (1985); *Spagnuolo v. Whirlpool Corp.,* 641 F.2d 1109, 1112–13 (4th Cir.), *cert. denied,* 454 U.S. 860, 102 S.Ct. 316, 70 L.Ed.2d 158 (1981); *Loeb,* 600 F.2d at 1014.

FDC contends that there is no evidence supporting the court's finding of discrimination. It maintains that the statistical evidence presented was flawed and did not show that the composition of the work force demonstrated an unlawful pattern of discrimination. It argues that no evidence was submitted regarding the racial background of the work force, and that any

2. We are aware that the Supreme Court has recently revisited the questions of burdens of proof in a title VII case, the proper methodology in proving a prima facie case, and the use of statistical evidence. *See Wards Cove Packing Co. v. Atonio,* — U.S. —, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). *Wards Cove* is inapplicable to the case before us today; it considers a claim of disparate impact in the context of alleged discriminatory hiring practices. As such, it does not provide guidance to us in this case where direct evidence of discrimination has been shown and the claim is one of disparate treatment, and we express no opinion as to its applicability to New Mexico law.

3. One way of meeting the initial burden of persuasion is through the use of statistical evidence that may be introduced by a plaintiff to assist him in demonstrating an inference of discrimination through a pattern of discriminatory activity. *Haskell v. Kaman Corp.,* 743 F.2d 113, 119 (2d Cir.1984); *Laugesen v. Anaconda Co.,* 510 F.2d 307, 317 (6th Cir.1975) (statistical evidence in individual suit goes to weight of evidence). It is not required, especially if the plaintiff can demonstrate direct evidence of discrimination.

evidence of the racial composition in the record is meaningless without evidence of the pool from which employees were drawn. Much of its argument is based on the contention that the evidence offered regarding the racial composition of the work force was based on a superficial analysis of surnames, which it maintains is not determinative of race. It further argues that there was a failure of proof concerning the race of other employees who were involved in accidents but were not dismissed.

In reviewing a decision to determine whether it is supported by substantial evidence, we examine the record for relevant evidence such that "a reasonable mind might accept as adequate to support a conclusion." *Toltec Int'l, Inc. v. Village of Ruidoso,* 95 N.M. 82, 84, 619 P.2d 186, 188 (1980). We resolve disputed facts in favor of the party prevailing below, indulging all reasonable inferences in favor of the verdict and disregarding contrary inferences, and we do not independently weigh conflicting evidence. *Id.*

Smith presented evidence that he was a member of two protected groups. He also presented evidence that he was qualified at the time of his termination to fully perform his job, that he was fired, and that other factory workers, who were not members of protected groups, were not dismissed when they committed similar safety infractions. Evidence was presented regarding the racial composition of the work force that indicated that there were few older or Native American workers in the plant. Although FDC is correct in arguing that the proof of the race of other employees, including those involved in accidents, is unsophisticated, there was evidence that Smith was the oldest employee in the work force and one of only several Native Americans. FDC did not rebut the anecdotal evidence presented, which was sufficient to support the inference that Native Americans and older workers were underrepresented in the work force, and company records submitted to the court supported Smith's testimony. FDC presented evidence demonstrating that Smith was legitimately terminated because of the accident that could have injured the foreman. Smith then presented evidence that this was a pretext, that the foreman caused the accident, and that others who were not members of protected groups but were guilty of similar safety infractions were not terminated. There was thus ample evidence in the record for the trial court to determine that the reason for the dismissal was race or age-based animus and not a valid business judgment.[4]

Furthermore, Smith presented direct evidence of age-based animus—Smith was called "old man," and the foreman had indicated that he was happily anticipating Smith's retirement. FDC contends that "old man" is simply a term of respect, an argument we find wholly unconvincing; in the trial court's discretion, it could easily be determined that such statements evinced age-based animus and evidence of discriminatory intent. *See Scofield v. Bolts & Bolts Retail Stores,* 21 Fair Empl. Prac.Cas. (BNA) 1478, 1480, 1979 WL 291 (S.D.N.Y.1979) (holding that the plaintiff made out a prima facie case of age discrimination based upon a showing that she was a member of the protected group, she was qualified and capable of doing her job, she was discharged, and that her manager called her "old woman," thus evincing age-based animus sufficient to demonstrate discriminatory intent). We find adequate evidence to support the trial court's similar determination here.

Thus, we find that Smith did make out a case that he was terminated because of his age and race, he did identify age and race-based animus, and he did demonstrate that he was treated differently than similarly situated young, non-Native Americans, to a

4. Although we agree with appellant that no evidence was offered regarding the racial composition of the pool of applicants from which the work force was drawn, and although Smith bore the burden of coming forth with evidence of discrimination, this lack of evidence is not determinative, especially as this was not a case alleging discriminatory hiring practices. Such statistical evidence may be helpful in showing intent to discriminate absent direct evidence of such intent, or in a disparate impact situation, where such intent is not determinative.

degree sufficient to support the trial court's judgment.

II. DAMAGES

FDC contends that the trial court's award of damages was not supported by substantial evidence. It maintains that the trial court did not consider that Smith, subsequent to his termination, had alternative sources of income that should have offset and mitigated the damage award.

Specifically, FDC contends that Smith's income from hauling wood should have been considered by the court. Smith testified at trial that he hauled one load of wood per day, twice a week, earning $60 per load. Smith also received public assistance and social security. FDC estimates that, combining these sources of income, Smith earns over $6,000 more per year than he did while employed by appellant, and contends that, if Smith worked five days a week, he would make much more.

Further, FDC contends that there is no substantial evidence to support the court's finding that Smith earned $4.00 per hour while employed by FDC, stating that the only evidence was that Smith earned $4.00 per hour when he was hired in 1973 and that there was no evidence of his earnings at the time of his termination. FDC also assigns error to the court's finding of lost future income, contending that no economic forecast or statistical analysis was submitted concerning job market fluctuations or the likelihood of Smith not being able to find future employment.

A. *The Rate of Pay*

An award of damages will not be disturbed if the trial court's determination is based on substantial evidence; it will not be reversed unless "it appears to have resulted from passion, prejudice, partiality, undue influence or some corrupt cause or motive, where there has been palpable error or the measure of damages has been mistaken." *Powers v. Campbell,* 79 N.M. 302, 304, 442 P.2d 792, 794 (1968) (quoting *Hammond v. Blackwell,* 77 N.M. 209, 421 P.2d 124 (1966)). On review, the evidence is considered in a light favorable to the verdict. *Nash v. Higgins,* 75 N.M. 206, 209, 402 P.2d 945, 947 (1965). Furthermore, in an employment discrimination case, once discriminatory activity has been proved, courts are willing to award damages despite uncertainty and the lack of precise measurement of injury as long as there is some evidence of damage, because of the public policy inherent in the law condemning invidious discrimination. *See Hairston v. McLean Trucking Co.,* 520 F.2d 226, 232–33 (4th Cir.1975); *United States v. United States Steel Corp.,* 520 F.2d 1043, 1050 (5th Cir.1975), *cert. denied,* 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 260–61 (5th Cir. 1974).

We are at a loss to understand why evidence of plaintiff's wages at the time of his dismissal was not elicited from plaintiff at trial. Although future earnings may be speculative and difficult to precisely measure, surely Smith's current wage rate at the time of his dismissal was easily susceptible of proof and would have greatly aided the court in its determination of damages. Nevertheless, we find that there was sufficient evidence for the court to form a basis for its permissible speculation into Smith's lost earnings. *See White v. Carolina Paperboard Corp.,* 564 F.2d 1073, 1091 (4th Cir.1977) (allowing trial court to speculate amount of lost income based on known earnings); *Brown v. Rollins, Inc.,* 397 F.Supp. 571, 578 (W.D.N.C.1974) (back pay determination based on evidence of other employee's earnings). Smith presented evidence that he was hired at $4.00 per hour in 1973 and that the starting wage for workers at the plant was $3.75 an hour in 1983. The calculation of back pay by the court was permissibly based on this evidence.

B. *Should the Court have Deducted Welfare Payments, Social Security, and Income from Self-Employment from Its Award?*

1. Self-Employment

The court could reasonably have determined that evidence of Smith's income

from hauling wood was speculative and that the income he gained from the activity was sporadic and uncertain, and thus it reasonably refused to offset the damage award. Once discrimination has been proved, the employer bears the burden of uncertainty in damage calculation. *See Hairston,* 520 F.2d at 233. Because Smith was discriminatorily denied his employment, there is evidence he lost income. Although the court must mitigate damages if there is evidence supporting such a determination, *see Vigil v. Arzola,* 102 N.M. 682, 689, 699 P.2d 613, 620 (Ct.App.1983), *rev'd on other grounds,* 101 N.M. 687, 687 P.2d 1038 (1984), *overruled on other grounds, Chavez v. Manville Prod. Corp.,* 108 N.M. 643, 777 P.2d 371 (1989), we find that the court here could properly determine that the evidence of mitigation presented was too speculative to require that Smith's income from hauling wood should be applied to offset the damage award.

2. Welfare and Social Security

Public assistance and social security constitute benefits from a collateral source, and they are not subject to offset from an award of damages. *See Trujillo v. Chavez,* 76 N.M. 703, 708, 417 P.2d 893, 897 (1966); *Mobley v. Garcia,* 54 N.M. 175, 177–78, 217 P.2d 256, 257 (1950); *see also Maxfield v. Sinclair Int'l,* 766 F.2d 788, 793–95 (3d Cir.1985), *cert. denied,* 474 U.S. 1057, 106 S.Ct. 796, 88 L.Ed.2d 773 (1986); *Littlejohn v. Null Mfg. Co.,* 31 Empl.Prac. Dec. (CCH) ¶ 33,587 (W.D.N.C.1983), *aff'd,* 732 F.2d 150 (4th Cir.), *cert. denied,* 469 U.S. 900, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984). Public sources that provide subsistence income do not constitute a windfall such that they should be offset against a damage award, especially when considered in light of the discriminatory activities of FDC that forced Smith and his family onto the public dole.

C. *Was the Award of Front Pay Appropriate?*

FDC argues that the award of damages for future lost earnings, or front pay, was unsupported by the evidence and was error. Nevertheless, evidence was presented that Smith attempted to find work and was unable to do so, and, in consideration of the discrimination precipitating Smith's situation, it was not inappropriate for the court to estimate future lost earnings based upon Smith's past income. *See Patterson v. American Tobacco Co.,* 535 F.2d 257, 269 (4th Cir.) (allowing back pay award to be supplemented at trial court's discretion "by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position"), *cert. denied,* 429 U.S. 920, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976); *Whittlesey v. Union Carbide Corp.,* 742 F.2d 724, 729 (2d Cir.1984) (allowing trial court discretion in age discrimination case to award front pay for four-year period from trial to compulsory retirement age). As the court in *Whittlesey* stated:

> [W]e think that front pay is, in limited circumstances, an appropriate remedy under the [Age Discrimination in Employment Act]. It serves a necessary role in making victims of discrimination whole in cases where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment.

742 F.2d at 729; *see also Maxfield,* 766 F.2d at 795–97 (upholding award of front pay when reinstatement not feasible).

We find that evidence of Smith's inability to find full-time employment in his locality, despite his strenuous efforts, constitutes sufficient evidence of his inability to mitigate damages to support the court's discretion in determining that future employment would be unlikely and to support an award of front pay.

III. WAS THE AWARD OF ATTORNEY'S FEES REASONABLE?

FDC contends that the attorney's fees awarded, $9,750, were excessive, arguing that it does not believe that the hours that Smith's attorney claims were spent in preparation for this case were accurate and that two of Smith's causes of action, under 42

U.S.C. Section 2000e (1964) and 42 U.S.C. Section 1981 (1870), were dismissed.

Reasonable attorney's fees may be awarded at the court's discretion to a prevailing complainant pursuant to NMSA 1978, Section 28-1-13(D) (Repl.Pamp.1987). As we have recently stated: "[T]he allowance of attorney fees is discretionary, but the exercise of that discretion must be reasonable when measured against objective standards and criteria." *Lenz v. Chalamidas*, 109 N.M. 113, 118, 782 P.2d 85, 90 (1989) (construing materialmen's lien statute). In determining the reasonableness of a fee award, a court should consider a variety of factors, including: (1) the time and effort required, considering the complexity of the issues and the skill required; (2) the customary fee in the area for similar services; (3) the results obtained and the amount of the controversy; (4) time limitations; and (5) the ability, experience, and reputation of the attorney performing the services. *Id.* at 118, 782 P.2d at 90; *Thompson Drilling, Inc. v. Romig*, 105 N.M. 701, 705, 736 P.2d 979, 983 (1987).

In this case, the court made a finding of fact that, after considering the above factors and the hourly records submitted by Smith's attorney, the fee award was appropriate. The award was less than that requested by Smith's attorney. Additionally, Smith prevailed at trial on his claims of age and race discrimination, and the fee awarded was reasonable in terms of the total damage award to Smith. Although Smith did not prevail on his claims based on federal law, those claims involved the same underlying occurrences and similar relief—Smith's attorney did not waste time pursuing spurious claims. Accordingly, we conclude that the trial court did not abuse its discretion in awarding attorney fees, especially in light of the attorney's efforts subsequent to trial both in pursuing this appeal and in attempting to collect upon the judgment.

IV. WAS THE JUDGMENT PROPERLY ASSESSED AGAINST A NONPARTY FOR VIOLATION OF A DISCOVERY ORDER?

The parties dispute the factual predicate of this issue. However, they do agree on the facts necessary for our resolution. Intervenor-appellant Cox is an officer and shareholder of FDC. Subsequent to the trial, Smith sought to depose Cox to assist in execution of the judgment, and he also issued a subpoena duces tecum requiring FDC to provide certain documents pertaining to FDC's assets. Although the parties dispute the scope of the subpoena, whether Cox had knowledge of the request for documents, and whether Smith attempted to pierce the corporate veil to find Cox personally liable for the judgment, these facts are unnecessary for our disposition. It is undisputed, however, that Cox was not named a party to this suit prior to trial, and Smith did not attempt to bring Cox into the suit as a party post judgment. After the judgment was entered, Cox and FDC did not comply with the discovery requests, and Smith moved the court for an order compelling discovery. Cox and FDC failed to comply with the order, and the court ordered sanctions to be assessed against Cox, holding him personally liable for the judgment.

Cox contends that he was never a party to the lawsuit and that, as a nonparty, the only appropriate sanction for noncompliance with discovery was a contempt order. He further contends that because the notices of deposition in aid of execution of the judgment were filed prior to the judgment, they were void ab initio; that the court erred in imposing liability on Cox because it did not issue a writ of execution, and that because the sanction order deprived Cox of property without the due process of law, it violated the United States and New Mexico Constitutions.

Smith, on the other hand, contends that the sanctions against Cox were justified under the circumstances. He asserts that Cox's gross noncompliance with the order compelling discovery justified the sanction and that such a sanction was within the trial court's discretion.

Because we find that Cox's first contention is valid, we reverse that part of the judgment requiring that Cox be personally

liable. Because we find that the court abused its discretion by sanctioning a nonparty in this way, we also find it unnecessary to address the other issues raised by Cox.

Upon a deponent's failure to comply with a discovery request, the party seeking discovery may apply for an order to compel. SCRA 1986, 1–037(A). Failure to comply with such an order is cause for sanctions. *See id.* 1–037(B). The choice of sanctions lies within the discretion of the trial court, and it will be reversed only for an abuse of discretion. *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 239, 629 P.2d 231, 315 (1980), *cert. denied*, 451 U.S. 901, 101 S.Ct. 1966, 68 L.Ed.2d 289 (1981).

SCRA 1986, 1–037(B) states in pertinent part:

> (1) If a *deponent* fails to be sworn or to answer a question after being directed to do so by the court in which the action is pending, the failure may be considered *a contempt of court.*
>
> (2) If a *party* or an officer, director or managing agent of a party or a person designated * * * to testify on behalf of a party fails to obey an order to provide or permit discovery, * * * the court in which the action is pending may make *such orders in regard to the failure as are just,* and among others the following:
>
> > (a) an order that the *matters regarding which the order was made* or any other designated facts *shall be taken to be established* for the purposes of the action in accordance with the claim of the party obtaining the order[.] [Emphasis added.]

Smith argues that, because his discovery was directed toward finding information regarding piercing the corporate veil with regard to Cox, the court properly deemed those facts true. He contends that, having thus determined that the corporate veil was pierced, the court appropriately ordered Cox to personally be liable on the judgment.

This argument, however, is flawed because Cox was never made a party to the suit. SCRA 1986, 1–037(B)(1) addresses sanctions available to a deponent who is nonresponsive to discovery requests and states that only contempt is available. On the other hand, SCRA 1986, 1–037(B)(2) has much broader sanctions available, but these may only be directed against a nonresponsive *party.*

Accordingly, we hold that an order requiring that the judgment be paid by a nonparty is not an appropriate sanction for violation of a discovery order. We therefore reverse that portion of the judgment.

We are not unmindful that this may well leave Smith unable to collect on the judgment, and we are reluctant to allow FDC to evade its responsibility in this matter. On the other hand, we find that the trial court abused its discretion in assessing the judgment against Cox, and we find that its order cannot stand. Therefore, we do not want this opinion to be construed as leaving Smith without recourse. He may petition the trial court to join Cox as a party pursuant to SCRA 1986, 1–019 and then pursue post-judgment discovery in execution of the judgment. Alternatively, he may bring suit against FDC and Cox to pierce the corporate veil, *see Scott v. AZL Resources, Inc.*, 107 N.M. 118, 753 P.2d 897 (1988), or he may take any other appropriate action to collect the judgment.

We therefore affirm in part and reverse in part, while leaving Smith the opportunity to pursue any appropriate action against Cox, either in this proceeding in an action pursuant to execution of the judgment, or in a separate proceeding. Accordingly, we REVERSE in part and AFFIRM in part.

SOSA, C.J., and WILSON, J., concur.

787 P.2d 443

Ralph F. PETTY, Jr.,
Plaintiff–Appellant,

v.

The BANK OF NEW MEXICO HOLDING COMPANY, George L. Clark, Charles Spann, Mike Anaya, Albert Arrigoni, Culbertson & Culbertson Partnership, Marie Ellen Culbertson, Myles C. Culbertson, George H. Dapples, Sam Dazzo, Sr., George M. Fernandez, James H. Franke, Jerry A. Henson, Holiday Management Company, Jerry W. Keeran, Jeffrey P. Lane, Richard D. Lueker, Joan Lueker, Joseph C. Murray, Ronald D. McConnell, Sosimo Padilla, Ruth Padilla, Don G. Price, Ron M. Price, Alonzo D. Romero, Antonio A. Sanchez, Orhan M. Sansoy, M.D., Orhan M. Sansoy, P.A. Pension Plan, Ronald J. Shettlesworth, Mary Ellen Shettlesworth, Southwest Cardiology Associates, P.A., Spann, Latimer and Hollowwa, Ronald B. Williams, Rebecca G. Williams, Ben A. Lanford, Sr., and State Beer Distributors, Inc., Defendants–Appellees.

No. 18059.

Supreme Court of New Mexico.

Feb. 19, 1990.

Freedman, Boyd & Daniels, John W. Boyd, Albuquerque, for Clark.

White, Koch, Kelly & McCarthy, Bruce R. Kohl, Santa Fe, for Bank of NM Holding Co.

Charles C. Spann, Albuquerque, pro se.

Spann, Latimer & Hollowwa, James A. Artley, Albuquerque, for Spann, Latimer & Hollowwa.

Robert B. Martinez, Albuquerque, for Shettlesworths and Williamses.

OPINION

MONTGOMERY, Justice.

In this stockholder's derivative suit a minority shareholder (Petty) seeks relief from officers and directors of the corporation (the Holding Company). The complaint requests a determination that funds advanced to the defendants as litigation expenses in another suit have been wrongfully diverted from the corporation and judgment for any such improper expenditures. The district court dismissed the complaint for failure to state a claim upon which relief could be granted. Petty appeals, claiming that his complaint was sufficient to state a cause of action on behalf of the corporation for the allegedly wrongful indemnification of the officers and directors. He maintains that the New Mexico statute authorizing indemnification of directors does not bar this action.

We agree that, under New Mexico's liberal pleading rules for testing the legal sufficiency of a complaint, Petty's complaint does state a claim for relief. We hold that, under the facts pleaded in the complaint, the corporate indemnification statute does not immunize the advances to the directors and that, while there is an aspect of prematurity to Petty's complaint that might justify withholding relief at this stage, the court erred in concluding that the complaint was legally insufficient. We accordingly reverse and remand for further proceedings.

I.

Petty purchased his fifty shares (less than 1% of the outstanding common stock)

Villella, Skarsgard & Noya, Patrick Villella, Albuquerque, for plaintiff-appellant.

in the Holding Company on September 23, 1987. One week later he addressed a letter to the Holding Company demanding that it refrain from paying any of the litigation expenses incurred by the defendants in another, pending lawsuit among persons who were Holding Company shareholders and signatories to a buy-sell and voting trust agreement relating to the corporation's stock. The next day, October 1, the corporation authorized reimbursement of its officers and directors for their legal fees, costs and expenses incurred in the defense of the other litigation.

The other litigation (the *Lanford* litigation), which is presently pending, is a suit by Ben A. Lanford and others against George L. Clark, president and chief executive officer of the Holding Company, against other shareholders of the Holding Company, and against the Holding Company itself, for a determination of the price at which shares of stock in the corporation will be bought and sold pursuant to a "Shareholders Buy–Sell and Voting Agreement." The agreement is a more-or-less standard agreement fixing the price at which shares of stock in the corporation shall be bought and sold among signatories to the agreement on the occurrence of certain events, and conferring on certain "Shareholder Representatives" power to vote the signatories' stock in electing members of the board of directors. The agreement is subscribed by shareholders owning over 80 percent of the stock of the Holding Company. Petty is not a party to the agreement.

On November 11, 1987—approximately one and one-half months after acquiring his stock—Petty filed in district court this suit against the Holding Company and its officers and directors. His complaint, amended by leave of court, asserts that funds belonging to the Holding Company are being expended for legal services to defend the actions and advance the private interests of the signatories to the buy-sell agreement. It further alleges that this use of corporate funds is wrongful and a breach by the officers and directors of their fiduciary and other obligations to the Holding Company and its shareholders. The amended complaint prays for the following items of relief, among others: "judgment to determine and prohibit the use of any Holding Company funds to defend the [*Lanford*] litigation by and among" signatories to the buy-sell agreement; judgment against the officers and directors "who authorized the improper use of Holding Company monies for the amount advanced or wrongfully diverted"; and "a determination that the fees and costs of defense of this action" by the officers and directors may not be reimbursed by the Holding Company.

The officers and directors, defendants in the present action, moved to dismiss the complaint for failure to state a claim upon which relief could be granted, asserting the following two specific grounds: (1) Indemnification of officers and directors is specifically permitted by statute (NMSA 1978, § 53–11–4.1 (1989 Supp.)), and (2) the complaint fails to allege why the directors and officers' action constitutes a breach of their fiduciary obligation. The court granted the motion, and Petty appeals.

II.

As to the second of the two grounds asserted in defendants' motion to dismiss, we think it clear that the complaint alleged sufficient facts to state a claim against the officers and directors for breach of their fiduciary duty. The foregoing recitation of facts is taken, of course, from the complaint, the allegations of which we are bound to accept as true on a motion to dismiss for failure to state a claim. *Gomez v. Board of Educ.*, 85 N.M. 708, 710, 516 P.2d 679, 681 (1973). The question before us, at the stage of testing the legal sufficiency of a complaint, is whether the plaintiff might prevail under any state of facts provable under his claim. *Id.; Hall v. Budagher*, 76 N.M. 591, 592, 417 P.2d 71, 72 (1966). Under our rules of "notice pleading," it is sufficient that defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim; specific evidentiary detail is not required at this stage of the

pleadings. *See Hambaugh v. Peoples*, 75 N.M. 144, 149, 401 P.2d 777, 780 (1965) (citing 2 *Moore's Federal Practice* § 813, 1695 [now 2A Moore's Federal Practice ¶ 8.13 (1989)]: "courts have recognized that the function of pleadings under the Federal Rules is to give *fair notice* of the claim asserted so as to enable the adverse party to answer and prepare for trial * * *") (emphasis in original opinion).

Here, the defendants were adequately apprised of the nature of Petty's claim (or more accurately, of the corporation's claim, asserted derivatively by Petty) against them, by virtue of the allegations that they had breached their fiduciary duty, or otherwise acted wrongfully, in authorizing the directors' indemnification by the Holding Company of their litigation expenses in the *Lanford* litigation. The most significant, if not the entire, basis for this assertion was that they had acted for their own private benefit, as signatories to the buy-sell agreement, in causing the corporation to pay their litigation expenses. These are adequate allegations under the general law surrounding corporate directors' breach of duty to the corporation and their liability to reimburse the corporation for any ensuing damage.

Although appellate courts in New Mexico have not often had occasion to discuss stockholders' derivative suits and the liability of officers, directors and controlling majority shareholders for breach of fiduciary duty to the corporation and its minority shareholders, it is thoroughly settled that an action such as this will lie, on behalf of the corporation, to restrain and seek reimbursement for disbursements by the corporation occasioned through the defendants' breach of their fiduciary or other duties owing to the corporation and the minority shareholders. "That such cause of action is proper, if well pleaded, cannot be doubted." *Pope v. Lydick Roofing Co.*, 81 N.M. 661, 666, 472 P.2d 375, 380 (1970). *Pope* is one case in which such an action has been recognized; there have been countless others around the country.

> The courts will protect minority stockholders against fraud or a breach of trust by officers or directors. Stockholders may obtain relief in equity against the officers of the corporation who wrongfully deal with its property to the injury of the stockholders. There is authority that minority stockholders can obtain relief against acts of mismanagement, abuse of discretion, failure to perform statutory duties, acts in violation of statute or against public policy, and negligence on the part of corporate directors or officers, through a derivative as distinguished from an individual action.

19 Am.Jur.2d *Corporations* § 2262, at 161 (1986).

We conclude that on its face the complaint was sufficient to withstand a motion to dismiss for failure to state claim, unless some provision of law immunized the directors' conduct in authorizing indemnification in this instance.

III.

What then of the directors' position that their action was permitted by a specific provision in the New Mexico Business Corporation Act?

NMSA 1978, Section 53-11-4.1(B) (1989 Supp.) provides:

> A corporation shall have power to indemnify any person made a party to any proceeding by reason of the fact that the person is or was a director if:
>
> (1) the person acted in good faith;
>
> (2) the person reasonably believed:
>
> (a) in the case of conduct in the person's official capacity with the corporation, that the person's conduct was in its best interests; and
>
> (b) in all other cases, that the person's conduct was at least not opposed to its best interests; and
>
> (3) in the case of any criminal proceeding, the person had no reasonable cause to believe the person's conduct was unlawful. Indemnification may be made against judgments, penalties, fines, settlements and reasonable expenses, actually incurred by the person in connection with the proceeding; except that if the proceeding was by or in

> the right of the corporation, indemnification may be made only against such reasonable expenses and shall not be made in respect of any proceeding in which the person shall have been adjudged to be liable to the corporation * * * *

The directors' principal position on this appeal is that, when a corporation acts pursuant to this section to indemnify its officers or directors (or other agents, *see* Section 53–11–4.1(I)), such action on its part is conclusive and confers the absolute right on the directors, etc., to receive the indemnification. They further contend that the "only circumstance" in which indemnification can be challenged as improper is that outlined in Section 53–11–4.1(C), which reads:

> A director shall not be indemnified under Subsection B of this section in respect of any proceeding charging improper personal benefit to the director, whether or not involving action in the director's official capacity, in which the director shall have been adjudged to be liable on the basis that personal benefit was improperly received by the director.

There are two defects in the directors' argument. The first is that the indemnification statute is, under the allegations of the complaint in this case, inapplicable to the Holding Company's action with respect to the defendants in the *Lanford* litigation. The second is that, while Section 53–11–4.-1(B) confers on a corporation the *power* to indemnify, it does not thereby insulate an indemnification from attack in a derivative suit on grounds of breach of fiduciary duty, mismanagement, etc. We shall explain the first of these defects now; we shall discuss the second in Part IV.

Section 53–11–4.1(B) empowers a corporation to indemnify a person made a party to a proceeding "by reason of the fact that the person is or was a director." Under the allegations in Petty's complaint, the statute does not apply to the Holding Company's action indemnifying the directors as defendants in the *Lanford* litigation because they were not made parties to that proceeding *by reason of the fact that* they are or were directors of the corporation. Rather, they were made parties to that litigation by reason of the fact that they are shareholders in the Holding Company and signatories to the buy-sell and voting trust agreement.

Section 53–11–4.1, adopted in 1987 (N.M. Laws 1987, ch. 238, § 9), was taken from the 1980 amendments to the American Law Institute and American Bar Association's Model Business Corporation Act, Sections 8.50–8.58. At the present time, all American jurisdictions have statutes providing for the indemnification of litigation expenses incurred by directors, officers and other corporate personnel in the defense of litigation brought against them as such. H. Henn & J. Alexander, *Laws of Corporations and Other Business Enterprises* § 380, at 1123 (3d ed. 1983) [hereinafter *Henn & Alexander*]. Typical of these statutes are the formulations in the various revisions of the Model Business Corporation Act. *Id.* at 1131.

> In most of the jurisdictions recovery of expenses by directors or others covered is dependent upon their being involved in the action by reason of "being or having been" a director, etc.

Fletcher, *Cyclopedia of Corporations* § 6045.3, at 645 (perm. ed. 1984). *See Sorensen v. Overland Corp.*, 242 F.2d 70 (3d Cir.1957) (contract made by plaintiff in individual capacity and not as director); *Mooney v. Willys–Overland Motors, Inc.*, 204 F.2d 888 (3d Cir.1953) (director sued for wasting corporation assets allowed full expenses of suit although part attributable to defense as stockholder); *Hydro–Dynamics, Inc. v. Pope*, 146 Ariz. 586, 708 P.2d 70 (1985) (director and wife who brought derivative action not entitled to indemnification because they sued in their capacity as shareholders); *People v. Uran Mining Corp.*, 26 Misc.2d 957, 206 N.Y.S.2d 455 (Sup.Ct.1960) (indispensable condition of statute is that defendant must have been made a party to the action by reason of his being or having been a director, etc., of the corporation).

Petty does not point specifically to the "by reason of the fact that" requirement in

the statute but argues repeatedly in his brief that the *Lanford* litigation is an action among the shareholders of the Holding Company and signatories to the buy-sell and voting trust agreement. By clear implication, then, Petty maintains that the directors were not made parties to that litigation by reason of the fact that they are or were directors of the corporation. The directors, for their part, likewise do not discuss the meaning or applicability of the statutory requirement, although they do argue that "[a] corporation has the right under law to indemnify an officer or director *whether or not* that person was acting in an 'official corporate capacity' in the conduct being defended." (Emphasis in original.) The directors go on to argue that, if an officer or director is sued in his "official capacity," the corporation may indemnify him as long as he acted in good faith and reasonably believed that his conduct was in the "best interests of the corporation," but that, if he was not acting in his official capacity, the corporation can indemnify him so long as he acted in good faith and reasonably believed that his conduct was "at least not opposed to [the corporation's] best interest." For this distinction the directors cite Subsections (a) and (b) of Section 53–11–4.1(B)(2). *See also* Section 53–11–4.1(A)(4) (definition of "official capacity"). Thus, completing their argument on this point, the directors contend that the standard of conduct for a director or officer for which he may be indemnified is *broader* for acts performed outside his official corporate capacity than it is for acts performed within his official capacity.

In terms of the *conduct* for which a director may be indemnified, the directors' argument—that the standard is broader for conduct outside one's official capacity than it is for acts within that capacity—may well be correct. However, the correctness of their argument on this point in no way supports an implication that the statute authorizes indemnification of persons who are not joined as parties to a proceeding by reason of the fact that they are or were directors. Under the statute, the reason for a person's being named a party appears critical; once he or she is joined as a party to the proceeding, the conduct placed in issue might very well give rise to a more relaxed standard of indemnification if that conduct was "unofficial" than if it was performed in the director's "official capacity." For an example of this distinction, *see Henn & Alexander, supra* at 1136 n. 71 (action taken or omitted by director with respect to an employee benefit plan in the performance of director's duties deemed to be for a purpose not opposed to the best interests of the corporation). Even so, it clearly would make no sense for the statute to authorize indemnification of an individual who was not sued because of his status as a director, etc., of a corporation—who, in effect, was a stranger to the corporation for purposes of the proceeding on account of which he or she was granted indemnification. The purpose of the legislation is to encourage qualified individuals to accept the responsibilities of corporate management without fear that expenses incurred by them in performing their duties as directors will not be borne by the corporation they serve. *Fletcher, supra,* § 6045.2 at 474. To expand the list of persons entitled to claim the benefit of indemnification to include signatories to a buy-sell agreement, who are litigating questions under that agreement for their own private benefit, would go far beyond this purpose of the statute.

We hold, therefore, that, under the facts as alleged in Petty's complaint, the indemnification statute does not apply to the defendants named in the *Lanford* litigation.

IV.

We turn next to the directors' principal contention on this appeal, namely, that "there is only a very narrow circumstance in which a shareholder might be able to litigate the propriety of a corporate decision to indemnify"—viz., that the conditions in Section 53–11–4.1(C) for *not* indemnifying a director are satisfied.

The directors assert, tracking the language of Section 53–11–4.1(C), that the "only circumstance" in which Petty could

state a claim for "wrongful indemnification" would be in the event the following four conditions existed: First, that the *Lanford* suit charged that a director received an "improper personal benefit"; second, that that suit was concluded; third, that it was concluded unfavorably to the indemnified director; and fourth, that the unfavorable outcome included an adjudication that the indemnified director was liable on the basis that he improperly received personal benefit.

It is certainly true that, if these four conditions did exist, indemnification of the directors would be improper and a stockholder such as Petty could maintain a derivative action against the Holding Company to recover funds advanced or otherwise paid by way of indemnification and/or to restrain any threatened indemnification. However, reliance on Section 53–11–4.1(C) is not the sole basis for an action to challenge a corporate indemnification. If the corporation exercises its power under Section 53–11–4.1(B) to indemnify under other circumstances, that exercise may be challenged in a stockholder's derivative suit where it is alleged that the action was taken by the authorizing directors in breach of their fiduciary or other duty to the corporation. To see that this is so requires recognition of Section 53–11–4.-1(B) as an enabling statute—as conferring on the corporation a *power* which it might otherwise lack, but not as declaring that any indemnification pursuant to the statute is immune from challenge in a derivative lawsuit. Section 53–11–4.1(B) does not, in other words, confer on the indemnified director an unquestionable *right* to indemnification.

Before proceeding further, we pause to note that our discussion as to why the indemnification statute does not immunize the directors from the challenge posed in Petty's complaint should shed light on this issue in the event it arises on remand. In this connection, the directors represent in their answer brief that, although Petty's complaint alleges that "officers and directors" of the Holding Company were granted indemnification for their litigation expenses in the *Lanford* litigation, in fact only the president of the corporation, Mr. Clark, was so indemnified. The record on appeal—not the complaint—contains suggestions that the *Lanford* litigation (the complaint in which is *not* part of the record in this case) involves assertions that Mr. Clark defrauded Mr. Lanford into signing the buy-sell agreement and that the agreement is being misinterpreted or improperly administered in some fashion. Thus, there may very well be allegations in the *Lanford* litigation implicating Mr. Clark and perhaps other directors of the Holding Company *as directors* so that one or more of them may turn out, as the facts are developed in the present case, to have been made parties to the *Lanford* proceeding "by reason of the fact that" they are or were directors of the Holding Company. In that case, Section 53–11–4.1 will be applicable, and the question will arise, does the statute bar Petty's complaint for "wrongful indemnification"? To answer this question, we must review briefly the history, purpose and structure of the statute.

As already noted, all American jurisdictions now have statutes empowering corporations to indemnify their directors and other agents under various circumstances. These statutes originated with an enactment in New York in 1941 in response to a case holding that certain directors who had been defendants in a derivative suit charging misconduct were not entitled to reimbursement of their litigation expenses, even though they had been successful in the action, unless they could show that in defending the action they brought some benefit to the corporation. *New York Dock Co. v. McCollom,* 173 Misc. 106, 16 N.Y.S.2d 844 (1939). Under the common-law rules developed up to that time and thereafter until enactment of the various statutes, there was a split of authority as to whether there was a right to indemnification, the cases reaching different results depending on whether or not the director was successful in his defense, whether a benefit was conferred on the corporation, and other factors. *See generally, Henn & Alexander, supra,* § 379; Fletcher, *supra,*

§ 6045.1. Several of these early cases held that the corporation lacked power to indemnify successful directors absent a benefit to the corporation. *See, e.g., New York Dock Co.; Griesse v. Lang,* 37 Ohio App. 553, 175 N.E. 222 (1931), *but see Figge v. Bergenthal,* 130 Wis. 594, 109 N.W. 581 (1906).

In New Mexico, the question whether the corporation has power to indemnify its directors has not until now been considered by this Court or the court of appeals. Under the corporation statutes in effect before adoption of our Business Corporation Act, there was no reference to this subject. *See* NMSA 1953, §§ 51–1–1 to –13–12.1. In 1967, however, our legislature enacted the Business Corporation Act, N.M. Laws 1967, ch. 81, taken from the 1960 version of the ALI–ABA Model Act, section 4(*o*) of which related to indemnification. Then, in 1980 the Model Act was revised to deal with indemnification at greater length, ALI–ABA, Model Bus.Corp. Act, § 5 (1980), and these provisions appear in Section 53–11–4.-1, as originally enacted (N.M.Laws 1983, ch. 304, § 23) and as amended in 1987 (N.M. Laws 1987, ch. 238, § 9). *See generally* 2 *Model Bus.Corp. Act Anno.* §§ 8.50–8.58 (3d ed. 1984). For a brief history of a corporation's power to indemnify and the evolution of this concept within the Model Act *see id.* at 1088–91.

Section 53–11–4.1(B) by its terms purports to give a corporation the *power* to indemnify a person under the conditions specified. We think it noteworthy that this section of our Business Corporation Act follows Section 53–11–4, which enumerates the various other powers possessed by corporations. Section 53–11–5, which immediately follows Section 53–11–4.1, also deals with a corporate power, the power to acquire a corporation's own shares. Then, consistently with this statutory scheme, Section 53–11–6 deals with the defense of *ultra vires*—the defense that a corporation acted beyond the scope of its power or has exercised its power irregularly. *Black's Law Dictionary* 1365 (5th ed. 1979).

From all of this—from the wording of Section 53–11–4.1(B) itself, from its historical background and from the placement of the section among other provisions of the Business Corporation Act dealing with powers of corporations—we conclude that the statute (that is, Section 53–11–4.1(*B*)) operates to *empower* corporations to indemnify their directors and other agents, not to confer on those persons the *right* to indemnification (except in the situation that will shortly be described).

This being so, we believe that an act of indemnification, like any other exercise by a corporation of one or more of its powers, is subject to challenge in a stockholder's derivative suit (or in any other type of proceeding in which an act of the board of directors or other corporate personnel may be called into question) in the same way that other corporate actions may be reviewed. It could not reasonably be argued, for example, that simply because a corporation has power to dispose of its assets or lend money or otherwise conduct its business, as contemplated by Subsections 53–11–4(D), (F) and (J), the actions of its board of directors in doing these things are immune from scrutiny in a stockholder's derivative suit or other proceeding. In such a case, the question is whether the directors properly exercised the corporation's admitted power to take the action or whether in doing so they were guilty of breach of fiduciary duty, mismanagement or some other violation of their duty to the corporation.

In the same way, an act of indemnification by a corporation pursuant to the general grant of power in Section 53–11–4.1(B) may be made the basis of a suit, at the instance of a minority shareholder or otherwise. In such a case—and in this case on remand and if the statute is otherwise found to be applicable—the question will be whether the directors have breached their fiduciary duty to the corporation or otherwise have failed to adhere to the various standards of conduct required of corporate directors in the management of their corporations.

Thus, we reject the directors' contention on this appeal that the "only circumstance" under which they could be liable for

"wrongful indemnification" is that envisioned by Section 53–11–4.1(C). If the circumstances contemplated by that subsection were found to exist, then the directors would be liable to restore to the corporation any funds improperly advanced to them by way of indemnification, whether or not there was any breach of fiduciary duty or other culpable conduct leading to the indemnification in the first place. In that situation, the indemnification would be *ultra vires*, and the directors would be absolutely liable to return any funds or other assets that had been improperly advanced or reimbursed to them.

But another "circumstance" in which the directors might be liable for "wrongful indemnification" is that at least arguably evoked by Petty's complaint—an indemnification under the broad authority conferred by Section 53–11–4.1(B), where the directors' exercise of their power under that subsection is shown, to the satisfaction of the trial court, to have been improper under the general fiduciary and other standards guiding corporate directors' exercise of their discretionary powers. As we have held, Petty's complaint states a cause of action, and if he proves that the directors breached their fiduciary duty in authorizing indemnity to Mr. Clark and any other directors in connection with the *Lanford* litigation, then Section 53–11–4.1(B) will not prevent his recovery on behalf of the corporation.

An exception to the statement just made is found, of course, in Section 53–11–4.1(D)(1). Under this subsection, a director who has been wholly successful in the defense of a proceeding "shall be indemnified" against the reasonable expenses incurred by him or her in connection with the proceeding. This subsection, therefore, gives such a director the absolute *right* to indemnification under the circumstances contemplated by it; and it does, moreover, make the "opinion of the board of directors" final on the question, assuming that their opinion is "reasonable."

V.

Much of the directors' brief on this appeal is devoted to the proposition that Petty's complaint is premature—that the outcome of his suit for "wrongful indemnification" will necessarily depend on how the *Lanford* litigation is concluded. For, as we have just seen, a disposition of that litigation in which the directors are "wholly successful" will *entitle* them to indemnification against their reasonable expenses incurred in connection with the proceeding (assuming that the board of directors reasonably arrives at the opinion that they have been, in fact, wholly successful). Alternatively, in the event that the directors shall be "adjudged to be liable" in the *Lanford* case on the basis that personal benefit was improperly received by them (assuming in that case that they are charged with having received improper personal benefit), then, according to Section 53–11–4.1(C), they *shall not be indemnified*, and the corporation will have the right (which can be asserted derivatively in a stockholder's suit) to recover any amounts advanced to the directors, regardless of any culpable conduct by the directors in authorizing the indemnification.

A third scenario under which disposition of the *Lanford* litigation will be highly pertinent is that to which our construction of Section 53–11–4.1(B) gives rise: The outcome of that litigation will probably have a significant effect on the trial court's determination in this case as to whether or not the directors acted improperly in authorizing advance indemnification of the *Lanford* litigation expenses. As the directors say, "the outcome of the *Lanford* litigation, and the matters determined therein, * * * will form the nucleus of facts from which the Holding Company [and, we add, the trial court] can make the determination of whether indemnification of Clark, et al., was permissible or prohibited" or perhaps even required.

There are numerous factors, in short, on the basis of which the district court could have concluded that this action is not ripe for an adjudication. If it drew such a conclusion, the court might well decide to dismiss the action as premature. *See Schy v. Susquehanna Corp.*, 419 F.2d 1112,

1115 (7th Cir.), *cert. denied,* 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970).

We note in this connection that Petty's complaint essentially is framed as a request for declaratory relief. He asks that the court *determine* that the use of any Holding Company funds to defend the *Lanford* litigation is improper, that such litigation expenses may not be reimbursed by the Holding Company and that any judgment against the directors in that case may not be reimbursed to any defendant. Under New Mexico law, it is not mandatory that a trial court entertain an action for a declaratory judgment; the court may in its discretion dismiss the action, presumably in a case where good reason for doing so exists. *Allstate Ins. Co. v. Firemen's Ins. Co.,* 76 N.M. 430, 415 P.2d 553 (1966).

Although tempted to do so, we do not affirm the trial court's dismissal in this case on this ground. For one thing, it does not appear that the court exercised its discretion to dismiss for lack of ripeness, and we should not pass upon the dismissal on any such ground in the absence of a showing that the trial court considered it and in the absence of argument on the point by the parties. For another, the directors' claim that this action is premature is predicated on the applicability of the indemnification statute. If that statute does not apply, as discussed in Part III of this opinion, then the case may well be ripe and not premature.

This action has many of the earmarks of a minority shareholder's "strike suit"—a suit by a holder of a miniscule interest in the corporation to harass and coerce the directors into a settlement far out of proportion to the minority shareholder's financial interest in the object of the suit. *See generally Cohen v. Beneficial Loan Corp.,* 337 U.S. 541, 548–49, 69 S.Ct. 1221, 1226–27, 93 L.Ed. 1528 (1949); *Gordon v. Elliman,* 306 N.Y. 456, 479–480, 119 N.E.2d 331, 345–46 (1954) (Fuld J., dissenting). This consideration, along with the others mentioned above and some that may occur to the district court, may, upon a fuller development of the facts by discovery or otherwise, lead the court ultimately to dismiss the action or to hold it in abeyance until it more clearly appears that the corporation, through its stockholder representative in this derivative lawsuit, is entitled to relief.

For the present, however, we conclude that Mr. Petty has stated a claim upon which relief could be granted. We therefore reverse the district court's order of dismissal and remand the case for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C.J., and BACA, J., concur.

787 P.2d 452

FOUNDATION RESERVE INSURANCE COMPANY, INC., Plaintiff–Appellant,

v.

Antonio MARIN and Leonel Prieto, Defendants,

and

Teresa Marin, Individually and as Personal Representative of the Estate of Anita Prieto, Defendant–Appellee.

No. 18708.

Supreme Court of New Mexico.

Feb. 23, 1990.

Atwood, Malone, Mann & Turner, P.A., John Nelson, Roswell, for plaintiff-appellant.

Duhigg, Cronin & Spring, P.A., Leon Thomas, Albuquerque, for defendant-appellee.

OPINION

SOSA, Chief Justice.

Foundation Reserve Insurance Company filed a declaratory judgment action to determine liability under an automobile insurance policy issued to Teresa Marin and her husband on their Ford Bronco. Marin was named in her individual capacity and as personal representative of the estate of her minor daughter. Both parties filed motions for summary judgment, and the district court entered judgment partially granting and denying each motion. The court found no coverage existed under the liability or medical payments provisions of the policy, but allowed coverage under the uninsured motorist provision. Foundation appeals the ruling on the uninsured motorist coverage. We affirm.

The facts are undisputed. Marin's daughter was killed in a two-car collision while Marin's husband was driving an uninsured Chrysler in which the daughter was a passenger. The parties agree that the accident was caused at least in part by the negligence of Mr. Marin, although the extent of his fault is not an issue in this appeal.

At the time of purchasing insurance on the Ford, the Marins owned the Chrysler, and apparently made a deliberate decision not to insure it. Mr. and Mrs. Marin were the named insureds on the Ford policy, and the daughter was covered as a "family member," making her a class one insured. *See Konnick v. Farmers Ins. Co.*, 103 N.M. 112, 703 P.2d 889 (1985) (named insureds, their spouses, and relatives who live in the same household are "class one" insureds).

The policy contained the following provision: "[An] 'uninsured motor vehicle' does not include any vehicle or equipment: 1. Owned by or furnished or available for the regular use of you or any 'family member'." Foundation claimed this exclusion precluded coverage since the uninsured Chrysler was a vehicle owned by or furnished or available for their regular use. Foundation argues this case is controlled by *Willey v. Farmers Insurance Group*, 86 N.M. 325, 523 P.2d 1351 (1974), and that it was entitled to judgment as a matter of law. The insured in *Willey* was a passenger in her own vehicle and was killed when the authorized, uninsured driver negligently collided with another vehicle. The court upheld the validity of the definition of an uninsured motor vehicle, as not including a vehicle owned by or furnished for regular use of the named insured, and affirmed the district court's dismissal of the insured's claim.

Marin submits that, in her capacity as personal representative, she was entitled to recover uninsured motorist benefits under the Ford policy because her husband was driving an uninsured motor vehicle and his negligence was a cause of her daughter's death. She claims that such coverage is personal and not vehicle-oriented. Marin further maintains that Foundation's exclusionary provision is contrary to our Unin-

sured Motorists' Insurance statute, NMSA 1978, Section 66-5-301 (Repl.Pamp.1989), and asserts that the proper precedent to be followed under these circumstances is *Chavez v. State Farm Mutual Automobile Insurance Co.*, 87 N.M. 327, 533 P.2d 100 (1975). We agree and hold that *Chavez*, more thoroughly reasoned than *Willey*, is controlling, and find the exclusionary clause in violation of public policy and the express language of the statute. *See Continental Ins. Co. v. Fahey*, 106 N.M. 603, 747 P.2d 249 (1987) (exclusionary provision in insurance contract that conflicts with express language of statute or with legislative intent is void).

In *Chavez*, the district court held a similar exclusionary provision to be in violation of public policy under our former, but materially identical, uninsured motorist insurance statute. There the court invalidated a clause that excluded the insured from coverage when the insured was riding in an uninsured vehicle. Although not expressly overruling *Willey*, the court in *Chavez* observed that "[t]here does not appear in the [*Willey*] opinion any consideration of the objective of the statute * * *." 87 N.M. at 328, 533 P.2d at 101.

The purpose of uninsured motorist insurance, articulated in *Chavez*, is "to protect persons injured in automobile accidents from losses which, because of the tortfeasor's lack of liability coverage, would otherwise go uncompensated * * *. In other words, the legislative purpose * * * was to place the injured policyholder in the same position, with regard to the recovery of damages, that he would have been in if the tortfeasor had possessed liability insurance." 87 N.M. at 329, 533 P.2d at 102. This underlying policy is to compensate persons injured through no fault of their own. *Konnick v. Farmers Ins. Co. of Ariz.*, 103 N.M. 112, 703 P.2d 889 (1985); *State Farm Auto. Ins. Co. v. Kiehne*, 97 N.M. 470, 641 P.2d 501 (1982).

The statute must be liberally construed. *Schmick v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 216, 704 P.2d 1092 (1985). The only legitimate limitations on recovery are those specifically set out in Section 66-5-301: (1) that the insured legally be entitled to recover damages, and (2) that the negligent driver be uninsured. *Continental Ins. Co.*, 106 N.M. at 605, 747 P.2d at 251. The circumstances surrounding the death of Marin's daughter satisfy both requirements, and, as a passenger in an uninsured vehicle, she was insured against bodily injury including death. *See Lopez v. Foundation Reserve Ins. Co.*, 98 N.M. 166, 169, 646 P.2d 1230, 1233 (1982) ("When someone purchases general uninsured motorist coverage he is insured against bodily injury * * * as a passenger in an uninsured car * * *.").

Under the present circumstances, the exclusionary provision Foundation urges us to uphold is incompatible with the stated purposes of the uninsured motorist insurance statute, and thus "invalid because it is not the intent of the statute to limit coverage for an insured to a particular location or a particular vehicle." *Chavez*, 87 N.M. at 330, 533 P.2d at 103. The legislature intended that an injured person be compensated to the extent of liability coverage purchased for his or her benefit. *Jimenez v. Foundation Reserve Ins. Co.*, 107 N.M. 322, 757 P.2d 792 (1988). "[T]he Legislature did not intend to allow the creation of a gap in coverage which is contrary to the purpose of the statute." *Chavez*, 87 N.M. at 330, 533 P.2d at 103. Therefore, to be clear, the holding in *Willey* concerning uninsured motorist coverage is hereby expressly overruled. *See also Padilla v. Dairyland Ins. Co.*, (No. 18575, filed Feb. 26, 1990). We hold that Marin's daughter falls within the class of "innocent victims [to be protected] against uninsured tortfeasors," *see Chavez*, 87 N.M. at 329, 533 P.2d at 102, and that the district court was correct in finding Foundation liable under the uninsured motorist coverage.

Accordingly, we affirm the summary judgment in its entirety.

IT IS SO ORDERED.

RANSOM and MONTGOMERY, JJ., concur.

787 P.2d 455

Mike C. MOLINAR, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 18939.

Supreme Court of New Mexico.

Feb. 27, 1990.

Rehearing Denied March 20, 1990.

Jacquelyn Robins, Chief Public Defender, Peter Rames, Asst. Appellate Defender, Santa Fe, for petitioner.

Hal Stratton, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

PER CURIAM.

Petitioner, Mike C. Molinar, has petitioned us for a writ of certiorari, seeking reversal of his conviction in *State v. Molinar,* Ct.App. No. 10,982, November 11, 1989, Apodaca, J., dissenting. We granted his petition, and have issued the writ. Upon review of the case, we find that Molinar was a co-defendant with Terry Callaway in the latter's trial. *See State v. Callaway,* Ct.App. No. 10,966, November 7, 1989, Apodaca, J., dissenting, *reversed, Callaway v. State,* 109 N.M. 416, 785 P.2d 1035 (1990), Baca, J., dissenting. As in *Callaway,* petitioner objected to the trial court's *sua sponte* order of mistrial. We thus conclude that petitioner's second trial was constitutionally invalid, for the same reasons we gave in *Callaway.*

Accordingly, we reverse the court of appeals in No. 10,982, and remand the case to the district court with instructions to discharge petitioner from custody.

IT IS SO ORDERED.

BACA, J., dissents.

787 P.2d 455

STATE of New Mexico, Plaintiff-Appellee,

v.

Kenneth J. STENZ, Defendant-Appellant.

No. 11403.

Court of Appeals of New Mexico.

Jan. 4, 1990.

Certiorari Denied Feb. 7, 1990.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BIVINS, Chief Judge.

Defendant appeals his conviction for misdemeanor aggravated battery. He raises three issues: (1) ineffectiveness of his trial counsel; (2) insufficiency of the evidence to support his conviction; and (3) his right to allocution at sentencing for the misdemeanor. We affirm.

Officer Elam received a call at 11:10 p.m. regarding a possible gunshot wound. When he arrived at the scene, he found the victim, who had been shot near the eye with what the victim and his two companions believed was a pellet rifle. The victim and his companions testified they had been shooting fireworks when defendant appeared and told them to stop. Two of the boys believed they saw a rifle or some type of gun in defendant's hands. The third boy saw something he thought might be a stick or rifle. The boys told Officer Elam where defendant lived.

Officer Elam testified that, after the victim and his companions were sent to the hospital, he approached the front door of defendant's home and knocked, but no one answered. The door was slightly ajar and there were no lights on inside. Officer Elam testified he heard noises inside the house. He called for backup because he believed the person who did the shooting was inside the house. After the other officers arrived, they surrounded the house while Officer Elam and three other officers entered. Defendant was not in the house. Officer Elam found a pellet gun in the bedroom and seized it. This gun was admitted as evidence at trial.

Defendant was convicted and sentenced in magistrate court. He appealed his conviction to the district court, where he was tried de novo and again convicted and sentenced. He now appeals that conviction.

Ineffective Assistance of Counsel

The test for ineffective assistance of counsel is whether counsel exercised the skill of a reasonably competent attorney. *State v. Talley,* 103 N.M. 33, 702 P.2d 353 (Ct.App.1985). Defendant has the burden of proving the incompetence of his counsel and prejudice resulting from this incompetence. *Id.* In the present case, defendant asserts he was denied effective assistance of counsel based on trial counsel's failure to move to suppress the admission of the pellet gun into evidence.

Although defendant testified that he owned a pellet gun and went outside with the gun on the night of the shooting, he argues this testimony was compelled by the admission of the gun into evidence. He asserts the admission of the gun was preju-

dicial because of the circumstantial nature of the evidence against him. Because we determine that defense counsel's failure to move for the suppression of the pellet gun does not demonstrate incompetence, we need not reach the prejudicial effect, if any, of this failure.

A trial counsel is not incompetent for failing to make a motion when the record does not support the motion. *See State v. Helker,* 88 N.M. 650, 545 P.2d 1028 (Ct. App.1975), *cert. denied,* 429 U.S. 836, 97 S.Ct. 103, 50 L.Ed.2d 102 (1976). *See also State v. Sanchez,* 98 N.M. 781, 652 P.2d 1232 (Ct.App.1982). We examine the law and the facts to determine if a reasonably competent attorney could have decided that a motion to suppress was unwarranted.

A warrantless search may be justified by probable cause and exigent circumstances. *See Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Warden, Md. Penitentiary v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *State v. Burdex,* 100 N.M. 197, 668 P.2d 313 (Ct.App.1983); 2 W. LaFave, *Search and Seizure* § 6.1(f) (2d ed. 1987). In *Warden,* the United States Supreme Court agreed that neither the entry without warrant to search for the robber, nor the search for him without a warrant, was invalid. It said that, under the circumstances of the case, " 'the exigencies of the situation made that course imperative'." *Id.* 387 U.S. at 298, 87 S.Ct. at 1645 (quoting *McDonald v. United States,* 335 U.S. 451, 456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948)). In *Warden,* the police were informed that an armed robbery had taken place, and that the suspect had entered a certain residence less than five minutes before they reached it. The Court held they acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Court went on to say that the fourth amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.

In the present case, the police had received a call to investigate a shooting and found the victim bleeding from a gunshot wound. The victim and his companions directed Officer Elam to defendant's home as the direction from which the shot came. Officer Elam found the door ajar and the lights off. He heard noises inside the home. Although defendant argues he had left the house and the noises were made by animals inside the house, it was reasonable for Officer Elam to believe defendant was armed and inside the house when he called for backup and entered the house. Based on these facts, a reasonably competent defense counsel could determine there was no basis in the record for a motion to suppress the pellet gun. *See State v. Helker; State v. Sanchez.*

Defendant's attempt to distinguish *Helker* is not persuasive. Although counsel in *Helker* moved to suppress the defendant's confession at trial, he had not moved for suppression of the confession prior to trial and did not call any witnesses to make his offer of proof concerning the involuntariness of the confession. This court determined the failure to have a suppression hearing prior to trial and the failure to request instructions on the issues of voluntariness, intoxication, and diminished capacity, which would not have been supported by the record, did not constitute ineffective assistance of counsel.

Defendant relies on *People v. Ibarra,* 60 Cal.2d 460, 386 P.2d 487, 34 Cal.Rptr. 863 (1963) to support his argument that failure to move for suppression constitutes ineffective assistance of counsel. In *Ibarra,* defense counsel's failure to object to the admission of heroin was a result of his failure to research the applicable law. The court found that this precluded his exercise of judgment. In *Ibarra,* however, the motion to suppress would have been meritorious. We are not persuaded defendant was denied effective assistance of counsel based on the failure to move for the suppression of the pellet gun.

Defendant also argues, pursuant to *State v. Boyer,* 103 N.M. 655, 712 P.2d 1 (Ct.App.1985), that he was denied effective

assistance of counsel by his counsel's failure to provide a zealous defense, to call the treating physician and other defense witnesses, and to object to improper statements by the prosecutor. We note defendant's trial counsel conducted cross-examination and called defendant and another witness on defendant's behalf. We are not prepared to say defense counsel failed to exercise the skill of a reasonably competent attorney. Moreover, as Judge Hartz pointed out in his specially concurring opinion in *State v. Crislip,* 109 N.M. 351, 785 P.2d 262 (Ct.App.1989) "[a]ppellate courts can spend considerable time and effort attempting to determine why an attorney acted in a particular manner, when an adversary proceeding below could have resolved the question conclusively." *Id.,* Hartz, J., special concurrence at 351, 785 P.2d 262. He suggested that in order to avoid the inefficiency and potential error caused by appellate courts resorting to speculation whenever substantial claims of ineffective assistance of counsel are raised on direct appeal from a judgment or conviction, we should either remand for a hearing on the matter or require defendant to resort to a post-conviction remedy under SCRA 1986, 5–802. Because Rule 5–802 provides a method for the defendant to present in a post-conviction proceeding a record establishing ineffective assistance of counsel, remands would be appropriate only in very limited situations, such as when the trial record establishes a prima facie case of ineffective assistance of counsel, but the state has not had an opportunity to present evidence to rebut that prima facie case. In light of the fact that this alternate claim was made pursuant to *Boyer* and does not appear to be substantial, remand is not indicated; however, in future cases we will not hesitate to pursue those alternatives when warranted. We determine defendant was not denied effective assistance of counsel. *See State v. Talley.*

Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support the judgment, pursuant to *Boyer.* On appeal, the evidence is to be viewed in the light most favorable to the judgment, and all reasonable inferences will be indulged in favor of the judgment. *State v. Fish,* 101 N.M. 329, 681 P.2d 1106 (1984). Defendant was convicted of violating NMSA 1978, Section 30–3–5(B) (Repl.Pamp.1984), which defines misdemeanor aggravated battery as infliction of an injury to a person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body. There was evidence that defendant came out of his house about 10:45 p.m. with a rifle or other gun in his hand and shouted at the victim and his companions to "go somewhere else and play," after they had been shooting off fireworks. The victim and his companions continued to shoot off the fireworks, and five or ten minutes later the victim was struck near the eye with a pellet as a noise was heard from the direction of defendant's house. There was also evidence that a man identifying himself as Ken Stenz called the victim's father early one morning and offered to pay money if the case against him was dropped. The voice was a male adult voice.

Although defendant testified he did not fire the gun or any weapon that night, and did not make any phone call to the victim's residence, the trier of fact could disregard defendant's version of events. *See State v. Gattis,* 105 N.M. 194, 730 P.2d 497 (Ct.App. 1986). Although circumstantial, the evidence was sufficient for a reasonable mind to infer defendant shot the victim with the pellet gun. *See* SCRA 1986, 14–5001; *State v. Sanchez,* 98 N.M. 428, 649 P.2d 496 (Ct.App.1982) (circumstantial evidence sufficient to support conviction for unlawful taking of motor vehicle).

Right to Allocution.

In the present case, the district court found defendant guilty of the charges and immediately proceeded to sentencing. Although the district court judge asked the prosecutor and defense counsel if they had any comments as to the proper disposition of defendant, defendant himself was not

offered an opportunity to address the court prior to sentencing.

The New Mexico Supreme Court has clearly stated that under NMSA 1978, Section 31–18–15.1 (Repl.Pamp.1987), a trial judge must give the defendant an opportunity to speak before pronouncing sentence for non-capital felony convictions. *Tomlinson v. State,* 98 N.M. 213, 647 P.2d 415 (1982). This interpretation of the statute was recognized as an extension of the common law right to allocution in capital cases. *Id. Cf. State v. Haar,* 94 N.M. 539, 612 P.2d 1350 (Ct.App.) (a defendant must be allowed to effectively challenge the reliability of material information introduced at a dispositional hearing, but has no right to know the specific recommendations of the probation office), *cert. denied,* 449 U.S. 1063, 101 S.Ct. 787, 66 L.Ed.2d 606 (1980).

Defendant argues, relying on *Tomlinson* and *Haar,* that he was denied due process of law by the trial court's failure to offer him the opportunity to speak before pronouncing sentence on his misdemeanor conviction. We determine that, in the absence of a statute or rule requiring allocution in misdemeanor cases, it was not error for the trial court to fail to offer defendant an opportunity to speak before sentencing.

This result does not offend the original purpose behind the common law doctrine of allocutus. As stated in *Tomlinson,* this purpose was to afford a defendant who did not have the benefit of counsel and who could not present evidence on his own behalf the opportunity to state why the court should not impose the death penalty. *Id.* 98 N.M. at 214, 647 P.2d at 416. It is also consistent with the law in other jurisdictions. *See generally* Annotation, *Necessity and sufficiency of question to defendant as to whether he has anything to say why sentence should not be pronounced against him,* 96 A.L.R.2d 1292, §§ 4[c], 10[b] (1964).

We have found no cases granting defendants in misdemeanor cases a common law right to allocution in the absence of a statute or rule. *See People v. Webb,* 31 A.D.2d 754, 297 N.Y.S.2d 499 (1969) (statutory or common law requirement of allocution not extended to misdemeanors). *See also Bowles v. State,* 168 Ga.App. 763, 310 S.E.2d 250 (1983), *cert. denied,* 465 U.S. 1112, 104 S.Ct. 1619, 80 L.Ed.2d 148 (1984) (statute provided for allocution in felony cases); *State v. Hanson,* 304 Minn. 415, 231 N.W.2d 104 (1975) (defendant was entitled to allocution based on a municipal court rule according defendants this right in misdemeanor cases). *Cf. City of Columbus v. Herrell,* 18 Ohio App.2d 149, 247 N.E.2d 770 (1969) (allocution statute imposed mandatory duty in misdemeanor as well as felony cases).

Section 31–18–15.1 clearly concerns only the alteration of the basic sentences for felony convictions. Subsection A refers to the sentences in NMSA 1978, Section 31–18–15 (Repl.Pamp.1987) setting forth the basic sentences for various degrees of felonies. Subsections B and C specifically refer to felony convictions only. Defendant concedes there is no rule or statute in the district or magistrate courts specifically requiring the court to provide defendants in misdemeanor cases the right to speak before sentence is pronounced. Furthermore, we are not convinced public policy supports granting defendants an absolute right to allocution in misdemeanor cases where a defendant has been represented by counsel and has taken the stand in his own defense.

Therefore, in the absence of such a statute or rule, we determine the district court was not required to offer defendant the opportunity to speak before sentencing. *Cf. Tomlinson v. State.*

The judgment and sentence are affirmed.

IT IS SO ORDERED.

ALARID and HARTZ, JJ., concur.

787 P.2d 821

STATE of New Mexico,
Plaintiff-Appellee,

v.

Samuel Edward WILSON,
Defendant-Appellant.

No. 18204.

Supreme Court of New Mexico.

Feb. 14, 1990.

Jacqueline Robins, Chief Public Defender, Stephen D. Aarons and P. Jeffrey Jones, Asst. Appellant Defenders, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Chief Justice.

Defendant-appellant, Samuel Edward Wilson (Wilson), was convicted pursuant to a jury verdict of first degree murder contrary to NMSA 1978, Section 30–2–1(A) (Repl.Pamp.1984) and conspiracy to commit murder contrary to NMSA 1978, Section 30–28–2(A) (Repl.Pamp.1984). The jury also found the aggravating circumstance of murder for hire. Wilson was sentenced to life imprisonment for first degree murder, and nine years with two years mandatory parole for conspiracy to commit murder, with the sentences set to run concurrently.

The State presented evidence that Wilson hired James Smith and Maurice Lee Smith, brothers, to kill the victim, the husband of a woman whom Wilson wanted to marry. Testimony at trial showed that Wilson provided a weapon, told the Smith brothers on which night to kill the victim and the method and manner of killing him, and to take money from the scene of the crime. Wilson points to various inconsistencies in this testimony and to the prosecutor's admission that the State's case contained such inconsistencies. After he was arrested, James Smith told police that Wilson had not been involved in the killing. The guns used in the murder were found on property owned by the Smith family. Later, however, James Smith told investigators that Wilson promised to pay him and his brother to kill the victim.

JUROR RECUSAL

During voir dire of the prospective jury, one juror stated in open court that an upcoming religious holiday, Yom Kippur, might prevent him from being able to attend to his jury duties every day of the trial. Prior to the parties' counsel asserting challenges to the venire, and after the prospective juror had spoken with the trial judge in chambers about his possible conflict, the following exchange took place:

> [Court]: One issue that I'd like to bring up, and I failed to go over this with [the juror]. He did indicate two Jewish holidays next week: Monday would not be a problem but Wednesday would be a problem. I don't know if we want to bring him in to see if he would refuse to serve or that if he had to sit in court on Wednesday if that would cause him any problems.
>
> [Prosecutor]: I asked him that and * * *.
>
> [Court]: Oh, did you? Oh, you asked him and he said it would not?
>
> [Prosecutor]: Yes.
>
> [Court]: O.K., I'm sorry. I did not hear then.
>
> [Defense Counsel]: We have no challenges for cause.
>
> [Court]: That's fine, let's bring the jurors in.

The prospective juror at issue was chosen. On the fourteenth day of trial, he sent another note (his third note) to the trial judge restating his anxiety about serving the following day, Yom Kippur. The trial judge met with the juror in chambers, out of the presence of counsel for either party, came back into court and announced that she was excusing the juror, and appointed an alternate juror to sit in the excused juror's place for the remainder of the trial.

After the judge's first in-chambers discussion with the juror, she stated to the parties and counsel what had been discussed. Prior to the second meeting in chambers, the juror had sent the judge a second note, to which the judge did not respond. Following his third note, the day before Yom Kippur, the judge met with the juror the second time and asked him if he could serve at least half a day, but he answered that it would be impossible. In his affidavit submitted after trial, the juror also testified, "During my two meetings with Judge Maes, neither the prosecution nor the defense attorneys were present."

He also testified, "[I]t is unthinkable for me to devote myself to any other pursuits on Yom Kippur than fasting, prayer and contemplation."

Prior to the judge's second in-chambers discussion with the juror, the following exchange took place in open court:

> [Court]: [The juror] has again raised his concern about tomorrow. Where are we as far as defendant * * *.
>
> [Defense Counsel]: There are two short witnesses * * *.
>
> * * * * * *
>
> I think that * * * we could easily finish testimony within * * * an hour, or two hours, I guess * * *. But we could do jury instructions tomorrow, and, I don't know, whatever the court feels is the proper thing to do.

No objection was raised to the juror's dismissal until Wilson's counsel filed a motion for new trial following the verdict, nor was any objection raised to the judge's consulting with the juror outside of the presence of the attorneys for the parties.

WILSON'S ALIASES AND HIS PRIOR MILITARY CONVICTIONS

Prior to trial, Wilson filed a "Motion in Limine About Aliases" in which he asked the court to "[r]efer to defendant during proceedings before the jury only as Ed Wilson[,]" and to "[r]equire that the prosecution, through its argument and witnesses, so refer to defendant." The court granted this motion. Wilson also filed a "Motion to Exclude All References to Defendant's Prior Convictions," which read, in pertinent part, as follows:

> 1. On two occasions more than ten years ago, defendant was convicted by military courts-martial of absenses [sic] without leave.
> 2. These convictions equate to misdemeanor offenses.
>
> * * * * * *
>
> Therefore defendant requests that the court prohibit the prosecutor from making any reference to this past conviction, and to direct witnesses to follow this ruling.

The court granted this motion also.

On cross-examination of a State witness, the following exchange took place:

> [Defense Counsel]: Now officer, that manslaughter charge that you brought up, you had an opportunity to check that, didn't you?
>
> [Witness]: Yes, sir. I did.
>
> * * * * * *
>
> [Defense Counsel]: Isn't it a fact that you found out that indeed there was no manslaughter charge for Mr. Wilson?
>
> [Witness]: That is true, sir.
>
> [Defense Counsel]: As a matter of fact, there are no felonies for Mr. Wilson—felony convictions for Mr. Wilson?
>
> [Witness]: Can we have—clarification?
>
> [Defense Counsel]: A conviction is when you get convicted for a felony?
>
> [Witness]: The conflict that I have is there was a special court martial and a special court martial through the military judicial system would be the same as a felony through the civilian system.

The subject of manslaughter had been elicited on direct examination. The Smith brothers had told the witness they felt threatened by Wilson to kill the victim because of Wilson's reputation for having committed manslaughter in Texas. The court allowed questioning about this matter. Following the witness' response equating a court martial conviction with a "felony through the civilian system," Wilson's counsel asked the court to take judicial notice that Wilson's court martial conviction of "AWOL" was a misdemeanor. The court did so. Defense counsel did not ask the court to admonish the jury on this point. After a recess, the prosecutor asked the court for permission to inquire on re-direct examination into Wilson's military convictions. Wilson's counsel then moved for a mistrial, or in the alternative, an admonition to the jury not to consider the military conviction as a felony conviction. The court ruled that the prosecutor could not inquire on re-direct into Wilson's military

conviction. It denied the motion for mistrial, and did not admonish the jury as requested.

Concerning the court's order disallowing testimony on any aliases Wilson may have used, the following exchange occurred on cross-examination of Wilson by the prosecutor:

[Prosecutor]: Now, you testified that the reason you put Ed Wilson to Samuel E. Wilson was just something you decided to do?

[Wilson]: No, sir.

[Prosecutor]: What was the purpose of it then?

[Wilson]: Like I said, at one time [officials at the department of motor vehicles] may ask you for your driver's license for I.D. and the next time they won't. "Ed" is just natural for me. I've gone by Ed all my life, since I was a little feller.

[Prosecutor]: You've never gone by any other name?

[Wilson]: Yes sir.

[Prosecutor]: What was that?

[Wilson]: John Edward Goodloe.

[Prosecutor]: Why did you go under that name?

[Wilson]: Because I didn't want to go back to Vietnam.

[Prosecutor]: You were finally discharged as a deserter?

At this point Wilson's counsel objected. The objection was overruled. The court previously had allowed the prosecutor to inquire into several different names Wilson had used on his vehicle registration forms.

JURY INSTRUCTION ON FIRST DEGREE MURDER

The court instructed the jury on first degree murder, in pertinent part, as follows:

For you to find the defendant guilty of first degree murder * * * the state must prove * * * each of the following elements of the crime:

1. The defendant had [the victim] killed;
2. The killing was with the deliberate intention to take away the life of [the victim] * * *.

This instruction was the same as that found in the relevant uniform jury instruction, SCRA 1986, 14–201, except that in the latter, paragraph number one reads, "The defendant killed [the victim]." Wilson's counsel had asked the court to instruct the jury verbatim from SCRA 1986, 14–201, and then add an instruction on aiding and abetting, to the effect that:

1. The defendant intended that the crime be committed;
2. The crime was committed;
3. The defendant helped, encouraged or caused the crime to be committed.

This second tendered instruction is the same as uniform instruction, SCRA 1986, 14–2822. The court refused both tendered instructions and read its own as quoted above.

ISSUES RAISED ON APPEAL

On appeal, Wilson asserts the following errors:

I. The trial judge's in-chambers communications with the eventually dismissed juror deprived Wilson of due process, equal protection and a fair trial.

II. The prosecutor's inquiry into Wilson's prior military conviction and his use of different names in referring to Wilson deprived Wilson of due process, equal protection and a fair trial.

III. The trial court's alteration of the uniform jury instruction, SCRA 1986, 14–201, by using the words "had [the victim] killed" instead of the words "killed [the victim]," and the court's refusal to read the uniform jury instruction, SCRA 1986, 14–2822, deprived Wilson of due process, equal protection and a fair trial.

IV. Upon the evidence presented at trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

OUR HOLDING ON APPEAL

For the reasons stated herein, we reverse the judgment and sentence and remand the case for a new trial. Before discussing the points outlined above as Roman numerals I–IV, we first discuss an issue not raised in Wilson's brief.

On oral argument, we learned that the trial court had made no record, before the jury began its deliberations, of any objection to the court's rejection of Wilson's tendered instruction on aiding and abetting. Instead, the court reconstructed the record on this issue after the jury had retired. Although Wilson did not raise this point as error in either the docketing statement or in his brief, nonetheless we review the trial court's actions in order to determine if they constitute fundamental error. As we have held previously,

> Errors not specifically objected to at trial may be reviewed by this Court if they concern:
>
> jurisdictional questions or questions involving:
>
> (a) general public interest;
>
> (b) fundamental rights of a party; or
>
> (c) facts or circumstances occurring or arising, or first becoming known after the trial court lost jurisdiction.

State v. Martin, 101 N.M. 595, 601, 686 P.2d 937, 943 (1984); *DesGeorges v. Grainger,* 76 N.M. 52, 59, 412 P.2d 6, 10–11 (1966). In the present case, the trial court's failure to offer defense counsel an opportunity to object on the record to the court's rejection of the tendered instruction on aiding and abetting, before the jury began its deliberations, when weighed together with the errors discussed below, deprived Wilson of a fair trial. SCRA 1986, 5–608(D) provides:

> [F]or the preservation of error in the charge, objection to any instruction given must be sufficient to alert the mind of the court to the claimed vice therein, or, in case of failure to instruct on any issue, a correct written instruction must be tendered before the jury is instructed. *Before the jury is instructed, reasonable opportunity shall be afforded counsel so as to object or tender instructions, on the record and in the presence of the court.*

(Emphasis added.)

As we have stated elsewhere, "The purpose of [such a] rule is to give the trial court an opportunity to correct any error before the jury retires to deliberate." *Nichols Corp. v. Bill Stuckman Const. Inc.,* 105 N.M. 37, 40, 728 P.2d 447, 450 (1986) (citing *City of Albuquerque v. Ackerman,* 82 N.M. 360, 482 P.2d 63 (1971)); *see Baros v. Kazmierczwk,* 68 N.M. 421, 427, 362 P.2d 798, 802 (1961); *Hamel v. Winkworth,* 102 N.M. 133, 134, 692 P.2d 58, 59 (Ct.App.1984). Although the cited cases pertain to the rules of civil procedure, we find no reason for limiting the stated policy to civil cases.

Indeed, we conclude that the policy applies with even more force to criminal cases, and thus we now hold that on remand the court shall give due consideration to SCRA 1986, 5–608, as written.

I. TRIAL JUDGE'S COMMUNICATIONS WITH JUROR

While the judge's pretrial conversations with the juror may not have been error, *see State v. Ramming,* 106 N.M. 42, 48–50, 738 P.2d 914, 920–22 (Ct.App.), *cert. denied,* 106 N.M. 7, 738 P.2d 125, *cert. denied,* 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987), when the juror persisted in making his objection to further service known to the judge, even well into the course of the trial, a greater degree of scrutiny of the judge's conversation with the juror should have been afforded Wilson than otherwise might have been the case. In *Ramming,* the juror in question wanted to convey to the judge her fear that her peers on the jury were not intelligent enough to understand the issues. After the judge conversed with the juror, in the presence of counsel for both parties, it was established that the juror's fear would not disqualify her from effective service.

Here, the juror had a far more disabling fear, namely, that his religious convictions would mandate his complete incapacity to serve on the jury during a portion of the

trial. Unlike the situation in *Ramming,* at no time did the court converse with the juror in the presence of counsel. In *Hovey v. State,* 104 N.M. 667, 726 P.2d 344 (1986), we held that it was improper for a trial judge to communicate with the jury during it's deliberations about *an issue of the case* without the defendant's personal participation. We have the same reservations about the trial judge's communications here as we had in *Hovey.* Justice Walters concurred in *Hovey* in order to emphasize that the defendant's right to participate in every phase of the trial was of constitutional dimension. She stated:

> [U]nless the defendant voluntarily elects to absent himself, or is excluded from the courtroom by reason of "disruptive, contumacious, or stubbornly defiant" conduct [*State v. Corriz,* 86 N.M. 246 at 247, 522 P.2d 793, 794 (1974)], his right to be present is a constitutional right that may not be waived by the attorney who acts without defendant's express consent.

Id. at 671–72, 726 P.2d at 348–49.

We do not extend our ruling in *Hovey* to cover every situation in which a trial judge communicates with jurors about a matter that is not at issue in the trial. Surely, as a hypothetical example, if a juror wrote the judge a note asking if the judge had received a promised telephone call from the juror's spouse about the success of the spouse's surgery that day, it would not prejudice the defendant for the judge simply to answer yes or no to the note out of the defendant's presence. Even in this hypothetical, however, the judge would be well advised to inform defense counsel and the defendant, individually and directly, of the substance of the communication, and to make a record of the communication as soon as practicable.

In a case such as the present one, where there had been three determined efforts by the juror to communicate with the judge, and where the substance of the communication involved the juror's further service, the defendant, individually and directly, should have been given the option of being present during the communication. While the trial judge fully and fairly notified counsel for both parties of the substance of her conversation with the juror, she should have offered Wilson himself the opportunity to be present during her conversation with the juror. In addition, the judge should have placed her conversations with the juror on the record. We note that the committee commentary to SCRA 1986, 5–610, states, "All communications between the judge and jury should be made a part of the record, whether made in the presence of defense counsel and defendant or not."

Here we hold that the trial court erred *both* in failing to offer Wilson a chance to be present during the judge's conversation with the juror *and* in failing to make a record of that conversation.

II. THE PROSECUTOR'S ELICITATION OF TESTIMONY CONCERNING WILSON'S ALIAS, AND HIS REFERENCE TO WILSON AS A "DESERTER"

It is possible, although we think not likely, that the prosecutor innocently blundered his way into an elicitation of Wilson's alias. It is also possible, and perhaps more credible, that the prosecutor on closing argument inadvertently referred to Wilson as a "deserter," thereby inaccurately making Wilson a convicted felon, rather than accurately saying that Wilson had been convicted of the misdemeanor charge of "AWOL." The context of the circumstances surrounding the testimony leads us to conclude that Wilson's military convictions (which were twenty-two years old) erroneously were emphasized by the prosecutor, as were Wilson's alias, to Wilson's prejudice.

Wilson correctly has relied on *State v. Bobbin,* 103 N.M. 375, 707 P.2d 1185 (Ct. App.), *cert. denied,* 103 N.M. 287, 705 P.2d 1138 (1985), for the proposition that a witness' conviction for a crime involving punishment of less than one year may not be used to attack the witness' credibility. *See* SCRA 1986, 11–609. Yet, neither that case nor the underlying rule of evidence are apposite, as the testimony concerning the conviction was not used to attack anyone's

credibility. Rather, it was elicited unfortuitiously by Wilson's own counsel during the cross-examination of a State witness.

Yet, it was the use that was made of the elicited testimony that gives rise to prosecutorial misconduct. Once the court had denied the prosecutor's request to inquire further of the witness concerning Wilson's military convictions, the prosecutor should have ceased from any further reference to Wilson's convictions, notwithstanding the fact that Wilson's counsel in closing argument himself referred to the testimony about those convictions. The subject was risky, and the prosecutor, having been forewarned, should have scrupulously avoided it, seeking zealously not to prejudice Wilson's right to a fair trial. Instead, the prosecutor intruded imprudently into the danger zone and then compounded his error by calling Wilson a "deserter."

The same lack of caution characterizes the prosecutor's elicitation of testimony about Wilson's use of other names. The prosecutor had adequate warning from the court's orders on the pretrial motions not to intrude into this sensitive area. When Wilson volunteered the alias "John Edward Goodloe," the prosecutor should have avoided his next question, "Why did you go under that name?", as he undoubtedly knew that the response would involve Wilson's prior military convictions.

If prosecutorial misconduct were the only issue before us, we would perhaps find, as to this issue, that the scales did not tip in Wilson's favor on appeal, relying, for example, on *State v. Taylor,* 104 N.M. 88, 95–96, 717 P.2d 64, 71–72 (Ct.App.), *cert. denied,* 103 N.M. 798, 715 P.2d 71 (1986), to the effect that Wilson's counsel had opened the door to the prosecutor's words on cross-examination and on closing argument. Here, however, we conclude that the doctrine of cumulative error is applicable. Other errors were committed during the course of the trial; defendant in other respects did not receive a fair trial. As we have stated elsewhere, "We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial. U.S. Const.Amend. VI, XIV; N.M. Const. art. II, § 14". *Martin,* 101 N.M. at 601, 686 P.2d at 943.

By this criterion, the prosecutor's elicitation of testimony concerning Wilson's alias, and the prosecutor's emphasis of Wilson's military convictions do not pass constitutional muster. Taken in the aggregate, in the context of the other errors committed at trial, the prosecutor's conduct amounts to reversible error.

III. THE COURT'S INSTRUCTION ON FIRST DEGREE MURDER

On oral argument, the State contended that insertion of the phrase "had the victim killed" made the instruction more compact, and thus more specifically informed the jury on the nature of the alleged crime. While this argument has merit, we also are mindful of the compelling policy reasons underlying our holding in *Jackson v. State,* 100 N.M. 487, 489, 672 P.2d 660, 662 (1983) (premising reversal based on improper jury instructions on the court's discretion "to prevent injustice where a fundamental right of the accused has been violated").

Here, we do not find that the slight change in the uniform instruction eliminated an essential element of the crime in the instruction or that it prejudiced Wilson. The instruction did not differ materially from the uniform instruction. *See id.* at 489, 672 P.2d at 662. It could even be argued that rejection of the instruction on aiding and abetting, in conjunction with the court's slight alteration of the instruction on first degree murder, was helpful to Wilson. *See State v. Ochoa,* 41 N.M. 589, 608–09, 72 P.2d 609, 621–22 (1937).

IV. PROOF BEYOND A REASONABLE DOUBT

While the evidence in this case arguably fell below the standard to which the State is held under its burden of proof beyond a reasonable doubt, we do not conclude the evidence was inadequate. The jury could have found guilt beyond a reasonable doubt.

For the foregoing reasons this case is reversed and remanded to the trial court for proceedings not inconsistent with this opinion.

IT IS SO ORDERED.

WILSON, J., concurs.

RANSOM and MONTGOMERY, JJ., specially concurs.

BACA, J., dissents.

RANSOM, Justice (specially concurring).

To the extent that, from the opinion filed today, it may be inferred that the trial court's violation of Rule 5-608(D) constituted fundamental error, alone or in combination with other error, I demur. I concur, nonetheless, that it is important to the administration of justice that Rule 5-608(D) be adhered to in every criminal trial. The dispositive issues in my mind, however, are the matter of the dismissal of the juror without meaningful input and participation by defendant, and prosecutorial misconduct in the extraordinary efforts used to present to the jury the matter of the military conviction that had been ruled inadmissible.

MONTGOMERY, Justice (specially concurring).

I CONCUR with the result reached in the plurality opinion, for most of the reasons stated in Part II of the opinion. I find that the prosecutor's violation of the trial court's pre-trial orders in referring to the defendant's military conviction and eliciting testimony as to the defendant's previous alias amounted to prosecutorial misconduct. The prosecution's references to these subjects in violation of the court's orders—going so far as to call the defendant a "deserter" on cross-examination and in closing argument—for me "tip the scales" in the direction of reversible error. Since I do not agree that other errors were committed in the trial, I obviously do not believe the doctrine of cumulative error is applicable to this case.

I do not agree that the trial court's failure to make a record of whatever transpired at the time the instructions were settled amounted to fundamental error. I also do not agree that the trial court's communication with the juror outside the presence of the defendant, given all the circumstances in this case, constituted reversible error; and I join in Justice Baca's dissent on this issue.

I understand the plurality opinion to reject the defendant's attack on the trial court's instruction on first degree murder, and I agree with this disposition.

Since a new trial is necessary, I make no decision on whether or not the evidence satisfied the State's burden of proof.

BACA, Justice (dissenting).

Unable to agree with the majority opinion, I respectfully dissent. The majority considered four questions on appeal: the judge's in-chambers communication and eventual dismissal of a juror; the prosecutor's inquiry into Wilson's prior military conviction and his use of aliases; the trial court's alteration of the Uniform Jury Instructions; and the court's timing of objections to jury instructions. The majority found that each question taken singly was not sufficient to reverse the conviction, but taken together constituted cumulative error and therefore mandated a reversal.

The majority found Wilson was "deprived of a fair trial" partly because objections to jury instructions were not made of record before the jury retired to deliberate. The majority then went on to find that the altered Uniform Jury Instruction complained of and the refusal to give an aiding and abetting instruction was not error. As a matter of fact, the majority found that the instruction as altered did not differ materially from the Uniform Jury Instructions and further "it could even be argued that rejection of the instruction on aiding and abetting in conjunction with the court's slight alteration of the instruction on first degree murder was helpful to Wilson." It is difficult to see how the court "deprived Wilson of a fair trial" notwithstanding the fact that an opportunity to object to these instructions was not afforded until the jury had retired when this court has specifically

found that there is no harm and perhaps there is help to the defendant by the giving of these instructions.

At the trial below, in the docketing statement, and in the briefs filed in this court there is no complaint about the fact that the judge failed to take objections to jury instructions before submitting them to the jury. Only upon oral argument did this court unearth that fact. Though the procedure was flawed, prejudice to the defendant does not exist. I agree that the better policy is for a trial judge to have a hearing on the record for objections to jury instructions before the jury retires. This is strongly suggested by SCRA 1986, 5–608(D).

Under almost all circumstances when a jury has been impaneled, it is best that a trial judge not communicate with a juror except in the presence of counsel and the defendant. In this case, the trial judge communicated with a juror prior to impaneling and several days into the trial as well as receiving three notes from the juror concerning continued service through a religious holiday. In *Hovey v. State,* 104 N.M. 667, 726 P.2d 344 (1986), this court held that it was inappropriate for a trial judge to communicate with a juror concerning matters that are at issue in the trial. In this case, the trial judge did not communicate with a juror concerning matters at issue in the trial but only tried to deal with matters of scheduling around a religious holiday. The majority specifically did not extend the *Hovey* rule to cover every situation in which a trial judge communicates with a juror. When defense counsel and defendant were made aware of the fact that the conversations had taken place and the juror was to be excused, no objections were made either as to the conversations, the absence of a record, or the fact that the juror would not continue serving.

It is the better practice that all communications between the judge and juror be made a part of the record whether made in the presence of defense counsel and defendant or not. SCRA 1986, 5–610 suggests this procedure. Rule 5–610 by its very language "presence of defense counsel and defendant or not" would seem to suggest that under certain circumstances defense counsel and the defendant would not be present when conversations are held with jurors. No objections being made below, no showing of prejudice by the conversation, or the excuse of the juror, there is no prejudice to Wilson.

A more troubling facet of this case is the revelation of the prior criminal record of Wilson and aliases used by him, along with the gratuitous referral to Wilson as a deserter by the prosecution in closing argument after being warned by the court. The question of Wilson's prior criminal record, however, was elicited by his own counsel in cross-examination. The court in response to an objection gave a curative instruction that an A.W.O.L. conviction in a military tribunal was equivalent to a misdemeanor and was not a felony conviction. The misuse of this information by the prosecutor in referring to Wilson as a deserter in closing argument was inappropriate. The inquiry by the prosecutor as to various aliases by Wilson by contrast was less objectionable. The referral to the aliases could be explained by inadvertence or innocent response to proper questions. The majority holds that "if prosecutorial misconduct were the only issue before us we would perhaps find, as to this issue, that the scales do not tip in Wilson's favor on appeal." I agree this standing alone is not sufficient to tip the scales in Wilson's favor.

Finding no error in the judge's in-chambers communication and the dismissal of the juror; finding no error in the refusal of the Uniform Jury Instruction and the altering of another jury instruction; finding no error or prejudice to Wilson in the timing of jury instructions objections; and, further, finding prosecutorial misconduct does not tip the scales in Wilson's favor, I find no cumulative error. I would affirm the conviction.

787 P.2d 830

WESTERN BANK OF SANTA FE,
Plaintiff-Appellee,

v.

William E. BIAVA,
Defendant-Appellant.

No. 18388.

Supreme Court of New Mexico.

Feb. 23, 1990.

Marchiondo, Vigil & Voegler, Douglas G. Voegler, Albuquerque, for defendant-appellant.

Sommer, Udall & Hardwick, Jack N. Hardwick, Santa Fe, for plaintiff-appellee.

OPINION

MONTGOMERY, Justice.

In *Clark Leasing Corp. v. White Sands Forest Products, Inc.*, 87 N.M. 451, 535 P.2d 1077 (1975), this Court held that the defense of accord and satisfaction could not be asserted by a debtor, in a suit by the creditor to collect an undisputed and liquidated amount, where the debtor claimed that the creditor/secured party had agreed to accept possession of the collateral in full satisfaction of the amount claimed. Raising a similar defense in the present case, the debtor (Biava) resisted the secured party's (the bank's) suit on a promissory note secured by the debtor's limited partnership interest, which the debtor alleged the bank had agreed to accept in full satisfaction of the amount for which suit was brought. Relying on *Clark*, the bank successfully moved for summary judgment. We hold that the trial court misapplied *Clark* and reverse the summary judgment.

I.

In January 1984 Biava executed a promissory note to the bank in the principal sum of $66,005.24 and secured it with an assignment of Biava's 6.7 percent interest in a limited partnership known as the Santa Fe Court House and Spa. The assignment had as its express purpose the granting to the bank of a security interest in the limited partnership interest, and the parties executed and filed for record a financing statement covering the collateral.

Biava defaulted in payment of the note and negotiated with Mr. Ortiz, a bank officer, concerning Biava's payment of his indebtedness. According to Biava's affidavit,

> on or about February 13, 1985, I entered into an agreement whereby Western Bank agreed to accept my 6.7% ownership in the Santa Fe Courthouse and Spa as full payment and satisfaction of the promissory note which I had executed.

While he was "waiting for the paperwork" (again, according to his affidavit), the instant litigation was commenced. Western Bank sued for judgment on the note, for foreclosure of its security interest, and for attorney's fees. Biava's answer admitted all material allegations of the complaint (including execution of note, default and amount due) and set up the affirmative defense of the alleged agreement "as full payment and satisfaction" of the note.

On this state of the pleadings the bank moved for summary judgment, arguing that "for purposes of this motion, the alleged agreement will be assumed to exist, because * * * the alleged agreement (even if it existed) is not a fact which would suffice * * * as a legal defense to" the bank's claim. The district court granted the motion, and Biava appeals.

II.

In *Clark*, the Court recognized that an "accord"—i.e., an executory agreement to settle a claim (*Restatement (Second) of Contracts* § 281 (1979))—operates as a defense to the claim even though there has not yet been "satisfaction"—i.e., the agreement has not yet been performed—in two situations. The first of these is when the claim is unliquidated. The second occurs when, if the claim is liquidated, there is "new and independent consideration" to support the creditor's agreement that the claim will be released. *See Clark*, 87 N.M. at 453, 535 P.2d at 1079; *Yates v. Ferguson*, 81 N.M. 613, 615, 471 P.2d 183, 185 (1970) (receipt of additional security operates as accord and satisfaction if parties intend settlement agreement). The debt in this case was undisputed and liquidated; hence the question is whether Biava's agreement to assign his 6.7 percent partnership interest constituted "new and independent consideration."

The debtor in *Clark* asserted that the creditor had been allowed to repossess the collateral with the understanding that this would be in full settlement of the outstanding indebtedness. The debtor maintained that (1) its agreement to allow the repossession constituted sufficient consideration for the alleged accord, and (2) its relinquishment of the right to a surplus on resale of the collateral furnished additional consideration. This Court responded that (1) allowing repossession was simply an agreement by the debtor to do what it was already obligated to do—surrender possession on default, and (2) there was no evidence that the agreement included the debtor's relinquishment of its right to any surplus. 87 N.M. at 453, 535 P.2d at 1079. As the Court said, an agreement to do what one is already legally bound to do is not sufficient consideration for the promise of another. *Id.* (quoting *Barnes v. Reliable Tractor Co.*, 117 Ga.App. 777, 778, 161 S.E.2d 918, 919 (1968)). On the evidentiary point, the Court noted that "there was not a shred of evidence of an accord [i.e., the agreement]," the issue having been raised for the first time on appeal. 87 N.M. at 452, 535 P.2d at 1078.

The case at bar is quite different. First, although Biava was similarly obligated to surrender "possession" of the collateral (the partnership interest) on default, this was not at all the same as a transfer of ownership. "Possession" of the collateral would have entitled the bank to sell it and

otherwise proceed as provided in the Uniform Commercial Code—Secured Transactions, NMSA 1978, Subsections 55-9-504(1) and (3) (Repl.Pamp.1987). Ownership of the collateral, on the other hand, would entitle the bank to exercise all of the rights of a limited partner under the partnership agreement and the Uniform Limited Partnership Act, NMSA 1978, Sections 54-2-1 to -63 (Repl.Pamp.1988). And, whereas there was no evidence in *Clark* of an agreement on the part of the debtor to relinquish its right to a surplus, in this case Biava swore in his affidavit:

> The value of my interest in the [partnership] could well have exceeded my indebtedness to [the bank] which would have entitled me to payment of the excess. However, I was willing to forego this, if [the bank] would accept my interest as full payment of the note.

The general rule on consideration in this context is, of course, that

> [a]ny new consideration, though insignificant or technical merely, is generally regarded as sufficient consideration to support a contract of accord and satisfaction. The courts do not inquire into and do not concern themselves with the adequacy of the consideration; anything which may be deemed in the judgment of the law a legal benefit to the creditor, or a legal detriment to the debtor, however slight, is sufficient.

1 Am.Jur.2d *Accord and Satisfaction* § 13 (1962).

As early as 1926 this Court noted the trend in cases of liquidated, undisputed debts to seize upon the "slightest" fresh consideration in order to uphold an accord and satisfaction. *Buel v. Kansas City Life Ins. Co.*, 32 N.M. 34, 41, 250 P. 635, 638 (1926) (citing 1 R.C.L. *Accord and Satisfaction*, § 15 (1914)). *Clark* itself stands for the proposition that new consideration will support the existence of an accord and satisfaction in the case of an undisputed, liquidated debt when there is in fact such consideration.

To sum up on this point, the bank's position on this appeal is based on a misreading of *Clark*, a misreading which may have led the trial court into error. The bank states, relying on *Clark:* "If the existing claim is liquidated or undisputed payment of less than the full amount of the claim will not be sufficient consideration to support the accord." And: "Since Western Bank's claim is liquidated and undisputed any agreement to pay less than the full amount owed cannot be an accord because it is not supported by consideration." As we have seen, *Clark* does not stand for these propositions—propositions which, while they may be accurate in the abstract, do not apply in this case because the agreement Biava asserted was not simply to pay less than the full amount owed; it rather was to transfer his ownership of a partnership interest and forego the rights he would otherwise have had under the Uniform Commercial Code as a debtor in default.

III.

While placing primary reliance on *Clark*, the bank also seeks to uphold the summary judgment as a matter of procedure. It argues that when it moved for summary judgment and adduced Biava's answer admitting liability on the note, it made a *prima facie* showing of entitlement to summary judgment and shifted the burden to Biava to establish at least a reasonable doubt as to the existence of a genuine issue of material fact. *See Koenig v. Perez*, 104 N.M. 664, 666, 726 P.2d 341, 343 (1986). The bank is correct as to the initial procedural posture before the court once the motion was filed and the answer was considered. At that point, since accord and satisfaction is an affirmative defense, *Transamerica Ins. Co. v. Sydow*, 107 N.M. 104, 105, 753 P.2d 350, 351 (1988), the burden rested on Biava to come forward with sufficient evidentiary matters to establish a genuine issue of fact as to his defense. *Fidelity Nat'l Bank v. Goff, Inc.*, 92 N.M. 106, 108, 583 P.2d 470, 472 (1978).

In ruling on the motion the trial court had before it, in addition to the pleadings, Biava's affidavit and a deposition he had given at the behest of the bank. The bank belittles the recitations in the affidavit, to the effect that there was "an agree-

ment" for the transfer of the partnership interest in exchange for a complete release, citing *Galvan v. City of Albuquerque,* 85 N.M. 42, 44–45, 508 P.2d 1339, 1341–42 (Ct.App.1973) (conclusory opinion regarding speed of vehicle in accident not considered because tests performed not identified and explained), and *Portales Nat'l Bank v. Bellin,* 98 N.M. 113, 117, 645 P.2d 986, 990 (Ct.App.1982) (conclusions stated in affidavits against summary judgment, unsupported by fact, are not sufficient to raise issue of material fact). We see no reason to cast doubt on these rulings emanating from our court of appeals. The justifiably cautious approach a court must bring to the treatment of "conclusory" testimony of an expert witness should not be engrafted onto an appraisal of an assertion by a lay person that he and another party made "an agreement." We simply note that factual assertions which could be characterized as conclusory can defeat a summary judgment motion if a material issue of fact remains.

We think that Biava's recitation in his affidavit, coupled with his testimony on deposition, was sufficient to raise a genuine issue of fact as to the existence of an agreement whereunder Biava would transfer to the bank ownership of his partnership interest in exchange for a complete release of his liability under the note. The bank argues that there was no showing of an offer and acceptance leading to formation of the agreement and that Biava did not identify the individual who allegedly entered into the agreement on the bank's behalf. Legalistic formulations of offer and acceptance are not necessary to establish an agreement sufficient to defeat a motion for summary judgment; the sworn statement of a layman that he "entered into an agreement" whereby the bank would accept ownership of his partnership interest as full payment and satisfaction of the promissory note should be—and we hold is—sufficient. In ruling on motions for summary judgment, a trial court should apply a common-sense interpretation of the language used by the affiant or deponent to determine whether the requirements of SCRA 1986, 1–056(E) (party must adduce "such facts as would be admissible in evidence" in moving for and resisting summary judgment) have been satisfied.

Moreover, the recitation in the affidavit did not stand alone. In his deposition Biava testified that he discussed another contemplated transaction with Mr. Ortiz and that

> Mr. Ortiz told me that he couldn't handle anything like that [the other transaction] until we got the other situation [the delinquent promissory note] straightened out, that he would be glad to take it to his board once the other thing was done, that if I would pass title to the units to them that he would be happy to carry that to the board for me * * *. He said it would save passing title on the units, the partnership units would save me and my family embarrassment.
>
> * * * * * *
>
> Q You're talking about passing title to the property. Did Mr. Ortiz say if you pass title to this limited partnership interest, this amount of debt that was then owing, which was about $75,000.00—
>
> A Right.
>
> Q $75,347.00 in December would be forgiven?
>
> A Oh, that was the understanding, yes.

We think these sworn statements were sufficient to satisfy Biava's burden to come forward with evidentiary facts sufficient to defeat the motion for summary judgment on the accord-and-satisfaction defense. We have no doubt that almost all trial courts would receive in evidence the testimony of the debtor that he and the bank had made an agreement along the lines testified to by Biava and leave for cross-examination questions of who on behalf of the bank made this agreement, when and where it was made, exactly who said what, and the other circumstances surrounding the making of the alleged agreement. It would then be for the trier of facts to evaluate the testimony and decide whether or not the agreement really was made. It is for this reason that trial is the preferred method for resolving this kind of dispute, *Pharmaseal Laboratories, Inc. v. Goffe,* 90

N.M. 753, 759, 568 P.2d 589 (1977), although the utility of the summary-judgment procedure in weeding out those cases in which a genuine fact issue is not present cannot be denied. *Goodman v. Brock*, 83 N.M. 789, 793, 498 P.2d 676, 680 (1972).

The summary judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

WILSON, J., concurs.

RANSOM, J., specially concurs.

RANSOM, Justice (specially concurring).

I specially concur to address whether the claimed accord was supported by consideration in the form of a promise by the debtor to relinquish contract and UCC (Article 9) rights to any surplus value in the security. On the issue addressed by the majority, distinguishing the surrender of possession (e.g., *Clark*) from surrender of title as in the accord claimed here, I find the distinction illusory without addressing whether, in either event, there was a promise to relinquish rights to any surplus value or to forego claim to other rights under the contract or Article 9.

I recognize that the majority addresses the issue of surplus value in its discussion of Biava's affidavit. However, the majority analysis also contains the suggestion that transfer of "ownership" in itself necessarily entails waiver of all legal and equitable rights in the collateral. I am not convinced that, unless so contemplated by the parties, transfer of title alone operates to do anything more than transfer of possession, i.e., to facilitate exercise of the creditor's preexisting right to obtain payment of the debt from the collateral upon default by the debtor. *Cf.* NMSA 1978, § 55-9-202 (Repl.Pamp.1987) (provisions of Article 9 with regard to rights, obligations, and remedies apply whether title is in the secured party or the debtor).

In *Clark*, when the debtor relinquished possession of the equipment, there was held to be no new consideration to support an accord absent evidence that the debtor agreed to relinquish contract and Article 9 rights to any surplus after resale. Although Biava claims such a relinquishment, the crux of the bank's argument on appeal is that Biava's response to the motion for summary judgment failed to set forth facts showing that the value of the collateral was greater than or equal to the indebtedness. That is, the bank argues Biava has not shown that relinquishment of rights to any surplus had a peppercorn of value. It does not appear, however, that the bank raised this issue below, and it is not incumbent on the respondent to show facts in support of any material element of his case not relied upon by movant as warranting summary disposition. *See Fidelity National Bank v. Tommy L. Goff, Inc.*, 92 N.M. 106, 583 P.2d 470 (1978) (moving party carries the burden to show no genuine issue of material fact as to affirmative defenses in the pleadings of party responding to motion for summary judgment).

To shift to Biava the burden to demonstrate the existence of surplus value, it was incumbent upon the bank to make a *prima facie* showing that there existed no genuine issue of material fact as to whether the promise of relinquishment was contemplated by the parties to constitute consideration of value at the time the accord was struck. Proof of value in that which is agreed to be forfeit is not necessary to establish a promise to forbear as consideration for an accord. In general, all that is required is a promise to forbear, made by one party and accepted by the other. *Gonzales v. Gauna*, 28 N.M. 55, 206 P. 511 (1922). *See also Mel Dar Corp. v. Commissioner of Internal Revenue*, 309 F.2d 525 (9th Cir.1962) (forbearance based on belief in existence of value is consideration even though value ultimately might not be upheld). Only if the parties contemplated the promise to be valueless would it fail to constitute consideration upon acceptance.

787 P.2d 835

Henry PADILLA, Virginia Padilla, individually and as next friend of Christina Padilla, a minor, Plaintiffs–Appellees,

v.

DAIRYLAND INSURANCE COMPANY, Defendant–Appellant.

No. 18575.

Supreme Court of New Mexico.

Feb. 26, 1990.

Butt, Thornton, & Baehr, P.C., David M. Bhouliston and John A. Klecan, Albuquerque, for defendant-appellant.

Thomas C. Esquibel and William A. Sanchez, Los Lunas, for plaintiffs-appellees.

William H. Carpenter and Michael B. Browde, Albuquerque, for amicus curiae, NM Trial Lawyers Ass'n.

OPINION

SOSA, Chief Justice.

Defendant-appellant, Dairyland Insurance Company (Dairyland), appeals a summary judgment granted to plaintiffs-appellees, Henry and Virginia Padilla, who had filed suit individually and as next friend of Christina Padilla, their daughter and member of their household. Christina was injured to the extent of more than $100,000 in a one-car automobile accident. The vehicle involved was owned by Henry Padilla and driven by Christina's sister, Florence, who was killed in the accident. Henry Padilla was the named insured of an insurance policy sold to him by Dairyland covering the accident vehicle up to $25,000 for bodily injury liability, and up to an additional $25,000 for uninsured/underinsured motorist protection. Florence was a named insured under the liability provision of the policy and was also a member of the Padilla household. Christina, as a passenger and member of the household, was insured under the uninsured/underinsured motorist provision of the policy. Henry Padilla similarly had insured two other vehicles he

owned. All three vehicles were covered by a single Dairyland policy.

Dairyland conceded it owed Henry Padilla $25,000 under the liability coverage, but denied that it owed him anything under the uninsured/underinsured motorist coverage. The Padillas filed suit, seeking to stack the benefits under the uninsured/underinsured motorist coverage for all three cars, arguing that the negligent driver, Florence, was underinsured. The trial court agreed with the Padillas. It permitted them to stack their coverage, deducted $25,000 for the liability payment Dairyland had already made, and awarded the Padillas $50,000. On appeal, Dairyland argues that the trial court in effect used the uninsured/underinsured motorist provisions of the policy to increase the liability limit on the accident vehicle to $75,000, thereby ignoring the contract entered into between the parties. Dairyland also points to an exclusion in the policy which reads as follows: "A motor vehicle owned by [Mr. Padilla] or furnished for [Mr. Padilla's] regular use isn't an uninsured motor vehicle [under the policy]."

The Padillas argue that under our prior holdings on stacking of uninsured/underinsured coverage, the exclusionary language in the policy should be invalidated as contrary to public policy. We frame the issue before us as a tripartite question: (1) Does the uninsured/underinsured motorist coverage on a vehicle owned by the named insured entitle an insured family member to recover for an accident involving the insured vehicle, as opposed to a vehicle owned by a third party, when the insurance policy attempts to exclude coverage for any vehicle owned by the named insured? (2) If the insured family member is otherwise entitled to recover, may she recover when the negligent driver was also an insured family member? (3) If the answer to the first two questions is yes, may the named insured stack benefits available to him under the uninsured/underinsured motorist coverage for two other vehicles covered by the same policy?

This is not an issue of first impression. Rather, it is an issue with which we were once presented but failed to resolve. In *Estep v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 105, 703 P.2d 882 (1985), we were faced with a similar factual situation. Appellant was injured in an automobile accident in which her husband was the driver and owner of the accident vehicle and which was caused by the husband's negligence. One of the issues raised on appeal was whether appellant could recover under the insurance policy's uninsured motorist coverage. In reversing a summary judgment for the insurance company on other grounds, we stated, as to the issue of possible benefits under the uninsured motorist coverage of the policy:

> We need not at this time decide [appellant's] alternative argument that ... in some instances a plaintiff in the circumstances of [appellant] might be able to claim coverage for damages under the "uninsured motorist" provisions of her husband's policy. Suffice it to say that the legislature clearly expressed its purpose in [NMSA 1978, Section 66–5–201.1]:
>
> > The legislature is aware that motor vehicle accidents in the state of New Mexico can result in catastrophic financial hardship. The purpose of the Mandatory Financial Responsibility Act [NMSA 1978, Sections 66–5–201 to –239] is to require and encourage residents of the state of New Mexico who own and operate motor vehicles upon the highways of the state to have the ability to respond in damages to accidents arising out of the use and operation of a motor vehicle. It is the intent that the risks and financial burdens of motor vehicle accidents be equitably distributed among all owners and operators of motor vehicles within the state.
>
> The courts are obliged to accede to the legislative purpose in applying the statutory law governing mandatory insurance.

Id. at 111, 703 P.2d at 888. We note that the quoted statute is identical to NMSA 1978, Section 66–5–201.1 (Repl.Pamp.1989), the law presently in effect.

We need not make an exhaustive review of our holdings in this area of the law. Instead, a brief summary of the direction in

which those holdings have evolved will suffice. In *Chavez v. State Farm Mut. Auto. Ins. Co.*, 87 N.M. 327, 533 P.2d 100 (1975), we held that the uninsured motorist statute must be liberally construed to implement its purpose of compensating those injured through no fault of their own. We invalidated an insurance policy's exclusionary clause that we found to be in conflict with the statute's purpose.

We are mindful here of our holding in *State Farm Auto. Ins. Co. v. Kiehne*, 97 N.M. 470, 641 P.2d 501 (1982), wherein we held valid an unambiguous exclusionary clause stating that uninsured motorist benefits were not available for damage sustained while any motor vehicle was being driven by the named insured. The distinction between *Kiehne* and *Chavez* lies in the nature of the exclusions in each case. In the former, the insurer excluded *all* coverage if Mr. Kiehne were the driver, while in the latter the insurer provided coverage to Mr. Chavez and then limited it. Thus *Kiehne* and *Chavez* stand for the proposition that an insurer's decision not to contract at all with a given person is allowable, while an insurer's contract entered into with a given person cannot be limited except where permitted by statute or regulation.

In *Lopez v. Foundation Reserve Ins. Co.*, 98 N.M. 166, 646 P.2d 1230 (1982), we held that an insured must be permitted to stack uninsured motorist coverages for separately owned vehicles where an insurance company charges a full premium for each vehicle. In *Konnick v. Farmers Ins. Co. of Arizona*, 103 N.M. 112, 703 P.2d 889 (1985), we extended our ruling in *Lopez* to underinsured motorist protection and clarified the classes of insureds who may be covered under uninsured motorized provisions. Class I insureds (household members) are entitled to stack benefits under such policies, while Class II insured (third-party passengers) are not. In *Schmick v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 216, 704 P.2d 1092 (1985), we held invalid an ambiguous exclusionary clause in an insurance policy that would have prevented the insured from stacking two policies providing underinsured motorist coverage. We held that:

> [T]he only limitations on protection are those specifically set out in the statute itself: that the insured be legally entitled to recover damages and that the negligent driver be uninsured * * * * In the context of underinsured motorist protection, a subcategory of uninsured motorist coverage, the requirements are that the insured be legally entitled to recover damages and that the negligent driver be inadequately insured.

Id. at 219, 704 P.2d at 1096.

In *Jimenez v. Foundation Reserve Ins. Co.*, 107 N.M. 322, 757 P.2d 792 (1988), we extended our ruling in *Schmick* to an exclusionary clause that was not ambiguous, holding that:

> Even though [the insurer's] liability limitation clause is unambiguous, that is not determinative.
>
> ....
>
> [W]hen public policy embraces the stacking concept, policy language limiting recovery to one vehicle's coverage (although premiums have been paid on more than one vehicle) shall be struck as null and void no matter how clear and unambiguous the limiting language.
>
> ....
>
> The trial court correctly determined that [the insured] could stack his policies to establish whether the negligent driver was underinsured. Because [the insured] had $50,000 in underinsured/uninsured motorists coverage and the negligent driver had only $25,000, the driver was underinsured to the extent of $25,000. [The insured] was entitled to recover $25,000 from [the insurer].

107 N.M. at 324–326, 757 P.2d at 794–796.

We note that the facts of coverage in *Jimenez* are the same as in the case before us, except that in the instant case the "negligent driver" is from the same family as the injured insured and was driving a vehicle owned by the named insured. The driver in the case at bar was likewise underinsured.

In *Sanchez v. Herrera*, 109 N.M. 155, 783 P.2d 465 (1989), we considered a case

involving stacking of payments under the medical coverage provision of an automobile insurance policy. We agreed with the insurance company that the stacking of uninsured motorist benefits is "distinguishable from the [stacking of medical payments] because the legislature mandated uninsured motorist coverage in NMSA 1978, Section 66–5–301(B) [Repl.Pamp. 1989], whereas medical coverage exists only by virtue of contracts freely entered into between the insured and [the insurer]." *Id.* at 158, 783.P.2d at 468. In *Sanchez,* because the important public policy issues raised by the uninsured motorist statute were not involved, we "resort[ed] to traditional methods of contract interpretation to assist our resolution of [the issue of stacking]." *Id.* In doing so, we upheld the insurance policy's exclusionary clause as binding and prohibitive of stacking.

The case at bar, however, is of a different species than *Sanchez.* It falls within the parameters of our holdings in *Jimenez* and its predecessors cited above, rather than within the parameters of rulings based on "traditional methods of contract interpretation" referred to in *Sanchez.* It is clear that cases involving uninsured motorist coverage must be given a qualitatively different analysis by this court than cases which do not involve such coverage. With that in mind, we now analyze the case before us, as argued by the parties on appeal.

We turn first to the authority cited by Dairyland. In *Myers v. State Farm Mut. Auto. Ins. Co.,* 336 N.W.2d 288 (Minn. 1983), plaintiff-appellant had brought suit against the insurer seeking underinsurance benefits following a one-car accident in which the fatally injured person was a guest passenger and the accident vehicle was both owned and driven by someone not related to him. Further, unlike the situation in the case before us, the injured person was not a listed insured under the policy covering the accident vehicle. The policy endorsement for underinsured motorist coverage provided that any person occupying the covered vehicle was entitled to recover benefits under the underinsured motorist provision of the policy. At the same time, however, the policy excluded coverage for any vehicle owned by or furnished for the regular use of the owner or driver of the accident vehicle, and thus served to exclude the accident vehicle as a covered vehicle.

Appellant argued that underinsurance coverage follows the person and not the car, and sought benefits under the policy. The court affirmed judgment for the insurer, holding:

> The purpose of underinsured coverage is to protect the named insured and other additional insureds from suffering an inadequately compensated injury caused by an accident with an inadequately insured automobile. Ordinarily, a passenger injured in a one-car accident involving *someone else's car,* such as here, would be able to recover underinsured motorist benefits under his or her own underinsured motorist coverage. Decedent Myers, however, did not own a car and consequently had no coverage. But * * * [the] insurance policy [of the person who owned the accident vehicle] is not designed to compensate [the owner of the accident vehicle] or his additional insureds from [his] failure to purchase sufficient liability insurance.
>
> ....
>
> We hold, therefore, that the policy definition of "underinsured motor vehicle," which excludes a vehicle owned by or furnished or made available for the regular use of the named insured is valid.

Id. at 291–92 (emphasis added).

A similar conclusion was reached by the Supreme Court of Iowa in a factual situation equivalent to the Minnesota case just cited. In *Poehls v. Guaranty Nat'l Ins. Co.,* 436 N.W.2d 62 (Iowa 1989), the court ruled: "[T]o allow [the insured party] to recover for [the driver's] negligence * * * would in effect amount to a duplicate payment of liability benefits." *Id.* at 64.

The Iowa court relied on *Millers Casualty Ins. Co. v. Briggs,* 100 Wash.2d 1, 665 P.2d 891 (1983). In that case, again based on a one-car accident involving an injured party neither related to the insured driver

nor listed as an insured in the policy covering the accident vehicle, a policy exclusion similar to the one in *Myers* was in effect. Interpreting the Washington statute which requires automobile insurers to offer potential clients the option of purchasing underinsured motorist coverage, the court rejected the injured party's claim that since the statute did not expressly permit an insurer to exclude a vehicle owned by the named insured from underinsured motorist coverage, the exclusion was invalid. The court also rejected the injured party's public policy argument, in which it was asserted that the state's policy of providing compensation to innocent victims of automobile accidents required an invalidation of the exclusion. The court noted that the injured party in such a situation as the one before it (1) has not paid a premium to the insurer, (2) because of benefits available under liability coverage on the accident vehicle is not without compensation, and (3) can recover under underinsured motorist provisions of any policy he or she may own.

The Supreme Court of Alabama has adhered to the reasoning of the courts in the three cases just reviewed. In *Sullivan v. State Farm Mut. Auto Ins. Co.*, 513 So.2d 992 (Ala.1987), the court approved a policy exclusion similar to the ones in the cases reviewed above and similar as well to the one in the case before us. The court upheld a judgment denying coverage for a guest passenger who had sought benefits under the underinsured motorist provision of the driver's policy. In so holding, the Alabama court relied on *Millers Casualty* and on an Arizona case that, in its factual setting, is on all fours with the case at bar: *Preferred Risk Mut. Ins. Co. v. Tank,* 146 Ariz. 33, 703 P.2d 580 (Ct.App.1985).

The latter case differs from the other cases we have discussed in that it involved injured parties who *were* named insureds under the policy covering the accident vehicle. The injured parties were also related to the negligent driver. The Arizona court upheld the validity of an exclusion clause similar to the one before us now. The court found the clause consistent with a statute requiring insurers to offer underinsured motorist coverage to the public. The court reasoned:

> When operation of the insured vehicle causes an injury, liability coverage is available to the injured party. By refusing to pay underinsured motorist benefits in addition, that type of coverage is limited to the situation for which it was created—compensation for injuries caused by *other* motorists who are underinsured. Thus, although the statute lacks specific terms permitting the exclusion, we find it consistent with the legislative purpose.

Id. at 36, 703 P.2d at 583 (emphasis added).

The crucial distinction between the Arizona case, on the one hand, and the cases from Minnesota, Iowa, Washington and Alabama, respectively, on the other hand, is that in the latter each injured party attempted to recover under someone else's underinsured motorist coverage, while in the former, as in the case at bar, the injured party, is attempting to recover under her *own* underinsured motorist coverage.

Because of the classification system we have erected in prior holdings, Christina Padilla falls into the category of Class I insureds, rather than Class II insured.

> [Class I] insureds generally "are covered by policies no matter where they are *or in what circumstances they may be;* coverage is not limited to a particular vehicle." [*Gamboa v. Allstate Ins.* 104 N.M. 756, 758, 726 P.2d 1386, 1388 (1986)]. "[S]econd class insureds are covered only because they occupy an insured vehicle." *Id.* Class one insureds "may stack all uninsured/underinsured motorist policies purchased by the named insured since the policies were obtained specifically to benefit the name insured and members of his family." *Schmick,* 103 N.M. at 220, 704 P.2d at 1096. Class two insureds, however, "are restricted to recovering under the policy on the car in which they rode because the purchaser of the policy only intended occupants to benefit from that particular policy." *Id.*

Morro v. Farmers Ins. Group, 106 N.M. 669, 671, 748 P.2d 512, 513 (1988) (emphasis added).

The Padillas argue that the distinction between, on the one hand, a guest passenger who has neither paid a premium to the insurer nor who is an insured under the policy at issue, and, on the other hand, an actual insured under the policy, should be determinative. The crucial difference, the Padillas argue, is that in the latter case the injured party has a contractual relationship with the insured along with an attendant reasonable expectation of coverage. *See Wolgemuth v. Hurleysville Mut. Ins. Co.*, 370 Pa.Super. 51, 535 A.2d 1145, 1149–50 (1988). The Padillas assert that the result reached in *Tank* is illogical and contrary to the public policy of New Mexico. And since Christina Padilla should be allowed to recover, the Padillas argue, she should also be allowed to stack coverage for the other two insured vehicles. *See Lopez, Schmick, Morro.*

The first question we must answer, therefore, is whether Dairyland's exclusion clause is invalid as violative of public policy. In deciding this question, we are faced with our holding in *Willey v. Farmers Ins. Group*, 86 N.M. 325, 523 P.2d 1351 (1974). In that case the insurance policy contained an exclusion clause virtually identical to the one before us. We held that the clause was clear and unambiguous in excluding the insured's car from uninsured motorist coverage. In rejecting the insured's public policy argument, we looked to NMSA 1953, Section 64–24–105 (1972), then equivalent to the present NMSA 1978, Section 66–5–301 (Repl.Pamp.1989). We ruled:

> It appears to us that this statute neither authorizes nor forbids the exclusion contained in the policy sued upon, nor does it define "uninsured motor vehicles." However, the statute does provide that the superintendent of insurance may promulgate rules and regulations which govern uninsured motorists. Acting under this statutory authorization, the superintendent of insurance has published rules that cover the subject * * * [which provide] that the term "uninsured motor vehicle" shall not include a "motor vehicle owned by * * * [the insured] * * * *"

Id., at 326–27, 523 P.2d at 1352–53.

Present law still contains language pertaining to the role of the superintendent of insurance in carrying out the purpose of the legislature in enacting the statute on uninsured motorist coverage. *See* NMSA 1978, § 66–5–301(A). And the present regulations of the New Mexico Department of Insurance provide that the term "insured motor vehicle," for purposes of determining benefits under uninsured motorist coverage, "shall not include * * * a motor vehicle owned by the [insured] or by any resident of the same household of such insured * * * or a motor vehicle furnished for the regular use of the [insured] or any resident of the same household." N.M. Ins. Dep't Reg., Art. 5, Ch. 66, Rule 1, § 5–1–2, at 266 (Rev.1989).

Were *Willey* still good law, we would of necessity have to rule that the exclusion here should be enforced as written. Very recently, however, in *Foundation Reserve Ins. Co. v. Marin*, 109 N.M. 533, 787 P.2d 452 (1990) we explicitly overruled *Willey.* In doing so, we have concluded the better course to follow is that laid out by *Chavez* and its progeny rather than the policy implications underlying our decision in *Willey.* We disavow *Willey* notwithstanding any regulation promulgated by the New Mexico Department of Insurance. Accordingly, the rule in *Willey* having been abolished, we hold that the exclusion before us is void as violative of public policy. Further, we agree with the Padillas that the Arizona Court of Appeals' ruling in *Tank* is not applicable in New Mexico, because our reading of public policy as mandated by our legislature requires a different result than reached by the court in *Tank.*

We thus answer the tripartite question raised by the parties on appeal as follows: (1) An insured family member is entitled to recover for an accident involving the insured vehicle, as opposed to a vehicle owned by a third party, even though the insurance policy attempts to exclude coverage for any vehicle owned by the named

insured; (2) the insured, injured family member is entitled to recover even though the negligent driver was also an insured family member; (3) the named insured may stack benefits available to him/her under the uninsured/underinsured motorist coverage for other vehicles covered by the same policy. We thus affirm the judgment of the trial court in its entirety.

IT IS SO ORDERED.

BACA, J., concurs.

MONTGOMERY, J., concurs in result only.

[redacted]

787 P.2d 1247

STATE of New Mexico,
Plaintiff-Appellee,

v.

Terry CALLAWAY,
Defendant-Appellant.

No. 10966.

Court of Appeals of New Mexico.

Nov. 7, 1989.

Hal Stratton, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Michael E. Vigil, Marchiondo, Vigil & Voegler, P.A., Albuquerque, for defendant-appellant.

OPINION

ALARID, Judge.

Defendant appeals his convictions, upon retrial, on two counts of second-degree criminal sexual penetration (CSP II), and one count each of criminal sexual contact (CSC), aggravated battery, kidnaping, and conspiracy to commit CSP. He raises three issues in his brief: (1) whether retrial, after his first trial ended in a "manifest necessity" mistrial, constituted double jeopardy; (2) whether a new trial should have been granted on the basis of newly discovered evidence; or in the alternative, whether he was denied effective assistance of counsel; and (3) whether his sentence contains an

illegal condition. Other issues listed in the docketing statement but not briefed are deemed abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985). We affirm.

DOUBLE JEOPARDY

At the first trial, the victim testified that, prior to the attack, she spoke to State Police Officers Garcia and Medina concerning a month-long campaign of harassment and threats by defendant, co-defendant and an unidentified third man. The state believed the defense intended to call the officers for their testimony that they did not believe the victim's allegations of harassment. The state made a motion in limine to exclude evidence concerning the officers' opinions of the victim's veracity. Defense counsel represented that he was planning to ask Officer Medina his opinion of the victim's credibility. Counsel stated that he had not planned to ask Officer Garcia his opinion. The trial court granted the state's motion, and instructed defense counsel to tell Officer Medina not to state his opinion. The trial court specifically told counsel that there would be an immediate mistrial if Officer Medina gave his opinion. Although the trial court directed counsel to inform only Officer Medina of his ruling, defense counsel was on notice that any opinion evidence concerning the victim's credibility was prohibited. Defense counsel asked Officer Garcia on direct examination if he had done anything to dissuade the victim from filing a complaint. The witness responded that he had not dissuaded the victim, but that he had not believed what she was saying. The trial court immediately declared a mistrial. After the jury left the courtroom, the trial court stated its belief that counsel had been probing for the officer's response. Counsel denied soliciting the response but admitted that he had not cautioned Officer Garcia about the court's ruling in limine. Defense counsel told the court he did not think Officer Garcia would volunteer such opinion so he had not discussed the court's admonition with him. The trial court noted that even if counsel had not acted intentionally, he violated his duty to inform the officer not to give his opinion.

Defendant contends the trial court's sua sponte declaration of a mistrial was not based upon reasons of manifest necessity. This being the case, he argues his retrial constituted double jeopardy.

Both the federal and state constitutions prohibit the state from twice subjecting a person to criminal prosecution for the same offense. U.S. Const. amend. V; N.M. Const. art. II, § 15. The double jeopardy clause also protects a criminal defendant against being retried in some instances when the criminal proceeding was aborted before a final judgment was obtained. *State v. Saavedra,* 108 N.M. 38, 766 P.2d 298 (1988). Jeopardy attaches when the jury is sworn in the first trial, and if the defendant objects to a mistrial he cannot be retried once jeopardy attaches, unless the mistrial was found to have been declared for reasons of "manifest necessity." *Id.* The question upon appellate review is whether the trial court exercised its sound discretion in deciding there was a manifest necessity for the declaration of a mistrial. *State v. Sedillo,* 88 N.M. 240, 539 P.2d 630 (Ct.App.1975).

The standard for determining the existence of manifest necessity to declare a mistrial involves carefully weighing the defendant's right to have his trial completed against the public's interest in a fair trial and just judgment. *State v. Messier,* 101 N.M. 582, 686 P.2d 272 (Ct.App.1984). Thus, a grant of mistrial is not proper merely to allow the state to strengthen its case upon retrial, or to secure the attendance of a witness which it neglected to subpoena or have present at trial. *Id.* The prosecutor must shoulder a heavy burden to justify the mistrial if the double jeopardy bar is to be avoided. *Arizona v. Washington,* 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *State v. Saavedra.*

In *Porter v. Ferguson,* 324 S.E.2d 397 (W.Va.1984), the court considered a case

similar in part to the present case. In *Porter,* defense counsel violated an order of the trial court issued after an in-limine hearing. The trial court directed that defense counsel not inquire into the fact of a previous arrest of a key prosecution witness on charges unrelated to those pending against the defendant. The court upheld the trial court's sua sponte declaration of a mistrial, observing that a general rule has evolved to the effect that improper conduct of defense counsel which prejudices the state's case may give rise to manifest necessity for the granting of a mistrial. The court found that the trial court did not abuse its discretion because defense counsel's questioning of the witness was in violation of the court's in-limine order, that defense counsel had been cautioned in advance not to conduct such inquiry and despite such warning counsel embarked on the line of questioning, and that the effect of such questioning prejudiced the state's case. Under these facts, the court in *Porter* determined that the trial court did not act precipitously, and the sua sponte granting of a mistrial came within the ambit of manifest necessity.

Defendant maintains the trial court abused its discretion in declaring the mistrial by acting hastily and failing to consider alternatives.[1] We hold that under the circumstances of this case, the trial court properly declared the mistrial.

Explicit findings on the presence of manifest necessity are not determinative of the issue involved, but the record must contain sufficient justification for the granting of the mistrial. *Arizona v. Washington; State v. Messier.* Where the conduct of the defense may have affected the partiality of the jury, the trial court's evaluation of the need for a mistrial is accorded the highest degree of respect. *Arizona v. Washington; see also State v. Fosse,* 144 Wis.2d 700, 424 N.W.2d 725 (Ct.App.1988). We agree with the state that situations in which the conduct of the defense has affected the trial create a difficult dilemma for the trial judge. If the trial court does not grant the mistrial, the prejudice could result in an unjust acquittal. On the other hand, if the trial court grants the mistrial the defendant will be discharged if an appellate court disagrees with the finding of manifest necessity. Under these circumstances, the trial court's decision should be accorded considerable deference.

Officer Garcia's comment seriously prejudiced the state's case. The state presented little evidence corroborating the victim's testimony. There was scant physical evidence of a sexual assault. The defendant presented alibi testimony. Thus, the victim's credibility was crucial to the state's case.

We find little support for defendant's position from our decisions in *Sedillo* and *State v. De Baca,* 88 N.M. 454, 541 P.2d 634 (Ct.App.1975). In *Sedillo,* the defense misconduct did not go to the "very vitals of the trial itself." *Id.,* 88 N.M. at 242, 539 P.2d at 632. By contrast, Officer Garcia's comment in this case was potentially devastating since the state's case was based almost entirely upon the victim's credibility. In *De Baca,* the alleged jury tampering did not create any possibility of juror bias. In this case, there can be little question that the officer's comment materially undermined the victim's credibility before the jury.

We also do not believe that the state used the mistrial to its tactical advantage by presenting new evidence and witnesses. The state did not move for the mistrial. *See State v. Messier.* Similarly, our review of the record does not support an inference that the state sought to gain, or would gain, any advantage from a mistrial. *See id.* The fact that the state did not present the identical case on retrial is not determinative of this issue. *Compare United*

1. We note that prior to the trial court's order declaring a mistrial, the record indicates that defense counsel had moved for a mistrial on differing grounds on three occasions. These motions were denied.

States v. Kin Ping Cheung, 485 F.2d 689 (5th Cir.1973). The trial court's exercise of discretion concerning whether to grant a mistrial is entitled to some weight in cases where defense counsel's failure to comply with a ruling of the court may serve to bias the jury against the state. *See State v. Fosse; see also United States v. Kwang Fu Peng,* 766 F.2d 82 (2d Cir.1985).

Defendant argues that the trial court did not explore possible alternatives to a mistrial. A trial court has a duty to inquire into the alternatives before declaring a mistrial. *State v. De Baca.* The trial court, however, is not required to make a detailed record of each alternative considered before declaring a mistrial. *Id.; State v. Messier.* The trial court's declaration of a mistrial should not be overturned solely because it failed to articulate all the factors which were considered in the exercise of its discretion. *See Arizona v. Washington.* We recognize that the trial judge's vitriolic outburst in his sua sponte declaration of a mistrial was inappropriate and we do not condone such conduct. However, just prior to the in-court presentation of Officer Garcia's testimony, the court in-chambers ruled on the state's motions in limine, and the trial judge stated that it would be improper to question the officers concerning their belief as to the victim's credibility and that a mistrial would result if such testimony were proffered. The in-chambers hearing and ruling by the trial court indicates that the court considered such questioning to be improper and of such seriousness such as not to be curable by an admonition to the jury. *Compare State v. Gardner,* 103 N.M. 320, 706 P.2d 862 (Ct.App.1985) (prejudicial response generally cured by prompt admonition from the trial court). Under the circumstances here presented, the trial court could reasonably conclude that an admonition to the jury would be insufficient to remove the prejudice resulting from the officer's comment. *See Arizona v. Washington.* This is especially true where the victim's credibility was the crucial factor in the state's case. We believe the trial court was in the best position to evaluate how Officer Garcia's improper opinion affected the jury. *See id.* Moreover, defense counsel was on notice that a mistrial would be declared if an opinion of the victim's credibility was introduced. Balancing defendant's right to have his trial completed and the public's interest in a fair trial and just judgment, we conclude the record contains sufficient justification for the trial court's declaration of the mistrial.

MOTION FOR NEW TRIAL

At the sentencing hearing, defendant's newly retained counsel made an offer of proof that defendant's ex-wife would testify that the Callaways had engaged in "wife-swapping" with the victim and her husband several years before the attack. Defendant also represented that his former wife would testify that the victim was present at his home on numerous occasions when Mrs. Callaway was not present. Counsel represented that Mrs. Callaway had refused to communicate this information to trial counsel, James Klipstine, because Klipstine had represented defendant in their divorce. The new evidence was offered to impeach the victim's testimony that she had never had an affair with defendant and was never in his home when Mrs. Callaway was not present. The trial court denied the motion.

A motion for new trial on the basis of newly discovered evidence must meet six requirements: (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it could not have been discovered before the trial by the 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, 696 P.2d 471 (1985). The trial court's denial of a motion for new trial will not be disturbed on appeal unless the ruling is arbitrary, capricious or beyond reason. *State v. Smith,* 92 N.M. 533, 591 P.2d 664 (1979).

Defendant has not demonstrated that the evidence could not have been discovered before trial by the exercise of due diligence. An out-of-state subpoena was issued for Mrs. Callaway's attendance at the first trial, and she was listed as a witness for the second trial. Moreover, if Mrs. Callaway's allegations were true, they would have been known to defendant. Thus, counsel could have discovered the evidence about the alleged affair through the use of due diligence. Defendant's motion for a new trial was properly denied.

Alternatively, defendant argues he was denied effective assistance of counsel. At a post-conviction motion, defendant represented to the court that he told his trial counsel that the victim told defendant that he was the father of her daughter. Defendant contends this evidence was material to the reasons given by the victim for changing her story. The victim testified that she did not originally name defendant because he threatened her daughter. Defendant asserts that evidence that the victim told him that he was the father of her daughter would have undermined the credibility of the victim's assertions concerning why she changed her account. Trial counsel did not elicit this information from the victim on cross-examination, or from the defendant when he testified.

An accused is entitled to effective representation of counsel. *State v. Dean,* 105 N.M. 5, 727 P.2d 944 (Ct.App.1986). 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. *Id.* 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). This court will not attempt to second-guess the tactics and strategy of trial counsel on appeal. *State v. Helker,* 88 N.M. 650, 545 P.2d 1028 (Ct.App.1975), *cert. denied,* 429 U.S. 836, 97 S.Ct. 103, 50 L.Ed.2d 102 (1976). We believe the matters complained of by defendant went to trial tactics and strategy. *See State v. Trejo,* 83 N.M. 511, 494 P.2d 173 (Ct.App.1972) (decision to call witnesses, cross-examination are matters of tactics and strategy).

DEFENDANT'S SENTENCE

The trial court imposed the basic sentence for each offense. Each basic sentence was to be served consecutively, for a total of 34 and one-half years. The trial court noted the premeditated nature of the attack, citing evidence of a month-long campaign of terror perpetrated against the victim by the defendant prior to the crimes. The trial court offered to cut defendant's sentence in half if he provided information pertaining to the third individual involved in the attack. (The same offer was made to co-defendant Molinar.) The victim testified that a third man took part in the crimes. This individual was never identified. Defendant argues that the trial court's offer constituted an illegal condition and that he is entitled to be resentenced. Specifically, defendant contends that the trial court imposed additional punishment based upon defendant's refusal to cooperate. He points out that in order to accept the judge's offer, he would have to effectively admit that his alibi testimony, as well as that of his stepfather and mother, was perjured.

A sentencing judge may take into account as a mitigating factor a defendant's voluntary cooperation with authorities. *United States v. Bradford,* 645 F.2d 115 (2nd Cir.1981). However, it is also well-settled that a sentence may not be increased based upon a defendant's failure to cooperate. *Id.; see also DiGiovanni v. United States,* 596 F.2d 74 (2nd Cir.1979) (improper to administer additional punishment to defendant who exercises his right to remain silent). There is a distinction between vindictiveness by enhancing a penalty, on the one hand, and a refusal to grant leniency, on the other. *Damiano v. Gaughan,* 770 F.2d 1 (1st Cir.1985); *Mallette v. Scully,* 752 F.2d 26 (2nd Cir.1984). We recognize the inherent difficulty trial

courts have in making such a distinction. Nonetheless, under the facts of this case, we are convinced that the trial court was offering leniency to the defendant.

The trial court imposed the basic sentence for each offense, without enhancement pursuant to NMSA 1978, Section 31–18–15.1 (Repl.Pamp.1987). The court cited the premeditated nature of the offenses in imposing sentence. In offering to cut his sentence by one-half, Judge Fort noted defendant's age. At no time during the sentencing hearing did the trial court tell defendant that he was imposing a more serious sentence because of his failure to identify the third accomplice. Our review of the sentencing hearing does not indicate that the state made any issue of defendant's cooperation. In *DiGiovanni,* cited by defendant, the trial judge specifically stated that he was imposing a more serious sentence because of the defendant's reluctance in assisting the government. *See also United States v. Stratton,* 820 F.2d 562 (2nd Cir.1987). Contrary to defendant's assertion, we are convinced that the trial court was simply extending an offer of leniency to the defendant. This was permissible. *Damiano v. Gaughan.*

Defendant also argues that the sentence is not sufficiently definite. He maintains the Corrections Department has no way of knowing whether he has been sentenced to 34 and one-half or 17 and one-quarter years. We disagree. Since defendant did not come forward within thirty days, the sentence of 34 and one-half years remained in effect. Defendant also argues that the sentence may constitute a danger to him since inmates who come to possess knowledge of the condition contained in the sentence might regard him as a "snitch." We find defendant's argument to be speculative. If defendant chose not to reveal his accomplice because he feared retaliation, he should have brought this fact to the attention of the trial court. *See United States v. Bradford.* Finally, defendant argues that the trial judge could not have made good on his offer since Section 31–18–15.1 only allows the court to alter the basic sentence by one-third. Nevertheless, Judge Fort could have effectively cut the sentence in half through a combination of reduction and suspension. *See* § 31–18–15.1; NMSA 1978, § 31–20–3 (Repl.Pamp.1987).

Defendant's judgment and sentence are affirmed.

IT IS SO ORDERED.

DONNELLY, J., concurs.

APODACA, J., dissents.

APODACA, Judge (dissenting).

I respectfully dissent. The majority has correctly stated the standard of review in this appeal: Did the trial court abuse its discretion in determining there was manifest necessity in declaring a mistrial? On review, the propriety of a trial court's determination that manifest necessity exists to justify a mistrial declaration is measured by the specific facts of each case. *United States v. Sisk,* 629 F.2d 1174 (6th Cir.1980), *cert. denied,* 449 U.S. 1084, 101 S.Ct. 871, 66 L.Ed.2d 809 (1981). Applying the same constitutionally-mandated principles the majority has applied, I have concluded that under the particular facts of this appeal, the record clearly shows the trial court abused its discretion.

The majority concedes the state "must shoulder a heavy burden to justify the mistrial if the double jeopardy bar is to be avoided[,]" citing *Arizona v. Washington,* 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). Absent in the majority's application of this constitutional principle, however, is the rigid standard by which we measure whether the state has met its burden. This standard was aptly stated in *Arizona v. Washington:*

> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden * * *. Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Web-

ster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate.

Id. at 505–06, 98 S.Ct. at 830–31.

The majority, citing *Arizona* and *State v. Messier,* 101 N.M. 582, 686 P.2d 272 (Ct. App.1984), additionally concedes that, although explicit findings on the presence of manifest necessity are not dispositive of the issue before this court, the record must nonetheless provide "sufficient justification for the granting of the mistrial." *Arizona v. Washington* (entry in record of findings and explanation of reasons supporting trial court's declaration of mistrial, although facilitating review by appellate court, is not essential if the basis for mistrial declaration is adequately disclosed by record, including extensive argument of counsel before judge's ruling). *State v. Messier* (explicit findings of manifest necessity, although strongly recommended, not determinative, if record provides sufficient justification for mistrial declaration, including the trial court's consideration of other reasonable alternatives). *State v. Saavedra,* 108 N.M. 38, 766 P.2d 298 (1988) (trial judge's exercise of discretion should not be overruled absent clear indication he failed to engage in scrupulous exercise of judicial discretion, including due consideration of possible alternatives). *Saavedra* is our supreme court's most recent pronouncement on the issue before us.

Arizona, Messier and *Saavedra* all have a significant, common thread: the record in each case clearly indicated (1) the basis for the mistrial or (2) that the trial court considered other viable alternatives. These requirements, then, were essentially satisfied in those three cases. Without detailing the precise steps taken by the respective trial courts in those cases, I need only state they were substantial. What the trial courts did there, when compared with what the trial court did *not* do here, distinguishes this case materially. The record in this appeal is sorely lacking of any hint whatsoever that the trial court ever considered other alternatives.

In this regard, the majority recognizes that the trial court's "vitriolic outburst in his sua sponte declaration of a mistrial was inappropriate" and not to be condoned. Notwithstanding this recognition, the majority nevertheless gives undue weight to the in-chambers proceeding at which the trial court heard the state's motion in limine seeking to exclude opinion testimony of two police officers. I submit that in so doing, as well as in concluding that Officer Garcia's uninvited, unsolicited comment seriously prejudiced the state's case, the majority is performing judicial "cosmetic surgery" on the trial court's conduct. The record reflects a total absence of reflection on the part of the trial court in consideration of other alternatives to a mistrial. Instead, its ruling at the in-limine hearing, although not approaching the ill-advised behavior that the majority itself categorizes as "vitriolic," was spontaneous, if not regrettably impulsive, and did not represent the thought and consideration employed by the respective trial courts in *Arizona, Messier* and *Saavedra.*

There is one other, important element in this appeal that necessitates reversal. The reasoning of the majority, to a great extent, rests on what it contends was defense counsel's "misconduct" in eliciting Officer Garcia's opinion testimony concerning the victim's credibility or veracity. *Porter v. Ferguson,* 324 S.E.2d 397 (W.Va.1984), relied on by the majority in this connection, is factually distinguishable. In upholding the trial court's sua sponte mistrial declaration in *Porter,* the reviewing court emphasized defense counsel's clearly improper conduct in intentionally violating the trial court's in-limine order. The record in this appeal, on the other hand, is not only repleat of any affirmative showing of such misconduct, but instead indicates the contrary. Such misconduct, when present, has consistently been a significant underlying factor in reviewing court's upholding of a trial court's mistrial declaration, as was the case in *Porter.*

In reviewing the audio tapes of the in-limine hearing and that segment of the trial

involving Officer Garcia's unsolicited remark and the exchange that transpired between counsel and the trial court, I deduced no showing of misconduct, only the trial court's notion that there had been. The trial court's perception was tainted, I believe, by what it interpreted as a direct, personal attack on its prior ruling. It is the epitome of irony that the trial court's conduct, in the presence of the jury, itself formed the basis for a mistrial, had defendant chosen to request one. In this connection, I fail to see the significance the majority attributes to the fact that defense counsel requested a mistrial on three previous occasions. That fact, to my knowledge, has never been relevant in resolving the issue before us.

In performing the cosmetic surgery I noted earlier, the majority has now joined the trial court's company in concluding that defense counsel prodded for the allegedly inadmissable and damaging testimony. I disagree with this interpretation of what occurred in the trial proceeding. Not only was the opinion testimony nonresponsive to defense counsel's question, but defense counsel, after the trial court's mistrial declaration, painstakingly explained his motives and intentions on the record. What follows is my understanding of this explanation.

The victim, Tammy Lewis, had previously testified that the state police (which included Officer Garcia) had attempted to dissuade her from filing a complaint. She also stated the police had maintained they could not pursue the matter because the case was not within their jurisdiction. In an attempt to discredit the victim, defense counsel sought to elicit testimony from Officer Garcia to the effect that neither he nor anyone else ever attempted to discourage the victim from "filing a complaint." The lead-up questions to the ultimate question that unfortunately led Officer Garcia to offer the allegedly inadmissable testimony reasonably indicate that was defense counsel's intent.

Defense counsel also reminded the trial court that its ruling on the motion in limine pertained only to another officer, not Officer Garcia, and that defense counsel had stated at that hearing he never intended to procure the opinion testimony from Officer Garcia. The basis for this decision was that, to counsel's knowledge, Officer Garcia had never held any opinion of the victim's veracity. Counsel explained he thought of warning the officer not to give any kind of opinion testimony, but that when the officer had entered the courtroom, counsel did not want to admonish him, lest the jury conclude he was inappropriately "coaching" him.

Counsel informed the trial court that when he realized Officer Garcia's answer was nonresponsive to the specific question asked, he did not stop him because he did not want the jurors to think he was trying to keep something from them. He explained further that when Officer Garcia's answers previously had been nonresponsive to the state's questions on direct examination, he (defense counsel) decided not to object, for fear the jury would believe he did not want damaging testimony to be introduced. Thus, in my judgment, there is absolutely nothing in the record indicating defense counsel was guilty of misconduct, but only the trial court's personal opinion that counsel purposely and intentionally, in violation of the in-limine order, went on a fishing expedition for the damaging testimony.

I conclude there was an absence in this appeal of manifest necessity and would therefore reverse defendant's convictions.

787 P.2d 1255

Ernest THOMPSON Fine Furniture Maker, Inc., a New Mexico Corporation, Plaintiff–Appellee,

v.

Tim YOUART and Jai Youart, d/b/a "Schelu," Defendants–Appellants.

No. 11459.

Court of Appeals of New Mexico.

Feb. 6, 1990.

David J. Berardinelli, Berardinelli & Martinez, Santa Fe, for plaintiff-appellee.

Barbera W. Stephenson, Barbera W. Stephenson, P.C., Albuquerque, for defendants-appellants.

OPINION

BIVINS, Chief Judge.

Defendants own the Schelu gallery in Albuquerque's Old Town. The gallery sells southwestern style furnishings. In 1982, defendants began selling the furniture plaintiff designed and manufactured. Defendants used photographs of plaintiff's furniture in their advertisements. In 1988, defendants decided to carry a new line of furniture in place of plaintiff's furniture. Defendants based this decision on problems with receiving special orders from plaintiff and the placement of advertisements by plaintiff which competed with defendants' advertisements. Defendants advertised the decision to carry the new line of furniture in a radio announcement. The new line of furniture sold by defendants was similar to plaintiff's.

Plaintiff filed a petition, complaint, and order to show cause why defendants should not be enjoined from selling the new line of furniture. Plaintiff alleged violation of common law copyright, unfair competition, and unfair trade practices. The complaint sought an injunction and damages. Defendants filed a motion to dismiss due to lack of subject matter jurisdiction on the basis that the main question was one of copyright, which is under the exclusive jurisdiction of the federal courts. Prior to the combined hearing on the motions, plaintiff filed an amended complaint dropping his copyright claim.

At the motions hearing, plaintiff presented expert testimony to show that a person who had seen plaintiff's furniture would assume that the new line of furniture was also made by plaintiff. Defendants introduced evidence to show that many of plaintiff's designs have been used historically on colonial southwestern furniture.

The district court issued a letter ruling, in which it found that the furniture designs had aesthetic value belonging to plaintiff and deserved some degree of protection. The court informed the parties that it intended to grant a temporary restraining

order prohibiting defendants from selling furniture deceptively similar to that of plaintiff. It based jurisdiction on the court's duty to prevent trade practices which are unfair or overreaching. A presentment hearing was held to decide the wording of the restraining order. At the hearing, defendants also filed a motion to certify the order for interlocutory appeal.

The district court made findings of fact and conclusions of law and certified the order for interlocutory appeal. The court found that this action was not preempted by federal law. The court also found that this was a case of common law unfair trade practices, and the issue was one of first impression in New Mexico. The matter of damages was not heard. This court granted defendant's application for interlocutory appeal.

The issues before us are (1) whether plaintiff has a right to prevent defendants from selling furniture "deceptively similar" to that of plaintiff where plaintiff has no copyright on the furniture or contract with defendants to sell plaintiff's furniture exclusively; and (2) whether plaintiff's claim that defendants should be prevented from selling furniture similar to plaintiff's is preempted by federal law. These two issues are so closely related that we discuss them under one heading. We conclude that the protection plaintiff seeks is protection against copying designs and that his claim is preempted by federal law.

We reverse and remand the case to the district court.

Discussion

Rights that are equivalent to any of the exclusive rights within the subject matter of copyright are governed by the Copyright Act of 1976. 17 U.S.C.A. § 301 (West 1977 & Supp.1989). Those rights governed by federal copyright law are under the exclusive jurisdiction of the federal courts. 28 U.S.C.A. § 1338 (West 1976 & Supp.1989). Works that do not enjoy the protection of a copyright are in the public domain and, absent a valid claim of unfair competition under state law, may be freely copied. *Towle Mfg. Co. v. Godinger Silver Art Co.*, 612 F.Supp. 986 (S.D.N.Y.1985); *see Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669 (1964); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir.1980). Imitation of items in the public domain is to be encouraged in order to permit " 'the normal operation of supply and demand to yield the fair price society must pay' " for a product. *Towle Mfg. Co. v. Godinger Silver Art Co.*, 612 F.Supp. at 993 (quoting *Gemveto Jewelry Co. v. Jeff Cooper, Inc.*, 568 F.Supp. 319, 334 (S.D.N.Y.1983)).

In order to avoid preemption by federal law, a state claim must go beyond the rights protected by copyright. *Towle Mfg. Co. v. Godinger Silver Art Co.*, 612 F.Supp. at 995. To be governed by state law, the claim must have a fundamentally different element than those elements protected by copyright law. *See Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204 (2d Cir.1986), *cert. denied*, 484 U.S. 820, 108 S.Ct. 79, 98 L.Ed.2d 42 (1987).

Plaintiff in this case dropped his copyright claim. He claims that the relationship of the parties to each other and the product provides the extra element which defines this cause of action as common law unfair competition. Plaintiff claims that, in light of the long-standing relationship, the copying of his designs constitutes palming off because the conduct by defendants was a continuing representation that the furniture being sold in their gallery was plaintiff's furniture.

Although the trial court and the parties argue that this is a case of common law unfair competition, we are not able to distinguish the claim from a claim under the Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -22 (Repl.Pamp.1987 & Cum.Supp. 1989). The New Mexico act is modeled after the Uniform Deceptive Trade Practices Act, 7A U.L.A. 265 (1985). *See* Comment, § 57-12-1. The prefatory note to

the Uniform Deceptive Trade Practices Act observes that unfair trade practices were commonly referred to as "unfair competition." The Uniform Deceptive Trade Practices Act was designed to bring uniformity to the law of unfair competition and to remove undue restrictions on the common law action for deceptive trade practices. Uniform Deceptive Trade Practices Act, Prefatory Note.

The relevant elements for a claim under this act are (1) a false or misleading representation (2) knowingly made (3) in connection with the sale of goods or services (4) in the regular course of trade or commerce (5) which may, tends to, or does deceive or mislead any person. *See* § 57-12-2(C).

Two examples of unfair or deceptive trade practices are (1) representing goods or services as those of another when the goods or services are not the goods or services of another; and (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services. *See* § 57-12-2(C)(1), (2).

We conclude that the former example is the statutory codification of the common law doctrine of "palming off" or "passing off." The latter example is closely related. The difference between palming off and causing confusion as to source is not distinct. Palming off is an attempt to make a purchaser believe that a product of a subsequent entrant is that of his better-known competitor, and, as related to creating confusion among purchasers as to the source of the product, palming off is simply a direct and more flagrant means of misleading purchasers. *Pezon Et Michel v. Ernest R. Hewin Assocs.*, 270 F.Supp. 423 (S.D.N.Y.1967); *see Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231 (2d Cir.1983). Under the New Mexico statute, the misrepresentation must be knowingly made. § 57-12-2(D). For palming off, plaintiff must clearly prove that defendants represented goods as plaintiff's; to prove that a competitor created confusion, plaintiff must show that the public was deceived as to the source of the product. *See Day-Brite Lighting, Inc. v. Sandee Mfg. Co.*, 286 F.2d 596 (7th Cir. 1960), *cert. denied*, 366 U.S. 963, 81 S.Ct. 1925, 6 L.Ed.2d 1255 (1961).

Cases on palming off involve active misrepresentation of the source of the product. *See Bentley v. Sunset House Distrib. Corp.*, 359 F.2d 140 (9th Cir.1966); *Day-Brite Lighting, Inc. v. Sandee Mfg. Co.; Zangerle & Peterson Co. v. Venice Furniture Novelty Mfg. Co.*, 133 F.2d 266 (7th Cir.1943); *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F.Supp. 776 (S.D. N.Y.1968); *Pezon Et Michel v. Ernest R. Hewin Assocs.* The essence of the wrong in palming off is in the misrepresentation as to the source. *See Zangerle & Peterson Co. v. Venice Furniture Novelty Mfg. Co.*

There was no misrepresentation made by defendants in this case. To the contrary, the announcement of the switch in furniture lines demonstrates that defendants did not attempt to misrepresent the source of the furniture. Defendants in this case may have knowingly copied the designs used by plaintiff, but there is no evidence to show that defendants knowingly misrepresented the new line of furniture to be the work of plaintiff.

Defendants announced that they would be carrying a new line of furniture made in Mexico. The new line of furniture was labeled with the country of origin. There was no active misrepresentation by defendants to confuse the public as to the source of the goods. Defendants did not use products made by plaintiff in their advertisements after they began carrying the new line of furniture. There was no evidence that defendants misrepresented the source of the furniture. There was no evidence to show that the public was actually deceived as to the source of the furniture.

If plaintiff has no exclusive right to a product or to use designs, then mere copying by another does not constitute unfair competition. *Gardenia Flowers, Inc.*

v. Joseph Markovits, Inc. In this case, there was evidence to show that the design elements used by plaintiff in his furniture were a part of the history of New Mexico and not the exclusive property of plaintiff. Although the lower court found that the design combinations used by plaintiff were unique, the evidence was insufficient to support that finding.

Although protection is available, the designs used by plaintiff and defendants were not protected by patent or copyright. Mere inability of the public to tell two identical articles apart is not enough to support an injunction against copying that which federal patent law permits to be copied. *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 232, 84 S.Ct. 784, 789, 11 L.Ed.2d 661 (1964). Absent patent or copyright protection, plaintiff's designs are in the public domain and can be copied. *See Compco Corp. v. Day–Brite Lighting, Inc.* Additionally, the goodwill of a product that is unpatented is in the public domain. *See Kellogg Co. v. National Biscuit Co.,* 305 U.S. 111, 59 S.Ct. 109, 83 L.Ed. 73 (1938). Therefore, the designs used by plaintiff were in the public domain, and defendants could freely copy those designs.

In cases of unfair competition, states may require that goods be labeled or that other precautionary steps be taken to prevent customers from being misled as to the source of a product. *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. at 232, 84 S.Ct. at 789; *see Towle Mfg. Co. v. Godinger Silver Art Co.* (the presence of a name goes far to eliminate confusion, even if it is not visible in advertisement); *Sublime Prods., Inc. v. Gerber Prods., Inc.,* 579 F.Supp. 248 (S.D.N.Y.1984) (court ordered clear labeling when the inequity of a free ride by defendant was overbalanced by the policy for encouraging competition); *American Safety Table Co. v. Schreiber,* 269 F.2d 255 (2d Cir.) (court found that some confusion as to source is inherent in imitation and ordered defendant to label or distinguish his product), *cert. denied,* 361 U.S. 915, 80 S.Ct. 259, 4 L.Ed.2d 185 (1959).

State action in deceptive trade practices law has been restricted by court interpretation of federal copyright law to regulating such matters as trade dress, labeling, and passing off to prevent source confusion. *George P. Ballas Buick–GMC, Inc. v. Taylor Buick, Inc.,* 5 Ohio Misc.2d 16, 449 N.E.2d 805 (Ct.App.1981), *aff'd,* 5 Ohio App.3d 71, 449 N.E.2d 503 (1982). A state may not prohibit copying of articles, but may protect businesses in their use of labels, or distinctive dress, in the packaging or advertising of such articles so as to prevent others from misleading purchasers as to the source of the article. *Id.*

This is not a case involving a state claim of unfair competition. The protection sought by plaintiff is protection against copying designs. The right to prevent copying is not a different right than those protected by federal copyright law. Therefore, this claim is preempted by federal law and under the exclusive jurisdiction of the federal courts. With no evidence to support the claim under the Unfair Practices Act, the temporary restraining order must be set aside.

Defendants argue that they are entitled to costs and attorney fees. Costs and attorney fees are available where permitted by law. SCRA 1986, 12–403(B)(3). Defendants have cited no authority for the payment of costs and attorney fees. *See In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984). Therefore, the request for costs and attorney fees is denied.

Conclusion

We reverse and remand this case to the district court with instructions to set aside the restraining order and enter a judgment dismissing plaintiff's complaint.

IT IS SO ORDERED.

ALARID and MINZNER, JJ., concur.

787 P.2d 1261

STATE of New Mexico,
Plaintiff–Appellee,

v.

Leo Michael LOPEZ,
Defendant–Appellant.

No. 11099.

Court of Appeals of New Mexico.

Feb. 8, 1990.

Winston Roberts–Hohl, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HARTZ, Judge.

Defendant appeals his conviction for receiving stolen property. He claims that the district court improperly denied a proposed instruction, that the evidence was insufficient to establish his guilt, that the evidence established entrapment as a matter of law, that he did not knowingly and willingly choose to represent himself, and that the prosecutor committed misconduct requiring reversal. We reverse for failure of the district court to instruct the jury on defendant's theory of the case. We remand for a new trial, rather than dismiss the charge with prejudice, because the evidence sufficed to prove guilt and defendant was not entrapped as a matter of law. We need not address the other issues.

FACTS

Numerous items, including jewelry, were taken from the victim's home on December 17, 1987. The victim hired a private investigator to help recover the stolen jewelry. The state called as witnesses an appraiser, the victim, the investigator, and the sheriff's deputy who arrested defendant.

The state's case was as follows: After learning that defendant, his brother Rudy, and Lawrence Barela had been working as landscapers at the victim's home around the time of the burglary, the investigator contacted defendant and his brother, informing them of the $5,000 reward for recovery of the property. At about 1:00 p.m. on January 8, 1988, the investigator met with the two brothers, who appeared very nervous. The investigator provided a list of the stolen items. The brothers said that they did not have the items but could possibly get them. At 4:00 p.m. they called the investigator to set up a meeting at 6:00 p.m. Defendant, but not his brother, appeared at the 6:00 p.m. meeting. Defendant said that he feared that he would be arrested, but the investigator reassured him. The investigator gave defendant $500 that defendant had requested in order to "buy back" the property. Defendant told the investigator that he had not taken the items but had been at the victim's house when Barela took them. He said that the property was in Truchas and Abiquiu. Defendant said that he was frightened of the persons who had the items and feared for his life. Because it would take a while to recover the property, defendant and the investigator arranged to meet at 11:00 p.m.

At 11:30 p.m. defendant and his nephew arrived at the prearranged rendezvous. Local law enforcement officers observed from a short distance away. Defendant said that Barela had been with him in his truck but had become sick and left. Defendant delivered most of the stolen jewelry to the investigator, explaining that the rest of the property was with a Truchas resident who was not at home. When the investigator was satisfied that the jewelry belonged to the victim, he gave defendant the rest of the reward—$4,500. Defendant told the investigator to tell Barela and Rudy that he was paid only $3,000 so he would not have to share the difference with them; defendant hid $1,500 in his boot. When the investigator suggested that they could do business selling stolen property in the future, defendant responded that the proposal was a good idea. Defendant was then arrested. The $4,500—but not the $500 given to defendant earlier—was recovered. Later defendant offered to assist in recovering the remainder of the jewelry and in "setting up" Barela, but he then changed his mind.

Defendant's sole witness was his nephew. Most of his testimony was irrelevant. On cross-examination he denied that Barela had been in his uncle's truck that night. He admitted, however, that he knew that defendant had purchased the jewelry in Abiquiu, Chimayo, Hernandez, and Truchas.

DENIAL OF DEFENDANT'S REQUESTED INSTRUCTION

The district court instructed the jury as follows with regard to the elements of the offense and the requisite intent:

INSTRUCTION NO. 3

For you to find the defendant guilty of receiving stolen property, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The jewelry belonging to [the victim] had been stolen;

2. The defendant kept or disposed of this property;

3. At the time he kept or disposed of this property, the defendant knew or believed that it had been stolen;

4. The property had a market value of over $2,500.00;

5. This happened in Rio Arriba County, New Mexico on or about the 8th day of January, 1988.

INSTRUCTION NO. 5

In addition to the other elements of receiving stolen property, the state must prove to your satisfaction beyond a reasonable doubt that the defendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime, even though he may not know that his act is unlawful. Whether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, his conduct and any statements made by him.

Defendant submitted the following proposed instruction:

Evidence has been presented that the defendant received, retained or disposed of the property with the intent to return it to its owner. The presence of such an intent is a defense to the charge of receiving stolen property. The burden is upon the State to prove beyond a reasonable doubt that this defense of intent to return the property to its owner does not apply.

If you find that the defendant did intend to return the property to its owner then you must find defendant not guilty.

This instruction is based on the "unless" clause of the statutory definition of the offense, which reads: "Receiving stolen property means intentionally to receive, retain or dispose of stolen property knowing that it has been stolen or believing it has been stolen, *unless the property is received, retained or disposed of with intent to restore it to the owner.*" NMSA 1978, § 30–16–11(A) (Cum.Supp.1989) (emphasis added). We shall refer to the defense expressed in the "unless" clause as the "intent-to-return" defense.

The trial judge gave three reasons for rejecting the instruction: (1) The element of intent was already adequately covered by the general intent instruction, Instruction No. 5. (2) The instruction misstated the state's burden of persuasion. (3) The instruction does not appear in the Uniform Jury Instructions adopted by our supreme court. We understand the state to contend on appeal that there were also two more reasons why the district court's refusal of the instruction was proper: (1) because returning property for a reward is no different from selling it to a fence, returning the property to the owner is no defense when the motive for the return is to obtain a reward; and (2) the evidence was insufficient to support the defense. We reject the reasons given by the district court and the state's additional contentions.

First, we disagree with the district court's view that the intent-to-return defense is covered adequately by Instruction No. 5. Nothing in that instruction, or any other instruction read to the jury, informed the jury that keeping and disposing of stolen property is not criminal if the accused's intent in keeping and disposing of the property is to return it to the owner.

Second, we hold that defendant's proposed instruction correctly states the prosecution's burden of proof. Defendant's sole burden was to point to evidence raising a reasonable doubt that his actions were protected by the intent-to-return defense. In other words, the state had the

burden of negating the defense beyond a reasonable doubt. Our statute is similar to a Model Penal Code provision whose drafters assumed that the burden would be so allocated. *See* Part II Model Penal Code and Commentaries § 223.6 comment 4, at 237 (1980). *Accord* 2 Cal.Jury Inst. Crim. 14.66 (Levin 5th ed. 1988) (instruction on receiving stolen property); *Godwin v. United States,* 687 F.2d 585, 589 (2d Cir. 1982). Although it may have been permissible for the legislature to place the burden on the defendant to prove the defense, *see generally* 1 P. Robinson, *Criminal Law Defenses* § 5(b) (1984), New Mexico courts have, in the absence of express legislative language, required the state to disprove such defenses beyond a reasonable doubt. *Compare State v. Lopez,* 91 N.M. 779, 581 P.2d 872 (1978) (insanity); *Esquibel v. State,* 91 N.M. 498, 576 P.2d 1129 (1978) (duress); *State v. Edwards,* 97 N.M. 141, 637 P.2d 572 (Ct.App.1981) (self-defense); *State v. Carrillo,* 80 N.M. 697, 460 P.2d 62 (Ct.App.1969) (entrapment), *cert. denied,* 397 U.S. 1079, 90 S.Ct. 1532, 25 L.Ed.2d 815 (1970), *with State v. Everidge,* 77 N.M. 505, 424 P.2d 787 (1967) (drug law places burden of proof of exceptions on defendant). We point out, however, that the district court must instruct on the defense only if it is raised by the defendant and only if, on the basis of the evidence at trial (whether offered by the state or by the defendant), a reasonable juror could have a reasonable doubt arising from the defense.

Third, defendant's proposed instruction should not be rejected solely because it is not among the Uniform Jury Instructions approved by our supreme court. The General Use Note for the Uniform Jury Instructions recognizes that the instructions provided are not exhaustive. *Cf. State v. Kraul,* 90 N.M. 314, 563 P.2d 108 (Ct.App.1977) (defendant entitled to instruction on self-defense although no uniform jury instruction on that defense in context of charge of battery on police officer). More specifically, the Committee Commentary to SCRA 1986, 14–1650 (the Uniform Jury Instruction for receiving stolen property) states that the defense defined by the "unless" clause is not treated in the instruction. Thus, the Uniform Jury Instructions do not preclude an instruction on the intent-to-return defense when appropriate.

Turning to the additional contentions raised by the state on appeal, we hold that the prospect of a reward does not defeat the intent-to-return defense. At common law the defense could apply to one who returned stolen property to the owner for a reward. *See Godwin v. United States,* 687 F.2d at 588. The language of the New Mexico statute's "unless" clause is virtually identical to that found in the Model Penal Code definition of receiving stolen property, Model Penal Code, *supra,* § 223.6(1), at 231 ("unless the property is received, retained, or disposed with purpose to restore it to the owner"), which was intended to codify the common law crime. *See Godwin v. United States.* We conclude that the "unless" clause in our statute encompasses the common-law defense, including its application in the reward context.[1]

The public policy behind permitting the defense in that context is to protect against criminal punishment those, such as private investigators, who seek to earn rewards by ferreting out and returning stolen goods. Not to recognize this defense would be to eliminate the incentive of a reward. This policy applies whether the person seeking the reward delivers the goods to the owner or to an agent of the owner, such as the private investigator in this case. Also, one need not be the most upright of citizens to benefit from the defense. Crime Stopper rewards are granted to those who, prior to learning of the reward, may have been sitting on information about a crime. The

1. *Leonardo v. Territory,* 1 N.M. 291 (1859) has language suggesting that one who acquires stolen property to obtain a reward is always guilty of receiving stolen property, but the result in that case appears to be consistent with the principle stated here.

same policy supports the use of rewards to retrieve stolen property by making the intent-to-return defense available to one who has knowledge of the theft or possession of stolen property but who is not moved to assist in recovery of the property until a reward is offered. Thus, defendant's intent to obtain a reward does not defeat the intent-to-return defense, even though a better citizen may have come forward with information about the stolen property before learning of a reward.

Of course, for the intent-to-return defense to apply, the stolen goods should never have been held for any purpose other than to return the goods to the owner. If, for example, one held stolen goods with intent to use them or sell them to a fence, such criminal misconduct is not excused by later delivering them to the owner for a reward. *See id.; State v. Simonson,* 298 Minn. 235, 237, 214 N.W.2d 679, 682 (1974) ("[O]ne who receives or conceals what he knows to be stolen property with the intent to restore it to the owner only if the owner pays a reward does have the requisite wrongful intent.").

The state's remaining contention is that the evidence did not support the intent-to-return defense. The test is whether a reasonable juror could maintain a reasonable doubt of defendant's guilt because defendant may have held and disposed of the stolen property with the sole intent of returning it for the reward that had been offered. *See State v. Lopez* (defendant's burden regarding insanity defense). Reasonable doubt could arise in this case from the possibility that defendant's involvement consisted of only (1) awareness of the burglary, (2) knowledge of where the goods were being kept, (3) use of the $500 from the investigator to purchase the goods from those holding them, and (4) delivery of the goods to the investigator. The trial judge did not reject the proposed instruction on the ground of insufficient evidence to support it. On the contrary, when the prosecutor argued that the jury could not find an intent to return in the absence of testimony by defendant, the trial judge pointed out that intent could be inferred from the circumstances.

Thus, we hold that defendant was entitled to an instruction on the intent-to-return defense. We note, however, that our holding does not mean that on retrial the district court must adopt defendant's proposed instruction verbatim. The district court, working with trial counsel, may wish to modify the language of the proposed instruction to improve jury comprehension of the intent-to-return defense. For example, the California Uniform Jury Instruction on this issue spells out in some detail (perhaps more detail than is customary in our Uniform Jury Instructions) that the innocent intent must exist at the moment defendant received the stolen property and must continue thereafter. (The public defender, acting as standby counsel for defendant at trial, offered to show the California instruction to the judge, but the judge declined the offer.)

Because we are remanding for a new trial, we need not consider defendant's claims regarding waiver of his right to counsel and alleged prosecutorial misconduct. We must, however, consider defendant's arguments concerning the sufficiency of the evidence and entrapment as a matter of law, because if either of those arguments is meritorious, defendant was entitled to an acquittal after his trial, and retrial is barred. *See Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

SUFFICIENCY OF THE EVIDENCE

We view the evidence in the light most favorable to the state. *See State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978). The evidence was sufficient to sustain defendant's conviction.

Although defendant attempted to shoulder Barela with all the blameworthy conduct, his statements to the investigator implied a working relationship among defendant, his brother, and Barela with respect

to the stolen property. Defendant admitted being present at the time of the theft. He also admitted Barela's involvement in producing the stolen goods for the investigator: he said that Barela had accompanied him part of the way to the rendezvous with the investigator before becoming ill and that Barela was to share in the reward. In addition, defendant expressed interest in the investigator's suggestion that they work together in the future in stolen-property transactions; and the jury could have inferred that defendant's nervousness at his first meeting with the investigator and his later expression of fear of being arrested evinced a consciousness of guilt inconsistent with his having been free of culpable dealings with the stolen property.

The jury could rationally have concluded beyond a reasonable doubt that defendant delivered to the investigator stolen property that he had possessed, *see* SCRA 1986, 14–130 (Uniform Jury Instruction definition of "possession"), prior to any offer of a reward. *See State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984) (stating appellate standard of review of sufficiency of evidence in criminal cases).

ENTRAPMENT

Defendant raises an entrapment defense for the first time on appeal. Even if the defense had not been waived by failing to raise it at trial, there is no merit to defendant's contention that the evidence demonstrated entrapment as a matter of law. To establish the entrapment defense, defendant must show either (1) he lacked a predisposition to commit the crime or (2) the law enforcement officers exceeded the standards of proper investigation. *See Baca v. State,* 106 N.M. 338, 341, 742 P.2d 1043, 1046 (1987). The first test, the subjective standard, can rarely be established as a matter of law. *See id.* at 339, 742 P.2d at 1044. The jury must weigh the evidence to determine defendant's character in this regard. In this case the testimony regarding defendant's statements to the investigator would support an inference that defendant needed no encouragement to deal in stolen property. As for the second test, the objective standard, the involvement of law enforcement officers in the investigation was rather attenuated. The driving force appears to have been the private investigator. The investigator testified that he was not working for the sheriff's office and agreed only to keep them informed. Nothing in the record suggests that law enforcement officers exceeded the bounds of propriety in their conduct. Entrapment was not established as a matter of law.

CONCLUSION

For the above reasons we reverse defendant's conviction and remand for a new trial.

IT IS SO ORDERED.

BIVINS, C.J., and MINZNER, J., concur.

788 P.2d 340

ALLSTATE INSURANCE COMPANY, Plaintiff-Appellee,

v.

Daniel Lee JENSEN and Gary Wayne Caldwell, Defendants,

v.

James L. BOUTELLE, Defendant-Appellant.

No. 18374.

Supreme Court of New Mexico.

Jan. 23, 1990.

W.T. Martin, Jr., Carlsbad, for defendant-appellant.

Bradley & McCulloch, Gordon McCulloch, Albuquerque, for plaintiff-appellee.

OPINION

RANSOM, Justice.

James Boutelle has a personal injury claim against David Jensen. Allstate Insurance Company brought this declaratory judgment action to determine its obligation to defend Jensen under the omnibus or permissive driver clause of an automobile insurance policy issued to Gary Caldwell. Boutelle appeals from a summary judgment in which the district court ruled that Allstate had no duty to defend Jensen. We affirm, but for reasons other than the "significant deviation" rule relied upon by the court below.

In 1984, Jensen and Caldwell were employed on a bridge construction project near Carlsbad, New Mexico. On the night of May 23, Jensen came to Caldwell's motel room in Carlsbad to pay a social call and asked Caldwell if he could borrow his pickup truck to drive to a nearby convenience store for cigarettes. Caldwell let Jensen borrow the truck, but when Jensen left he headed in the opposite direction from the store. Apparently, Jensen had consumed an enormous amount of beer in the preceding twenty-four hours, as much as three cases. He had socialized with Caldwell that day and had drank another beer in Caldwell's room before taking the truck

that evening. Caldwell had questioned him as to whether he thought he was fit to drive, and he said "yes". In his deposition, he stated that after leaving the motel "all of a sudden I wound up on the Hobbs highway with state policeman Hickey trying to pull me over."

A high speed chase ensued, through Carlsbad and the surrounding countryside, involving members of both the state and Carlsbad police. Jensen evaded one roadblock when Carlsbad police officers removed their vehicles from the road after deciding that Jensen had no intention of slowing down as he approached them. Later, James Boutelle, a Carlsbad police officer, pulled up alongside Jensen while they were traveling on the Artesia highway. Jensen rammed the truck into the police vehicle rolling it over and off the road. He was finally apprehended after he rammed a second roadblock and destroyed two police vehicles in the process. He told the police, "I wish I had taken a couple of you with me." Jensen was charged with multiple criminal violations and was later sentenced to the New Mexico penitentiary.

Boutelle was injured when he was forced off the road. He later filed suit against Jensen for negligent and intentional acts, and against Caldwell for negligent entrustment. Allstate sought a declaratory judgment that, because of Jensen's excessive deviation from his announced purpose for the use of the vehicle, Jensen was not a permissive driver within the meaning of the omnibus clause of Caldwell's insurance policy. In addition to the owner of the vehicle as the named insured, the policy covered "[a]ny other person with respect to the owned automobile, provided the use thereof is with the permission of the insured and within the scope of that permission."

The appellate courts of New Mexico have not addressed the omnibus clause question presented here. *Cf. Gruger v. Western Cas. & Sur. Co.*, 89 N.M. 562, 555 P.2d 683 (1976) (involving whether an owner had given his implied consent to use of his vehicle by a third-party permittee of the original permittee). There is, however, a wealth of decisions from other jurisdictions that address questions regarding the "scope of the permission" which was given, or whether permission was given for the "actual use" of the vehicle at the time of the accident. *See* Annotation, *Automobile liability insurance: permission or consent to employee's use of car within meaning of omnibus coverage clause,* 5 A.L.R.2d 600 (1949 & Later Case Service 1985); Ashlock, *Automobile Liability Insurance: The Omnibus Clause,* 46 Iowa L.Rev. 84 (1960). The approaches taken by these decisions have tended to be grouped within one of three categories: (1) the strict rule requiring use precisely within the scope of permission granted, (2) the initial permission rule covering any deviation short of theft or the like, and (3) the intermediate significant or major/minor deviation rule. *See, e.g., Columbia Cas. Co. v. Hoohuli,* 50 Haw. 212, 216, 437 P.2d 99, 103 (1968).

On appeal, Boutelle argues that in light of public policy evinced in the New Mexico Mandatory Financial Responsibility Act of 1983, NMSA 1978, Sections 66–5–201 to 66–5–239 (Repl.Pamp.1989), this Court should adopt either the "initial permission" rule, or what Boutelle calls the "social permittee" rule, and reverse the entry of summary judgment. Allstate urges the adoption of the "significant deviation" rule, and argues that Jensen's gross deviation from the scope of permission bars coverage under the omnibus clause. In ruling on the motion for summary judgment, the trial judge stated: "I agree with [Boutelle] that from a policy point of view this should be changed. Nevertheless, we have case law * * * in New Mexico which * * * binds me. [T]here has been a rather significant deviation from the scope of the permission granted * * *."

The parties agree that coverage under a contract for automobile liability insurance is not solely a function of the intent of the parties and the terms of the contract. Under the Mandatory Financial Responsibility Act, effective January 1, 1984, an owner's certified motor vehicle liability policy must "insure the person named in the policy and any other person, as insured, using any

such motor vehicle with the express or implied permission of the named insured." NMSA 1978, § 66-5-221(A)(2).[1] Both parties assume that this statutory omnibus clause is applicable to the present case. If so, the Allstate contract for liability insurance cannot be more restrictive than the statutory clause.[2] At issue, then, is the extent to which the phrase "with the express or implied permission of the named insured" was intended by the legislature to modify the word "using".

Under the statutory clause, coverage is extended to any person merely "using" the motor vehicle with the express or implied permission of the named insured.[3] Under

1. The Mandatory Financial Responsibility Act conditions motor vehicle registration on evidence of financial responsibility. NMSA 1978, §§ 66-5-206, -234. A motor vehicle must be covered by a liability insurance policy or a $60,000 cash deposit with the state treasurer, or a surety bond in the same amount. NMSA 1978, §§ 66-5-205, -225, -226.

2. Allstate argues that its omnibus clause does no more than clarify what is meant by "permission" in Section 66-5-221(A)(2). However, it is not at all clear to us that, after the passage of the Mandatory Financial Responsibility Act, the provisions of Section 66-5-221 were intended to be applicable to *all* motor vehicle liability policies. We will proceed as if that were the case, but as the issue has not been briefed and argued we will reserve judgment on the question for resolution when appropriate.

The uncertainty concerning the applicability of Section 66-5-221 arises from changes made to the New Mexico financial responsibility laws in 1984. Prior to 1984, registration of motor vehicles was not conditioned upon a showing of financial responsibility. Rather, such a showing was required only in certain cases such as an unsatisfied judgment against a motorist. 1978 N.M.Laws, ch. 35, § 281. A motorist might avoid the suspension of his driver's license and vehicle registration by filing a certificate of insurance with the division of motor vehicles, verifying that the motorist had in effect at the time of the accident a policy meeting the minimum liability coverage provisions of the Financial Responsibility Act. *See* 1978 N.M. Laws, ch. 35, §§ 295, 303, 306. After a policy was certified by such a filing, it could not be canceled without notice to the division. 1978 N.M.Laws, ch. 35, § 308. We decided in *Estep v. State Farm Mutual Insurance Co.,* 103 N.M. 105, 703 P.2d 882 (1985), that *all* motor vehicle liability policies, whether certified or not, were subject to the minimum liability coverage provisions of that act. This was because a motorist could avoid suspension only by certifying that the policy *in effect at the time of the accident* met the minimum requirements of the act. These requirements would include the statutory omnibus clause in effect at that time. *See Estep,* at 108, 703 P.2d at 885.

Under our present statutory scheme, an owner of a motor vehicle applying for registration may give evidence of financial responsibility by having either a "motor vehicle liability policy," or a "*certified* motor vehicle liability policy." NMSA 1978, § 66-5-218 (emphasis added). Significantly, the 1984 Act eliminated all provisions that would require a motorist to file a certified policy with the division. In this present Act, while the definition of a certified policy is tied to the minimum coverage requirements of Section 66-5-221 (including the statutory omnibus clause), *see* Section 66-5-202(A), the definition of a "motor vehicle liability policy" is not. *See* NMSA 1978, § 66-5-202(H). The latter is simply defined as an owner's policy meeting the minimum dollar amounts set forth in Section 66-5-208. *Id.* Under these circumstances, we are not willing to accept on its face that "evidence of a motor vehicle liability policy" under Section 66-5-218(A) necessarily incorporates all of the requirements concerning certified policies under Section 66-5-221.

In order to give any meaning at all to Section 66-5-221, these provisions might seem applicable to particular policies when a "certificate of liability insurance" is issued to a policy holder to be carried in his vehicle, in lieu of the policy itself, as evidence of financial responsibility as required by Section 66-5-229(C). In this way, absent an actual policy, certain standard provisions would be known to exist. The motor vehicle division has promulgated an administrative rule which recognizes that a "certificate" which contains certain minimum information is sufficient to meet the requirement of having evidence of financial responsibility carried in the vehicle at all times. Transportation Rule No. 84-1-MVD. However, anomalously, in the absence of filing the certificate with the motor vehicle division, such a policy cannot be considered a certified policy. *See* Sections 66-5-202(A), -219. The use of the term "certified" in this context is foreign to the meaning of that term as it is used both in the present Act and its predecessor. While the present Act still requires that an insurance company notify the motor vehicle division prior to canceling a certified policy, NMSA 1978, Section 66-5-223, we question whether today the division ever receives such notification regarding any policy.

3. Implied permission to use a motor vehicle can be inferred from a course of conduct or relationship between the parties, or other facts and circumstances signifying the assent of the owner. *See Gruger v. Western Cas. & Sur. Co,* 89 N.M. 562, 555 P.2d 683 (1976); *Western Cas. & Sur. Co. v. Grice,* 422 F.2d 921 (10th Cir.1970); *see also* 8 P. Kelley, *Blashfield Automobile Law and Practice* §§ 321.7 & 321.10 (rev. 3d ed. 1987).

the Allstate policy, other persons are insured provided the "use" is within "the scope of such permission." While the Allstate policy clearly indicates that permission to use the vehicle is defined by the particular use being made of it at the time of the accident, we do not believe that the statutory provision is so qualified. The purpose of the Mandatory Financial Responsibility Act was stated by the legislature as follows:

> The legislature is aware that motor vehicle accidents in the state of New Mexico can result in catastrophic financial hardship. The purpose of the Mandatory Financial Responsibility Act is to require and encourage residents of the state of New Mexico who own and operate motor vehicles upon the highways of the state to have the ability to respond in damages to accidents arising out of the use and operation of a motor vehicle. It is the intent that the risks and financial burdens of motor vehicle accidents be equitably distributed among all owners and operators of motor vehicles within the state.

NMSA 1978, § 66–5–201.1. This statement of legislative purpose reflects the view that the required automobile liability insurance is for the benefit of the public generally, innocent victims of automobile accidents, as well as the insured. *See Estep v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 105, 703 P.2d 882 (1985). In order to effectuate such legislative policy the statutory omnibus clause must be interpreted broadly.

In Section 66–5–201.1, the legislature has expressed its concern that *operators* of motor vehicles be able to respond in damages. The act defines "operator" as every person who drives or is in physical control of a motor vehicle. *See* NMSA 1978, § 66–5–202(K) & (D). In many instances, an operator's ability to respond in damages will be dependent upon the vehicle owner's contract for liability insurance. This is because the entire focus of the required liability coverage in the act is on liability coverage for motor vehicles. *See* NMSA 1978, §§ 66–5–205, –206. Motor vehicle registration, not a driver's license, is conditioned on meeting the financial responsibility requirements. *See* NMSA 1978, §§ 66–5–206, –234.

An owner may certainly impose restrictions on the particular use of a loaned vehicle, and we do not mean to discourage such agreements between individuals. However, we do not believe the legislature intended that the owner's liability coverage for the motor vehicle be affected by such understandings. Instead, based upon the provisions of the Mandatory Financial Responsibility Act, we conclude that the omnibus clause of the Allstate liability policy must provide coverage to any person using the insured vehicle with the owner's consent, without regard to any restrictions or understanding between the parties on the particular use for which the permission was given.

We wish to emphasize that we construe Section 66–5–221(A)(2) to adopt what may be called the initial permission rule because we believe the legislature intended to accomplish this result. We do not view our decision as a choice among various "rules" employed for the interpretation and application of an omnibus clause in a contract for insurance. We likewise express no opinion on whether the decision in this case and the provisions of the Mandatory Financial Responsibility Act should affect our decision in *Gruger* concerning the coverage afforded a third person using a motor vehicle with the consent of the original permittee of the named insured.

In arguing against the adoption of the initial permission rule, Allstate directs our attention to the statutory omnibus clause adopted in New Hampshire which provides that:

> The Insurance applies to any person who has obtained possession or control of the motor vehicle of the insured with his express or implied consent even though the use in the course of which liability to pay damages arises has been expressly or impliedly forbidden by the insured or is otherwise unauthorized. This provision, however, shall not apply to the use of a vehicle converted with the intent to wrongfully deprive the owner of his property therein.

N.H.Rev.Stat.Ann. § 264:18 VI (1982). This statute leaves little doubt that the New Hampshire legislature intended to extend coverage to permissive users even when the operation of the vehicle was clearly outside of the scope of permission which was granted. *Concord Gen. Mut. Ins. Co. v. Haynes,* 110 N.H. 76, 260 A.2d 99 (1969). Allstate argues that the New Mexico legislature chose not to include such a provision, and that to graft one onto our statute is unwarranted.

While the clarity of the New Hampshire statute is enviable, the wording of our own statute certainly points to the construction we have given it. In examining decisions of other jurisdictions said to have adopted the initial permission rule, we find that in a number of cases those jurisdictions have statutory omnibus clauses very similar to our own. *See, e.g., Commercial Union Ins. Co. v. Johnson,* 294 Ark. 444, 745 S.W.2d 589 (1988); *Farm Bureau Mut. Ins. Co. of Idaho v. Hmelevsky,* 97 Idaho 46, 539 P.2d 598 (1975); *Konrad v. Hartford Accident & Indem. Co.,* 11 Ill.App.2d 503, 137 N.E.2d 855 (1956); *United States Fidelity & Guar. Co. v. Fisher,* 88 Nev. 155, 494 P.2d 549 (1972). In addition to public policy considerations underlying the statutory omnibus clause, to greater and lesser degrees, the wording of these statutes has been a significant factor in the adoption of the initial permission rule in those jurisdictions. *See, e.g., Protective Fire & Cas. Co. v. Cornelius,* 176 Neb. 75, 125 N.W.2d 179 (1963).

Also, we note that in California the legislature added to its statutory omnibus clause language to the effect that the use of the loaned vehicle must be within the scope of the permission granted by the named insured. The earlier version of the statute was like our own and was interpreted to adopt the initial permission rule. *See Jordan v. Consolidated Mut. Ins. Co.,* 59 Cal.App.3d 26, 130 Cal.Rptr. 446 (1976). Only with the statutory change was coverage restricted to those situations in which the permissive user was acting within the parameters set by the owner of the vehicle. *Hartford Accident & Indem. v. Abdullah,* 94 Cal.App.3d 81, 156 Cal.Rptr. 254 (1979).

Allstate also cites the court of appeals decision in *Benham v. All Seasons Child Care, Inc.,* 101 N.M. 636, 686 P.2d 978 (Ct.App.), *cert. denied,* 101 N.M. 686, 687 P.2d 743 (1984), and states that this case stands for the proposition that permission to use an automobile can be limited in scope. In *Benham,* an employee was involved in an accident while on a personal mission with his employer's van, which he was authorized to use. The decision was concerned with the question of the liability of the employer under the doctrine of respondeat superior. Such liability is premised upon whether or not an employee is acting within the scope of his employment. *Id.* at 638, 686 P.2d at 980. But, this factor is not the primary test of omnibus clause coverage, although in jurisdictions which do not follow the initial permission rule the "scope of employment" may, in certain cases, be co-extensive with the "scope of permission." *See Columbia Cas. Co. v. Hoohuli,* 50 Haw. 212, 215, 437 P.2d 99, 103 (1968). We see no reason to equate the two. As the *Hoohuli* Court pointed out, the policy considerations which determine whether an employer will be held vicariously liable for the acts of his employee are completely different from the policy considerations involved in determining whether a permittee is an insured under a statutory omnibus clause. *See Id.* at 215 n. 2, 437 P.2d at 103 n. 2.

Our reading of the statutory omnibus clause in Section 66-5-221(A)(2) does not, however, suggest that the owner's motor vehicle liability insurance was intended to extend to any and all persons who might come to operate the vehicle. By conditioning insurance coverage on the word "permission", we believe that the legislature meant to exclude unlawful takings such as theft. In decisions adopting the initial permission rule this has been a recognized limitation. *See, e.g. Matits v. Nationwide Mut. Ins. Co.,* 33 N.J. 488, 166 A.2d 345 (1960) (barring theft or the like); *Maryland Cas. Co. v. Iowa Nat'l Mut. Ins. Co.,* 54 Ill.2d 333, 297 N.E.2d 163 (1973) (same). We hold that wrongful intent to deprive the

owner of his property bars coverage.[4]

In addition, an intent to deprive the owner of his property may be shown by the intentional destruction of the vehicle, or that state of mind which evinces an utter disregard for the return of the vehicle or for its safekeeping. The facts of this case raise no genuine issue of fact on that score. No reasonable juror could find that Jensen was innocent of that state of mind which we here hold to vitiate initial permission. We caution, however, that it is not the act of driving while intoxicated that is determinative. Here, it is significant that the owner granted permission with the apparent awareness of the impairment, but we also believe that it was the intention of the legislature that permittees who are guilty of that or similar transgressions be deemed insured under the financial responsibility policies of this state.

For these reasons, we affirm the judgment of the district court.

IT IS SO ORDERED.

SOSA, C.J., and WILSON, J., concur.

788 P.2d 345

Archie CORBIN, d/b/a Corbin's Spring Crest Draperies, Plaintiff-Appellant,

v.

STATE FARM INSURANCE COMPANY and Robin Houlton, Defendants-Appellees.

No. 18598.

Supreme Court of New Mexico.

Feb. 7, 1990.

4. In addition to excluding cases of "theft or the like," some jurisdictions that have adopted the initial permission rule have also made exception for cases involving "conversion". *See, e.g., Commercial Union Ins. Co. v. Johnson,* 294 Ark. 444, 745 S.W.2d 589 (1988); *Milbank Mut. Ins. Co. v. United States Fidelity & Guar. Co.,* 332 N.W.2d 160 (Minn.1983). Our research indicates, however, that only one court has addressed the meaning of conversion in this context and has rejected the application of the definition of tortious conversion to the exception recognized. *Western States Mut. Ins. Co. v. Verucchi,* 66 Ill.2d 527, 6 Ill.Dec. 879, 363 N.E.2d 826 (1977) (only the intent to permanently or indefinitely deprive the owner of his rights in the property will bar insurance coverage, notwithstanding the fact that the action may have constituted a technical conversion). Similarly, we believe that the rigid use of the elements of this tort would be counterproductive as a standard against which to measure permission.

Under New Mexico law, tortious conversion of property has been defined to include, *inter alia,* the wrongful possession of, or the exercise of dominion over, a chattel to the exclusion or in defiance of the owner's rights. *Ross v. Lewis,* 23 N.M. 524, 169 P. 468 (1917); *see also Mine Supply, Inc. v. Elayer Co.,* 75 N.M. 772, 411 P.2d 354 (1966); *Taylor v. McBee,* 78 N.M. 503, 433 P.2d 88 (Ct.App.1967). If we were to recognize the tort of conversion as an exception to liability coverage under the statutory omnibus clause, we would reduce our inquiry to a form of the major/minor deviation rule. *See Gelder v. Puritan Ins. Co.,* 100 N.M. 240, 668 P.2d 1117 (Ct. App.1983). This would defeat the general uniformity of coverage for all permissive drivers for the benefit of the public as was intended by the legislature. For this reason, we reject the idea that the tort of conversion will bar coverage under the omnibus clause. The owner may well have a valid claim in tort based upon the injurious misuse of his vehicle, but unless the case rises to the level of theft (larceny) or *criminal* conversion (embezzlement), omnibus clause coverage is unaffected.

Spann, Latimer & Hollowwa, E. Douglas Latimer, Albuquerque, for plaintiff-appellant.

Farlow, Simone, Roberts & Weiss, P.A., Randal W. Roberts, Albuquerque, for defendant-appellee State Farm.

Sager, Curran, Sturges & Tepper, P.C., Eric Scott Jeffries, Sarah Curry Smith, Albuquerque, for defendant-appellee Houlton.

OPINION

BACA, Justice.

This case is before the court on an appeal from a grant of summary judgment against plaintiff-appellant Archie Corbin, d/b/a Corbin's Spring Crest Draperies (the Corbins), on their action for breach of contract, wrongful termination of fire insurance against State Farm, and negligent misrepresentation against defendant Robin Houlton, individually, an agent for State Farm. We affirm.

FACTS

On May 5, 1986, the Corbins applied for business insurance with State Farm through its agent, Robin Houlton. The application was filled out by Houlton with the words "draperies sales" listed as the type of business insured, and signed by Mrs. Corbin who acknowledged that the application was correct. The Corbins also obtained car and home insurance from State Farm at this time. Because the policy was in excess of $100,000 in coverage, State Farm requested a field survey on May 19, 1986, in order to determine the underwriting risk. On July 9, 1986, Wes Whiteley conducted a field survey and determined that the Corbins were in business as a manufacturer of draperies to a much greater extent than as a retail outlet. Because State Farm does not insure manufacturers, Mr. Whiteley recommended cancellation of the business insurance policy. State Farm mailed a notice of cancellation to the Corbins on July 29, 1986, informing them that their business policy was cancelled effective August 30, 1986. This was more than sixty days after the policy was issued.

Robin Houlton told the Corbins that he would "take care of everything," and referred them to John Jay in order to obtain replacement insurance. The Corbins applied for, and received replacement business insurance from John Jay through Aetna on September 18, 1986. Aetna cancelled the policy on December 20, 1986, apparently due to nonpayment of premiums. On May 6, 1987, there was a fire at Corbin's Spring Crest Draperies. The Corbins then sued State Farm and Robin Houlton for breach of contract, unfair insurance practices, negligence, and negligent misrepresentation.

The district court found no genuine issue as to material fact exists and granted summary judgment as a matter of law. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676

(1972); *see O'Brien v. Chandler*, 107 N.M. 797, 765 P.2d 1165 (1988).

ISSUES

The Corbins argue that three factual issues do exist. They claim that State Farm violated NMSA 1978, Section 59A–18–29 (Repl.Pamp.1988) by cancelling the policy after it had been in existence more than sixty days and not informing the Corbins of the cause relied on. They further claim that Robin Houlton violated Section 59A–16–23(A) by making misrepresentations on the insurance application. Finally, they argue that State Farm and Robin Houlton failed to notify the Corbins that their insurance was cancelled and Houlton created a higher duty for himself and a false sense of security in the Corbins by telling them that he would "take care of everything."

STATUTORY VIOLATIONS

There was no willful misrepresentation on Houlton's part and good cause existed for State Farm to cancel the policy after sixty days. NMSA 1978, Section 59A–16–23(A) provides:

> A. No agent, broker, * * * applicant or other person shall knowingly or wilfully:
>
> (1) make any false or fraudulent statement or representation as to any material fact in or with reference to any application for insurance * * *.

The undisputed facts show that this was not a case of willful statements amounting to fraud. Houlton inspected the premises and saw that drapery sales, as well as manufacturing, indeed, took place. Ms. Fisher, a Corbin representative, told him that the business was drapery sales. Houlton in filling out the application form for fire insurance, under type of business, entered "drapery sales." Houlton checked in the application the "risk complied with" blank. Ms. Corbin signed the application which stated: "I hereby apply for the insurance indicated and represent that I have read both sides of this application and the statements hereon are correct." Houlton did not knowingly make a false statement because the statement was not false and was not intended to mislead; it was simply incomplete for State Farm's purposes. Based on these facts, the trial court correctly found that as a matter of law Houlton did not violate Section 59A–16–23(A).

Section 59A–18–29 provides that insurance may be cancelled without cause within sixty days of its issuance. If the insurer cancels the policy after sixty days, it must be for *reasonable cause* and notice of cancellation must be given. This statute does not preclude an insurer from cancelling insurance after sixty days, but requires only that reasonable cause exists for cancellation. Neither does it mandate that the insurer give notice of what the reasonable cause is. The Corbins do not argue that they did not receive notice of cancellation. They do not argue that reasonable cause did not exist for the termination of the policy. They simply argue that they were not notified of the reason for cancellation and were therefore misled. Notification of reasonable cause for termination is not a statutory requirement. State Farm acted within the statutory requirement in both cancelling the policy for reasonable cause, and in notifying the Corbins that their policy was cancelled without noting the specific cause.

IS ROBIN HOULTON RESPONSIBLE FOR THE CORBINS' LACK OF FIRE INSURANCE?

The Corbins submit a factual issue existed concerning Houlton's statement that he would "take care of everything." *Sanchez v. Martinez*, 99 N.M. 66, 70, 653 P.2d 897, 901 (Ct.App.1982), requires "[a]n agent who agrees to procure or renew an expired policy of insurance * * * to either obtain the insurance, renew or replace the policy, or seasonably notify the principal that he is unable to do so in order that the principal may obtain insurance elsewhere." By procuring another insurance carrier, which was willing to insure the Corbins' drapery manufacturing business, Houlton satisfied his legal duty. The Corbins signed another business insurance contract with Aetna. It is difficult to believe that experienced business people would feel that they were insured against fire by State Farm after receiving notice of cancellation and contracting for a replacement of the cancelled insurance with another company.

Finally, a procedural question that arose in the course of this appeal must be resolved. The Corbins filed a motion to amend their complaint on June 2, 1989. Summary judgment was entered on June 6, 1989. NMSA 1978, Section 39-1-1, provides that after the entry of a judgment, the trial court retains jurisdiction for thirty days. The court granted the motion to amend on July 14, 1989, more than thirty days after the order of summary judgment was entered (on June 6). The trial court no longer had jurisdiction. The exception to the thirty day rule in Section 39-1-1 is that further time is available beyond thirty days if the court must dispose of any motion "*directed against such judgment.*" (Emphasis added.) The motion in this instance was to amend the complaint. It had nothing to do with the summary judgment granted and, therefore, thirty days is the limit to the trial court's jurisdiction after the judgment was entered. The trial court acted outside of its jurisdiction in granting the motion to amend. *See Bralley v. City of Albuquerque,* 102 N.M. 715, 719, 699 P.2d 646, 650 (Ct.App.1985) (failure of trial court to rule within thirty days of the filing of motion to set aside or reconsider order of dismissal, amounted to denial of motion by operation of law). Notice of appeal was filed on June 26, 1989. The taking of appeal divests the district court of jurisdiction of the cause of action and transfers it to the appellate court. *See State ex rel. Bell v. Hansen Lumber Co.,* 86 N.M. 312, 523 P.2d 810 (1974); *see also Thompson v. Harry C. Erb, Inc.,* 240 F.2d 452 (3rd Cir. 1957); *Grand Opera Co. v. Twentieth Century Fox Film Corp.,* 235 F.2d 303 (7th Cir.1956); *cf. Luna v. Homestake Mining Co.,* 100 N.M. 265, 669 P.2d 741 (Ct.App. 1983). This cause is therefore appropriately before this court.

Summary judgment was appropriate. We therefore AFFIRM.

IT IS SO ORDERED.

SOSA, C.J., and WILSON, J., concur.

788 P.2d 348

Dorothy GONZALES, Petitioner-Appellant and Cross-Appellee,

v.

NEW MEXICO EDUCATIONAL RETIREMENT BOARD and Frank Ready, Director, Respondents-Appellees and Cross-Appellants.

No. 18114.

Supreme Court of New Mexico.

Feb. 23, 1990.

Rehearing Denied March 29, 1990.

James A. Burke, Santa Fe, for petitioner-appellant and cross-appellee.

Hal Stratton, Atty. Gen., Andrea R. Buzzard, Asst. Atty. Gen., Santa Fe, for respondents-appellees and cross-appellants.

OPINION

BACA, Justice.

Petitioner Dorothy Gonzales appeals from an order of mandamus which denied retroactive disability benefits to the date of the accident, August 16, 1983. The New Mexico Educational Retirement Board (ERB or the Board) and Frank Ready cross-appeal the declaration that ERB Regulation VI is unconstitutional, the award of disability benefits from January 1985, and the award of reasonable attorney fees pursuant to 42 U.S.C. Section 1988. We reverse in part and affirm in part.

This case does not rise to the level of a constitutional question. It is rather a question of the ERB exceeding its statutory authority and abusing its discretion in denying Ms. Gonzales benefits and in creating regulations outside its stated authority. Ms. Gonzales was apparently totally disabled in an accident, yet was not awarded disability benefits until nearly three years after the accident. Ms. Gonzales must bear some of the responsibility for such a late award as she did not apply until eighteen months after the accident. A constitutional resolution of this problem is unnecessary.

FACTS

Ms. Gonzales, a school bus owner/driver was involved in an accident in August 1983, while driving a school bus for Penasco schools. She was found to be totally disabled by both the Worker's Compensation Board and the Social Security Administration. Although Ms. Gonzales no longer drove the bus after the accident, she continued to maintain her rights in the bus contract along with her husband, and hired an employee to drive the bus.

The nature of the Board of Education school bus contract differs from an employment contract. The contractor is paid a lump sum for such anticipated costs as maintenance, oil, gas, drivers' salary, etc. The contractor may either drive the bus himself/herself and keep all net profits, or hire a driver and keep profits remaining after the driver's salary and expenses are paid. It is uncontroverted that the terms of the contract provide that a contractor may hire another person to drive the bus.

Ms. Gonzales applied for disability benefits from the ERB in March of 1985, eighteen months after the accident. ERB ad-

vised Ms. Gonzales that under its Regulation VI(A) "[a] school bus owner/driver shall not be eligible for disability benefits unless (s)he terminates all school bus operation contracts with the public schools." It therefore refused to process her application until she divested herself of any interest in the contract. Although she claimed disability and did not drive the bus herself, Ms. Gonzales finally resigned her contract in February 1986, and reapplied. Her application was again denied because it was found to be stale. As of July 1986, the ERB found petitioner eligible for benefits. This was one month shy of three years from the time of the accident.

Petitioner then sued ERB alleging that Regulation VI was unconstitutional in that it violated the equal protection, due process, and contract clauses by forcing Ms. Gonzales to divest herself of the contract before receiving benefits, or in the alternative, exceeded the authority granted ERB by statute. Ms. Gonzales also sued under 42 U.S.C. Section 1983 and Section 1988, claiming that her civil rights had been violated by the ERB and that she was therefore entitled to attorney's fees. The district court awarded $4,500 in attorney's fees under 42 U.S.C. Section 1988, and found Regulation VI to be unconstitutional as applied, granting Ms. Gonzales disability benefits from January 1985, when the Board first had constructive notice of the disability.

■ The state claims that because the petitioner failed to exhaust her administrative remedies by appealing the Board's decision to the Board under ERB Rule I, Section C(2), mandamus does not lie. Although this is generally true, when a board has acted outside its jurisdiction, as in this case, mandamus is properly granted. *Sanderson v. New Mexico State Racing Comm'n*, 80 N.M. 200, 453 P.2d 370 (1969).

CONSTITUTIONAL QUESTION NOT REACHED

■ It is unnecessary to reach the constitutional questions when there is a showing of abuse of discretion and overstepping of the statutory authority. The Educational Retirement Act, NMSA 1978, Sections 22–11–1 to –45 (Repl.Pamp.1989) (the Act) is the legislative grant of authority for the ERB. Section 22–11–35 deals with actions of the Board in relation to disability benefits. It provides:

> A. A member *shall* be eligible for disability benefits if [s]he has acquired ten years or more of earned service-credit and the *board certifies the member to be totally disabled* to continue [her] employment and unable to obtain and retain other gainful employment commensurate with [her] background, education and experience.
>
> B. Prior to any certification of disability by the board, the board shall require each applicant for disability benefits to submit [herself] to a medical examination by the medical authority.

NMSA 1978, § 22–11–35 (emphasis added).

The legislature, through this statute, has granted the ERB the authority to award disability benefits if certain requirements are met. If the Board certifies the eligible member to be totally disabled, the Board must award benefits. Once the determination of total disability is made, it is the duty of the Board to certify the member as disabled. There is nothing in this grant of authority which authorizes the Board to refuse to accept an application for disability if the applicant continues to hold a property interest in a bus contract.

The Board has the authority by regulation to set out an application process in order to determine disability. It does not, however, have the statutory power to create unreasonable or irrelevant requirements within the application process, before it considers the application. ERB does not even consider an application if the applicant maintains an interest in a bus contract. This goes beyond the power vested in the ERB to certify an applicant as totally disabled. ERB did not act reasonably in determining when Ms. Gonzales' application was complete so that review of her disability would commence. Compliance with Regulation VI(A) as a condition precedent to even considering the application goes beyond ERB's statutory authority.

The applicant's work activities in administering a bus contract may be relevant to a consideration of total disability but should not be a bar to initial evaluation.

An agency may not create a regulation that exceeds its statutory authority. *Rivas v. Board of Cosmetologists,* 101 N.M. 592, 686 P.2d 934 (1984); *see Family Dental Center of New Mexico v. New Mexico Board of Dentistry,* 97 N.M. 464, 641 P.2d 495 (1982). To claim that an application for disability will not be considered so long as an applicant maintains an interest in a bus contract goes beyond the legislative intent in allowing the ERB the power to determine disability. It would more likely be within the legislative intent to consider the contract and activities required by it as factors measured against the definition of total disability. It may be possible, however, to maintain a property interest and be disabled at the same time. If a party is disabled under the statute, then that party should receive disability benefits and the Board exceeds its authority by not considering the application.

WHEN SHOULD BENEFITS BEGIN?

Petitioner Gonzales also argues that Regulation VI(C) is an unconstitutional "statute of limitations." Regulation VI(C) provides:

> *Effective Date of Benefits*
>
> (1) The effective date of disability benefits *shall* be the first day of the month following the member's termination of employment, or the first day of the month following *receipt of the member's application,* whichever is later. (Emphasis added.)

This regulation *is* within the scope of power vested in the Board by the Act. The legislature, through the Act, gives authority to the Board to grant disability benefits *after an applicant has been certified* disabled. Delaying benefits until the time of application falls within the statutory grant because the Board must have information upon which to base its disability decision. This logically and reasonably falls within the grant of authority vested in the ERB.

The ERB exceeded its authority and abused its discretion in creating Regulation VI(A) by requiring divestment of the contract before the application would be considered. However, requiring an application before awarding benefits is an acceptable use of the Board's power. So the question remaining is when should benefits begin? Regulation VI(C) provides that benefits should begin either one month after termination or one month after an application is received, whichever is later. Notice of disability is what is necessary, and in this instance, the ERB had notice of disability through the filing of an application March 1, 1985. Benefits for Ms. Gonzales should have begun on April 1, 1985, one month after receipt of her application. It would serve no useful purpose to go back and try to reconstruct the period when she was disabled but still maintained an interest in the bus contract.

ATTORNEY'S FEES, PREJUDGMENT INTEREST

This case is not one to enforce 42 U.S.C. Section 1983 (or any other civil rights statute), and therefore no attorney fees are awardable under 42 U.S.C. Section 1988. Although Ms. Gonzales claimed that the ERB's rules violated various federal constitutional requirements, her suit at bottom was one to interpret and apply those rules and to determine their validity in light of the governing *state* statutes. Section 1988 is accordingly not applicable. There is no other statute that pertains to this situation from which attorney's fees might be awarded. Without an authorizing statute, attorney's fees may not be awarded. *Martinez v. Martinez,* 101 N.M. 88, 93, 678 P.2d 1163, 1168 (1984); *Norton v. Board of Education of Hobbs Municipal Schools,* 89 N.M. 470, 472, 553 P.2d 1277, 1279 (1976). Prejudgment interest also is not awardable as against a state agency. NMSA 1978, § 56–8–4 (Repl.1986); *see also Bradbury & Stamm Constr. Co. v. Bureau of Revenue,* 70 N.M. 226, 238, 372 P.2d 808, 816–17 (1962).

In conclusion, the ERB overstepped its statutory authority in denying then delaying benefits based on Regulation VI(A). It did not have the authority to deny a hearing to a claimed disabled party simply be-

cause she maintained an interest in a contract without more. Benefits should therefore be awarded in accordance with Regulation VI(C) one month after receipt of Ms. Gonzales' first application, April 1, 1985. Because appellant no longer maintains the contract, further inquiry in this regard is not necessary. Attorney's fees and prejudgment interest may not be awarded. We reverse in part and affirm in part and remand for entry of judgment in accordance with this opinion.

IT IS SO ORDERED.

MONTGOMERY and WILSON, JJ., concur.

788 P.2d 352

STATE of New Mexico, Plaintiff–Appellee,

v.

Darci Kayleen PIERCE, Defendant–Appellant

No. 17813.

Supreme Court of New Mexico.

Feb. 27, 1990.

Jacquelyn Robins, Chief Public Defender and Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen. and Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Chief Justice.

Defendant-appellant, Darci Pierce, was found guilty but mentally ill of first-degree murder, kidnapping and child abuse. The crimes were committed on July 23, 1987. Appellant was sentenced to life imprisonment for first-degree murder, eighteen years for kidnapping, and eighteen months for child abuse. The sentences were to run concurrently. Our statutes pertaining to a verdict of guilty but mentally ill and sentencing thereon are, respectively, NMSA 1978, Sections 31–9–3 and 31–9–4 (Repl. Pamp.1984).

The record shows that Appellant is and has been for a long period of time a mentally unstable person. Prior to the crimes for which she was convicted, she told various persons, including her husband and doctors, that she was pregnant, when in fact she was not. During the months preceding the crimes, she became increasingly obsessed with the desire to have a baby. She kidnapped the victim, who was a pregnant woman near her date of delivery. Appellant took the victim to a remote spot, strangled her in successive stages in order to keep her alive but unconscious, while Appellant performed a crude cesarean section delivery on the victim. Appellant then took the newborn infant from the victim's body, leaving the victim to bleed to death. Appellant at first claimed the baby as her

own, then, that of a surrogate mother, but eventually confessed to police what she had done and led them to the scene of the murder.

Appellant raises five points of error on appeal: (1) that a prospective juror concealed material facts during interrogation on voir dire and that the court erred in not granting a new trial on this issue following proper defense motion; (2) that the court's instructing the jury on felony murder deprived Appellant of due process and a fair trial in that it lessened the degree of *mens rea* required to be shown by the State on the separate charge of first degree murder; (3) that the court's instruction on a verdict of not guilty by reason of insanity violated due process by improperly shifting the burden of proof on this question to Appellant; (4) that the court erroneously modified a uniform jury instruction pertaining to the definition of "mentally ill" and failed to track the language of Section 31–9–3 when instructing the jury on a verdict of guilty but mentally ill; (5) that the prosecutor's questioning of an expert defense witness on her having testified for the defense in another murder trial denied Appellant due process and a fair trial. We address each of these issues in turn.

I. THE JUROR'S ALLEGED CONCEALMENT OF A MATERIAL FACT AND THE COURT'S DENIAL OF THE DEFENSE MOTION FOR A NEW TRIAL.

The colloquy between the court and the juror on voir dire proceeded as follows:

> *Court:* [H]ave you ever had to be treated by a psychiatrist or psychologist for any reason?
>
> *Juror:* Not that I remember, your Honor. Not that I can remember * * * [A]t one time, I had * * * kind of a dizzy spell, and they thought that I needed a psychiatrist, and finally a doctor got ahold of me and took care of me. So I didn't have to have a psychiatrist.

The day after the verdict was returned, the juror was quoted in a newspaper as saying:

> I was mentally sick—It caused me to go berserk at 12 or 13. I had to go to a hospital for a year. That's why it was so easy to judge her case. I've seen people who were 10 times worse than she was go into mental hospitals and be cured.

Based on this statement, Appellant filed a motion for a new trial. At the hearing on the motion, the juror testified that his father had hit him with a board when he was young, and that this traumatic event caused him to be unable to talk and resulted in his being hospitalized for depression. When asked if the person who helped treat him in the hospital had been a psychiatrist or psychologist, the juror responded, "No, no, no, because they was not dealing with my mind. They was dealing with my speech because I knew what was wrong."

He stated further that it was not medical treatment that healed him, but a "beautiful experience" in which "the Lord Jesus Christ, the living God, healed me. That is the experience that I have received." He denied having told the newspaper reporter that he had once been mentally sick or that he had gone berserk. He further testified that he could see the devil in the Appellant. He continued, "I saw in her right away, I saw in her witchcraft. I saw in her rebellious. I saw in her murder * * * I saw in her all these things because I am a spiritual man." The juror continued to maintain that he had never been treated by a psychiatrist, that he had not falsely answered any question put to him by the court on voir dire, and that he had made his decision on the verdict based on the evidence presented at trial.

At the conclusion of the hearing, the court denied the motion for new trial, stating the following:

> The Court will find that the Defense has failed to establish, to the satisfaction of the Court, that there were any material misrepresentations, misrepresentations or false statements of fact in the Voir Dire Examination. Also, that the Defendant's [sic] have failed to establish to the Court's satisfaction that actual prejudice has been shown by [the juror's] having been seated as a juror. The Court might

> just comment that he may not be the type of juror that most of us would want sitting on our cases, but that also is questionable. It could have been that the Defense might have rather had persons who had undergone psychiatric treatment or had mental illnesses, and they may have been more favorable to the Defendant's situation, as opposed to persons who had not experienced that type of illness themselves or in their families.
>
> Also, the Court might just comment that I can easily understand how there may have been misunderstandings between what [the juror] said to the reporter and how the reporter understood them. It's difficult to follow [the juror] here as to how he testified and what he really meant. And it took a lot of explanation, and I am not sure that any of us still really understand and comprehend just what he is trying to say in all respects. According to [the juror's] testimony, as far as he's concerned, he never was treated by a psychiatrist or psychologist.

The standard for review of this issue is based on two cases, each involved with the same defendant and the same set of facts. *State v. Baca,* 99 N.M. 754, 664 P.2d 360 (1983), and *Baca v. Sullivan* 821 F.2d 1480 (10th Cir.1987). After we affirmed the conviction in *State v. Baca,* the defendant petitioned in *Baca v. Sullivan* for a writ of habeas corpus to the United States District Court for the District of new Mexico. The petition was dismissed, and on appeal to the United States Court of Appeals for the Tenth Circuit, the dismissal was affirmed.

In *State v. Baca,* a juror falsely answered "no" to a jury questionnaire in which he was asked if any member of this family "past or present" had served in a law enforcement agency. In actuality, his brother had served over thirty years on the Albuquerque police force before retiring. The juror also checked "criminal" on the questionnaire when in fact he had previously served on a jury trying a civil suit. Finally, when the panel was asked on voir dire if anyone had a relative or close friend "who might work for a police department," the juror remained silent, presumably because the question was phrased in the present tense and did not require him to answer.

As in the case before us, in *State v. Baca,* when the juror's inaccurate responses came to light, the defendant sought a new trial. In denying the motion for new trial, the trial court found that the juror's false answer to the question about his brother's service on the police force was not relevant to the juror's ability to serve as an impartial juror. In reviewing the record in that case we held there were not "such relevant and material facts present in the case that might bear on possible disqualification of the juror, so that it could be asserted that the defendant's trial was conducted in an atmosphere of bias or partiality." *Id.,* at 756, 664 P.2d at 362. In reviewing the trial court's hearing of the motion for new trial, we held, "Where there is nothing to indicate either manifest error or abuse of discretion by the trial court, in permitting [the juror] to serve as a juror, the trial court's decision will not be disturbed on appeal. The burden of establishing partiality is upon the party making such a claim." *Id.* (citations omitted).

In its review of the case, the United States Court of Appeals for the Tenth Circuit focused both on the irrelevance of the juror's answer to his service as an impartial juror and the failure of the defendant to show actual prejudice. Similar to the appellant's position at oral argument in the case at bar, the defendant in *Baca v. Sullivan* argued before the Court of Appeals that the juror's false answer deprived the defendant of a peremptory challenge. The Court of Appeals rejected that argument, relying on *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 555, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984). In *McDonough,* the Supreme Court held both that a challanged juror must be shown to have answered dishonestly a material question on voir dire, and that had the juror given a correct response, the answer would have been grounds for a challenge for cause. Finally, the Court of Appeals relied on *United States v. Perkins,* 748 F.2d 1519, 1532 (11th Cir.1984), as support for the proposition that " '[a] party who seeks

a new trial because of non-disclosure by a juror during voir dire must show actual bias.'" *Baca v. Sullivan,* 821 F.2d at 1483.

Appellant argues that *Mares v. State,* 83 N.M. 225, 490 P.2d 667 (1971), supports her contention that it makes no difference whether the juror in the case before us *mistakenly* or *willfully* stated he had never seen a psychiatrist or a psychologist. In *Mares* a prospective juror had disclosed on voir dire that he had long been a friend of the complaining witness, but had failed to disclose in addition that he had been in the witness' home on the date of the crime, when police officers were present seeking fingerprints. In *Mares,* we held that unintentional fault on the part of the challenged juror made no difference, so long as the defendant was prejudiced. We reversed the conviction and ordered a new trial. We agree with Appellant that *Mares* is still good law despite *Baca v. State* and *Baca v. Sullivan,* but we disagree with her that *Mares* compels us to reach a different result than that reached in the *Baca* cases.

First, unlike the situation in *Mares,* we find no relationship in the case before us between the juror's erroneous answer and his capacity to sit as an impartial juror. We agree with the trial court that had the juror told the court that he had had prior psychiatric or psychological therapy, it may have been interpreted by Appellant as a helpful response. Whatever remarks the juror may later have made to a newspaper reporter, the trial court was bound to consider only the juror's in-court statements. Had those statements indicated prior psychological treatment, it is not clear that the defense would have regarded him as an unfavorable juror. The defense only later came to regard the juror as unfavorable, and solely because of certain remarks he made to a journalist, a portion of which the juror later denied having made.

Thus, second, we find no actual prejudice to Appellant stemming from the juror's answers on voir dire. It is true that after trial the juror made certain eccentric remarks about his ability to judge Appellant's character. However, the issue at the hearing on motion for new trial was whether the juror had misled the court in giving false answers as to his supposed prior psychiatric or psychological treatment. In conducting the hearing on the motion for new trial the court was limited to that issue and to the issue of the juror's impartiality. At the hearing on the motion, the juror testified that he arrived at his verdict on the basis of the evidence presented at trial, and not on the basis of what he had known about former mental patients he may have seen, or about his ability "to see the devil in the Appellant." When asked by defense counsel if his experience with former mental patients had given him "special insights as to whether [Appellant] was insane," the juror answered, "No, no. Like I said, at that time when I was sitting as a juror, it did not even enter—it didn't enter my mind at all."

Finally, in response to the issue raised by Appellant at oral argument as to her right to have peremptorily challenged the juror, we agree with the court in *Williams v. United States,* 418 F.2d 372, 377 (10th Cir.1969), that "[t]he fact that [the] juror * * * might have been peremptorily challenged by defendant is not alone sufficient to reverse defendant's conviction."

We thus hold: (1) assuming that the juror made the alleged misrepresentations on voir dire, whether intentionally or unintentionally, his statements were not germane to his capacity to sit as an impartial juror; (2) assuming the juror made the alleged misrepresentations, Appellant has not shown how she was actually prejudiced by the juror's sitting on the jury; (3) Appellant was not entitled as a matter of law to have exercised a peremptory challenge to strike the juror from sitting on the jury; and (4) the trial court soundly exercised its discretion in denying the motion for new trial. Appellant, as to this issue, has not shown reversible error.

II. THE COURT'S INSTRUCTION ON FELONY MURDER AND ITS EFFECT ON THE JURY'S CONSIDERATION OF APPELLANT'S INTENT TO COMMIT FIRST-DEGREE MURDER.

The court instructed the jury on first-degree murder, in pertinent part, as follows:

> For you to find the defendant guilty of first degree murder by deliberate killing * * * the state must prove * * * each of the following elements of the crime:
>
> 1. The defendant killed [the victim];
>
> 2. The killing was with the deliberate intention to take away the life of [the victim];
>
> * * * * * *
>
> A deliberate intention refers to the state of mind of the defendant. A deliberate intention may be inferred from all of the facts and circumstances of the killing * * * * To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.

The court likewise instructed the jury on felony murder, in pertinent part, as follows:

> For you to find the Defendant guilty of felony murder, which is first degree murder, as charged in the alternative to Count I, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The Defendant committed the crime of kidnapping;
>
> 2. During the commission of kidnapping, the Defendant caused the death of [the victim];

Appellant contends that the court's instructing the jury in the alternative as to first-degree murder and felony murder made the prosecution's burden lighter in that the prosecution did not have to show *mens rea,* or the necessary state of mind, for first-degree murder, and that this lesser burden deprived Appellant of a fair trial.

First of all, as our court of appeals has correctly held:

> When a death occurs during the commission of an inherently dangerous felony, the prosecution bears no burden of proving intent to kill. Rather, the requisite malice aforethought can be inferred from the commission or attempted commission of the felony * * * * Thus, the determination of whether felony murder has been properly charged does not turn on whether the murder was intentionally or unintentionally committed; felony murder simply contains no *mens rea* requirement.

State v. Price, 104 N.M. 703, 726 P.2d 857 (Ct.App.), *cert. quashed,* 104 N.M. 702, 726 P.2d 856 (1986), citing *State v. Harrison,* 90 N.M. 439, 564 P.2d 1321 (1977); *Head v. State,* 443 N.E.2d 44 (Ind.1982).

The fact that felony murder has no *mens rea* requirement, however, does not lessen the *mens rea* requirement for the separate crime of first-degree murder, as is shown by the detailed instruction given by the court, quoted above, on the intention needed to establish first-degree murder as a separate crime.

Appellant would apparently have us do away with the doctrine of felony murder, an option we faced in *Harrison* but declined to choose. We reiterate our holding in *Harrison:* Where the felony supporting felony murder is inherently dangerous, and where it is independent of the act causing the death of the victim, it may be used to support an alternative count of felony murder against a defendant charged separately with first-degree murder.

The felony relied on here, kidnapping, was obviously an inherently dangerous crime, for the victim was taken against her will at Kirtland Air Force Base with the intent to hold her for service against her will—namely, to extract the victim's unborn child from her womb. The victim was driven to a spot several miles away from Kirtland, to a location where the baby was delivered and the murder was committed. The kidnapping and the murder were separate acts. Taking the victim for service against her will did not kill her. Strangling the victim and allowing her to bleed to death killed her. In this case, the kidnapping and the murder were separate and individual crimes. By the test adopted in *Harrison,* the trial court did not commit error in instructing the jury in the alternative on first-degree murder and felony murder.

III. THE COURT'S INSTRUCTION ON A VERDICT OF NOT GUILTY BY REASON OF INSANITY.

The disputed instruction reads, in pertinent part, as follows:

> There is an issue in this case as to the Defendant's mental condition at the time the acts were committed. You will be given alternative verdict forms for each crime charged as follows:
>
> * * * * * *
>
> Not guilty by reason of insanity.
>
> * * * * * *
>
> You will first consider whether the Defendant committed the crime. If you determine that the Defendant committed the acts charged, but you are not satisfied beyond a reasonable doubt that she was sane at the time, you must find her not guilty by reason of insanity.

Appellant contends that by instructing the jury first to consider whether Appellant committed the "crime" and *then* to determine whether she was sane at the time "the acts charged" were committed, the court deprived her of due process. Appellant reasons that by having the jury determine whether a crime was committed before considering Appellant's sanity turns the burden of proof "on its head." Appellant contends that the jury could not determine whether a crime had been committed until it had first determined whether Appellant was sane or insane. Thus, Appellant concludes, the above instructions deprived her of a fair trial.

We find it hard to understand why the court erred by phrasing the instruction in the way it did when Appellant's own tendered instructions likewise first ask the jury to find whether the defendant is guilty of the crimes of kidnapping and first-degree murder, and then asks the jury to determine if the defendant was "not guilty by reason of insanity." The court's instruction was patterned on SCRA 1986, 14–5101, which states:

> You will first consider whether the defendant committed the crime. If you determine that the defendant committed the act charged, but you are not satisfied beyond a reasonable doubt that [s]he was sane at the time, you must find [her] not guilty by reason of insanity.

There is no disparity between the court's instruction and the uniform instruction. Further, the propriety of the jury's consideration of the crime charged before its consideration of the defendant's sanity has long been settled. *State v. James,* 83 N.M. 263, 267, 490 P.2d 1236, 1240 (Ct.App.1971).

IV. THE COURT'S MODIFICATION OF THE UNIFORM INSTRUCTION AND ITS FAILURE TO TRACK THE WORDS OF NMSA 1978, 31–9–3, AS REQUESTED IN DEFENDANT'S INSTRUCTION NO. 3.

SCRA 1986, 14–5103, the uniform jury instruction at issue, reads:

> The defendant was mentally ill at the time of the commission of the crime if a substantial disorder of thought, mood or behavior impaired [her] judgment at the time of the commission of the offense. If you find beyond a reasonable doubt that the defendant committed the *act* charged you may find [her] guilty but mentally ill at the time of the commission of the offense. (Emphasis added.)

The court's actual instruction reads word for word the same as the above, except that in the actual instruction the word *offense* was substituted for the word *act* in the second sentence. Appellant contends that this change deprived her of a fair trial. Second, Appellant contends that the instruction did not track the language of NMSA 1978, Section 31–9–3(D), and specifically, Appellant's version of that section, which was tendered as Defendant's Requested Instruction No. 3, reading as follows:

> You may find the Defendant guilty but mentally ill if you find beyond a reasonable doubt that the Defendant:
>
> 1) is guilty of the offense charged;
>
> 2) was mentally ill at the time of the commission of the offense;
>
> and
>
> 3) was not legally insane at the time of the commission of the offense.

The portion of the statute in question reads identically to the words used by Appellant, except that the preamble in the statute reads as follows:

> When a defendant has asserted a defense of insanity, the court may find the defendant guilty but mentally ill if after hearing all of the evidence the court finds beyond a reasonable doubt that the defendant: [then follow the three requirements listed by Appellant above in her requested Instruction No. 3].

Appellant contends that the instruction given by the court should have included the words contained in Defendant's Requested Instruction No. 3, or that it should have tracked the statute. In summary then, Appellant contends that by changing the uniform jury instruction (14–5103), and by not giving Defendant's Requested Instruction No. 3 ("tracking the statute," Section 31–9–3), Appellant was deprived of a fair trail.

At the time when the court discussed jury instructions with the parties' attorneys, Appellant's attorney stated on the record as follows: "We did strongly object to the word *act* * * * *". The court then stated, "I changed that to *offense*—committed the *offense* charged, which is what you asked me to do." Appellant cannot be heard now to object to a change in the court's instruction which she herself through her attorney asked the court to make.

As to the issue raised by the statement in Section 31–9–3 to the effect that the court "shall separately instruct the jury that a verdict of guilty but mentally ill may be returned instead of a verdict of guilty or not guilty," the court by giving the uniform instruction (SCRA 1986, 14–5103), and the other instructions discussed above, did precisely what the statute calls for. The statute does not say that the instruction must replicate itself in the instruction so given. We prepared SCRA 1986, 14–5103 *after* the enactment of Section 31–9–3 precisely for the purpose of giving trial courts a uniform instruction to meet the requirements of Section 31–9–3. The court committed no error in giving the uniform instruction and in not tracking the language of Section 31–9–3 as requested by Appellant in her Requested Instruction No. 3.

V. THE PROSECUTOR'S QUESTION TO AN EXPERT DEFENSE WITNESS

The question objected to by Appellant occurred during the following exchange between the prosecutor and the expert witness:

> Q. And you've been called upon often to testify in murder cases on behalf of the Defense, haven't you?
>
> A. Yes.
>
> Q. And, in fact, you've testified or you did testify in the case involving William Wayne Gilbert, didn't you, for the Defense?

At that point Appellant's attorney objected and the objection was sustained. In a bench conference, the court instructed the prosecutor as follows: "You can go in to [sic] whether or not she testifys [sic] for the Defense. It's an attempt to show bias. But you can't cite specific cases unless you're going to use that testimony in that [sic] case for some reason." The witness never answered the question about having testified in the Gilbert case, and Appellant's attorney did not seek to have the court admonish the jury concerning the question. We fail to see how Appellant was prejudiced by the prosecutor's question, which lay unanswered, and even if it had been answered in the affirmative would have been of dubious prejudicial value. The prosecutor's question was hardly fundamental error requiring a new trial.

For the foregoing reasons we affirm the judgment and sentence of the trial court in its entirety.

IT IS SO ORDERED.

RANSOM, J., specially concurs with opinion.

BACA, J., concurs.

MONTGOMERY, J., dissents with opinion in which WILSON, J., joins.

RANSOM, Justice (specially concurring).

I concur that a new trial should be denied and that the judgment and sentence of the trial court should be affirmed. I wish, however, to express my view of a distinction to be made when jury selection is implicated and when it is not implicated in a defendant's claim that a juror has been disqualified by bias or otherwise, or that deliberations have been tainted.

Jury selection implicated. In general, if a defendant makes a prima facie showing that a juror misrepresented a material fact during voir dire, then the defendant is entitled to an evidentiary hearing as to whether the juror did, indeed, expressly or tacitly misrepresent a material fact.[1] If the juror did not do so, then defendant is entitled to no new trial and the inquiry is at an end, unless, alternatively, as I believe to be the case at hand, there also is a claim of disqualification in which voir dire is not implicated.

If the juror did expressly or tacitly misrepresent a material fact, then the defendant is entitled to an evidentiary hearing on whether the misrepresentation was dishonest or simply an inadvertent mistake. If the answer was a dishonest one, then a new trial is required under the sixth amendment to the Constitution.[2] If the answer was not dishonest, the defendant yet is entitled to an evidentiary hearing as to whether a disqualification (related to the misrepresentation) is actually or presumptively present, i.e., its disclosure on voir dire would have required excusal.[3] If so, then a new trial is required. If not, then no new trial is required.

Jury selection not implicated. Evidence Rule 11–606(B), like its federal counterpart, provides that jurors are incompetent to testify about their deliberations, emotions, or the effect of anything on their state of mind while deliberating, except that jurors may testify concerning extraneous prejudicial information or outside influence.[4] This rule does not apply, however, to the above-discussed question of dishonesty or bias connected with misrepresentations on voir dire.[5]

While misrepresentations made on voir dire may indicate sixth amendment constitutional defects in the jury selection process, the express exceptions to Rule 606(B) allow a defendant to raise a fifth amendment due process challenge to alleged taints in the jury deliberation process.[6] If

1. *See Mares v. State,* 83 N.M. 225, 490 P.2d 667 (1971) (right to impartial jury implicated when juror has mistakenly or willfully misrepresented material fact during voir dire); *United States v. Perkins,* 748 F.2d 1519 (11th Cir.1984) (defendant entitled to evidentiary hearing upon making prima facie showing that juror misrepresentation during voir dire deprived defendant of right to impartial jury).

2. *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).

3. *Id.* at 556, 104 S.Ct. at 850 (Justice Blackmun concurring, joined by Justices Stevens and O'Connor); *see generally Smith v. Phillips,* 455 U.S. 209, 222, 102 S.Ct. 940, 948, 71 L.Ed.2d 78 (1982) (O'Connor, Justice, concurring) (no finding of bias necessary when presumed or implied bias exists because, e.g., a juror is employed by the district attorney's office, is a close relative to one of the participants, is a witness, or is involved in some manner in the criminal transaction at issue).

4. *See United States v. Tanner,* 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) (discussing Rule in detail, but concluding that allegations of alcohol and drug use by jurors did not constitute allegation of external influence).

5. *State v. Martinez,* 90 N.M. 595, 566 P.2d 843 (Ct.App.1977); *Brofford v. Marshall,* 751 F.2d 845, 853 (6th Cir.) (en banc), *cert. denied,* 474 U.S. 872, 106 S.Ct. 194, 88 L.Ed.2d 163 (1985); *see generally* 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 606[04], at 606–33 (1989).

6. *State v. Sacoman,* 107 N.M. 588, 590–92, 762 P.2d 250, 252–54 (1988) (extraneous information created a presumption of prejudice that the trial court reasonably found to have been overcome); *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) (right to fair trial required evidentiary hearing and determination of prejudice). Extraneous prejudicial information and outside influence also may implicate the defendant's sixth amendment right to confront evidence. *Parker v. Gladden,* 385 U.S. 363, 364, 87 S.Ct. 468, 470, 17 L.Ed.2d 420 (1966) (prejudicial remarks by bailiff to jurors). The *Parker* Court noted that the bailiff's unauthorized conduct also "involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id.* at 365, 87 S.Ct. at 471 (quoting *Estes v. Texas,* 381 U.S.

the claim is not within the Rule 11–606(B) extraneous information or outside influence exceptions, some courts, ours among them, hold the defendant still is entitled to an evidentiary hearing, at least when the offer of proof constitutes a clear, strong showing that a juror's disqualifying state of mind resulted in a deprivation of the sixth amendment right to an impartial jury.[7] If such a showing is made, then the defendant is entitled to an evidentiary hearing as to whether a disqualification is actually or presumptively present.[8] Arguably, that was the state of things here.

It is only the due process inquiry, under the express exceptions to Rule 606(b), that turns on whether there was prejudice to the defendant. If a defendant makes a preliminary showing of the existence of extraneous prejudicial information or outside influence that implicates a due process violation, the court must conduct a hearing to determine the existence of a taint on the jury deliberation process.[9] The introduction of extraneous prejudicial information or the presence of improper outside influence creates a presumption of prejudice.[10] If, at the hearing, the trial court finds a

532, 542–43, 85 S.Ct. 1628, 1637–38, 14 L.Ed.2d 543 (1965)).

7. *Sacoman,* 107 N.M. at 590–93, 762 P.2d at 252–55. One of the claims of extraneous prejudicial information in *Sacoman* involved a story fabricated by one of the jurors on the final day of deliberations that tended to undermine the defendant's alibi defense. We analyzed this claim first in terms of its prejudicial impact on the verdict. *Id.* at 592, 762 P.2d at 254. We also addressed the defendant's claim that the juror's misconduct in fabricating the story and in perjuring herself when initially asked about the incident by the trial court established a disqualification of the juror for dishonesty and bias. Under the circumstances, we concluded that the juror's misconduct reasonably could be found to have been motivated only by her appraisal of the evidence heard at trial and her desire for peer recognition, and therefore affirmed the trial court's ruling denying the defendant's motion for a new trial. *Id.* at 593, 762 P.2d at 255. *See also Brofford v. Marshall,* 751 F.2d at 853–54 (further inquiry not warranted by unnotorized juror statement that, after trial, she found herself unable to return verdict of other than guilty given extent of pretrial publicity in case, notwithstanding her good faith answer to question on voir dire that she could be impartial); *King v. United States,* 576 F.2d 432, 438 (2d Cir.) (weakly authenticated, vague, and speculative material attributed to juror was not a clear, strong showing that warranted further inquiry), *cert. denied,* 439 U.S. 850, 99 S.Ct. 155, 58 L.Ed.2d 154 (1978); *United States v. Dioguardi,* 492 F.2d 70 (2d Cir.1974) (allegation of juror incompetence), *cited with approval in United States v. Tanner,* 483 U.S. at 125, 107 S.Ct. at 2750.

Some courts have suggested that Rule 606(B) creates an absolute bar to post-verdict testimony of this sort. *See, e.g., United States v. Duzac,* 622 F.2d 911, 913 (3d Cir.), *cert. denied,* 449 U.S. 1012, 101 S.Ct. 570, 66 L.Ed.2d 471 (1980). In *Shilcutt v. Gagnon,* 827 F.2d 1155, 1159 (1987), by contrast, the court limited itself to consideration of whether a racially biased remark prejudicially affected the verdict. 827 F.2d at 1159. *Cf. Wright v. United States,* 559 F.Supp. 1139, 1151–52 (E.D.N.Y.1983) (allegation that juror was racially biased should be considered on case-by-case basis to avoid trampling the sixth amendment guarantee to a fair trial and impartial jury), *aff'd,* 732 F.2d 1048 (2d Cir.1984), *cert. denied,* 469 U.S. 1106, 105 S.Ct. 779, 83 L.Ed.2d 774 (1985).

8. If either a sixth amendment disqualification or a fifth amendment taint is present, it must be determined whether actual or constructive notice of the disqualification or taint was had by the defendant before the verdict was rendered. If not, then a new trial is required. If notice of disqualification or taint was had prior to verdict, then it must be determined whether the defendant preserved error. If he did, then a new trial is required. If error was not preserved, then defendant would be entitled to a new trial only upon a finding of fundamental error. *See State v. Escamilla,* 107 N.M. 510, 760 P.2d 1276 (1988) (even when defendant did not move for mistrial until after verdict, trial court had duty to make record and rule on any fundamental error regarding whether one juror did not understand English and regarding communications about that subject between court and jury outside defendant's presence).

9. *Remmer,* 347 U.S. at 229–30, 74 S.Ct. at 451–52.

10. *Id.* at 229, 74 S.Ct. at 451 (any direct or indirect private communication, contact, or tampering with a juror during trial about the matter pending before the court is deemed presumptively prejudicial if not made pursuant to known rules of the court and the instructions and directions of the court during trial, and with the full knowledge of the parties); *State v. Melton,* 102 N.M. 120, 692 P.2d 45 (Ct.App.1984) (while Rule 606(B) effectively precludes defendant from showing the affect on verdict of improper communication to jury, presumption that improper communication amounts to prejudice satisfies the requirements of due process); *cf. Lacy v. Gabriel,* 567 F.Supp. 467, 469

reasonable possibility of prejudice, a new trial should be granted.[11]

Juror not shown to have answered question dishonestly, nor shown to have been actually or presumptively biased. On her claim that voir dire was implicated, defendant here received an evidentiary hearing as to whether juror Griego expressly or tacitly misrepresented a material fact. I am satisfied there was substantial evidence to support the finding of the trial court that Griego did not misrepresent a material fact. Even were I to conclude otherwise, the evidence did not show that Griego's answers were dishonest, nor does the mere fact of Griego's prior psychological counselling establish actual or presumptive bias such as would have required his excusal. Consequently, no new trial was required based on misrepresentations during voir dire.

However, because of the showing made, Justice Montgomery posits in his dissent that the issue of bias (unrelated to the voir dire) was before the court on juror Griego's testimony concerning his "special insight" into defendant's character. The court made no finding one way or the other on the question of bias. After finding no misrepresentation of material fact, the trial court noted that defendant had failed to establish actual prejudice flowing from Griego's having been seated as a juror. As discussed above, there was here no issue of prejudice to defendant regardless of whether voir dire was implicated. Taint in the deliberation process was not the question, and no Rule 11–606(B) objection was made; I, therefore, agree with the dissent that the pertinent inquiry at this point was one of bias, not prejudice.

If the judge who presided at trial had not since retired from the bench, it would be appropriate for us to remand for the trial court to decide whether such bias was actually or presumptively present. However, since the judge has retired from the bench, I believe it comports better with justice for this Court to review the record to determine whether bias actually or presumptively was present. From my review of the record, I am satisfied that it was not.

The evidence reasonably may be read to indicate, as suggested by Justice Montgomery's description in his dissenting opinion, that Griego's testimony revealed deep-seated attitudes about mental illness, and that these attitudes made him an unsuitable juror. I agree that such a finding would require the grant of a new trial. However, as noted by the Seventh Circuit Court of Appeals in a related context:

> Jurors are expected to bring commonly known facts and their experiences to bear in arriving at their verdict. We cannot expunge from jury deliberations the subjective opinions of the jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system.

Shillcut v. Gagnon, 827 F.2d 1155, 1159 (7th Cir.1985) (quoting *State v. Poh,* 116 Wis.2d 510, 518, 343 N.W.2d 108, 113 (1984)). It follows that jurors may bring to bear somewhat eccentric beliefs in arriving at their conclusions without those beliefs necessarily amounting to bias that would violate the constitutional right to an impartial jury.

Here, I read the evidence to indicate that Griego took with him to the jury box the store of his past experience and certain religious and attitudinal dispositions; that these characteristics did not amount to bias against the defendant or her insanity defense; that these characteristics nevertheless led Griego to make a preliminary judgment on Pierce's defense theory; and that this judgment was confirmed for Griego by the weight of the evidence. Griego stated that he had known mentally ill persons in the past, and the newspaper reporter testified that Griego had expressed some sympathy for the defendant. Moreover, the

(D.Mass.1985) (allegations that juror's unmasking of excluded portion of photographic evidence deprived defendant of the right to confront the evidence against him analyzed in terms of the impact of the evidence on an "average" or "reasonable" juror, rather than in terms of its actual effect on the jurors involved).

11. *State v. Jane Doe,* 101 N.M. 363, 683 P.2d 45 (Ct.App.1983).

reporter testified that Griego's comments showed his familiarity with the evidence presented at trial. Griego explained how he viewed the case thus:

> [T]aking an apple apart, when you see why its wormed—why the apple is wormed, why it is rotting inside. It looks so pretty, and you can take that apart, like we took Darci Pierce apart.

This evidence supports my interpretation that Griego was not biased against the insanity defense, but that, in his judgment, the defense was not proved in this case. I note that no evidence was presented to indicate a belief by Griego that all mentally ill persons were possessed by the devil, or that mentally ill persons always should be held accountable for their actions. For these reasons, I would affirm the decision of the trial court.

MONTGOMERY, Justice (dissenting).

This is a case in which our system for the trial of criminal defendants simply did not work. It is undeniable that one of every citizen's most precious rights, guaranteed by the Bill of Rights in the sixth amendment to the United States Constitution and in article II, section 14, of New Mexico's own Constitution, is the right to trial by an impartial jury in which each and every juror " 'is totally free from any partiality whatsoever.' " *Fuson v. State,* 105 N.M. 632, 633, 735 P.2d 1138, 1139 (1987); *Mares v. State,* 83 N.M. 225, 226, 490 P.2d 667, 668 (1971) (both quoting *State v. McFall,* 67 N.M. 260, 263, 354 P.2d 547, 548–49 (1960)). In this case, although the defendant committed a particularly heinous and atrocious act, she was entitled to be provided with this basic and fundamental right in her trial.

It was particularly important in that trial that none of the jurors have any disqualifying bias on the subject of mental illness. That defendant committed the acts with which she was charged was not in dispute at the trial and is not disputed here. Critically important to her fate is the answer to the question: Under New Mexico law, was the defendant "guilty but mentally ill" or was she "not guilty by reason of insanity" at the time she committed the acts at issue? Having a jury each member of which had an open mind on this subject was of bedrock importance to this defendant and, indeed, to the fairness with which our system of criminal justice operates in New Mexico. Defendant was denied such a jury in this case, and I would therefore reverse and remand for a new trial.

I.

There is no way in which the system can, with unfailing perfection, provide a pristinely pure jury in each and every case. Juries are made up of imperfect human beings, and their use in the trial of a criminal case is administered by imperfect human beings. The best that can be done is to devise measures to discover those potential jurors who may harbour feelings or attitudes inimical to the defendant and then to administer those measures in a manner calculated to weed out such unsuitable jurors. The principal measure our system has devised to date is the technique of *voir doir* examination: questioning of potential jurors by the trial judge and by counsel to elicit responses that may reveal attitudes and predilections that might otherwise go undetected.

Fundamental to the proper operation of this part of the system is the requirement that each potential juror make a truthful and reasonably complete answer to the questions put to him or her on *voir dire.*

> It is the duty of a juror to make full and truthful answers to such questions as are asked, neither falsely stating any fact *nor concealing any material matter.* If a juror falsely represents his interest or situation *or conceals a material fact* relevant to the controversy and such matters, if truthfully answered, might establish prejudice or work a disqualification of the juror, the party misled or deceived thereby, upon discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though the bias or prejudice is not shown to have caused an unjust

> verdict, it being sufficient that a party, through no fault of his own, has been deprived of this constitutional guarantee of a trial of his case before a fair and impartial jury.

Mares, 83 N.M. at 227, 490 P.2d at 669 (quoting *Marvins Credit Inc. v. Steward,* 133 A.2d 473 (Mun.Ct.App., D.C., 1957) (emphasis added; court's emphasis omitted)).

In the case before us, when Mr. Griego was asked whether he had ever been treated by a psychiatrist or psychologist, his answer that he could not remember was perhaps true. But his additional statements—that he had had "kind of a dizzy spell," that "they" thought he needed a psychiatrist; and that he didn't have to have a psychiatrist—were simply inadequate to provide even a clue to the revelation that he had been hospitalized for a year for depression manifested by an inability to talk. It is not necessary to ascribe fault to Mr. Griego or to find that he intentionally misrepresented his prior experience with mental illness to hold that the system in this case simply malfunctioned. Whether intentionally or not, Mr. Griego concealed his previous history with a mental disorder. In addition to his testimony at the post-trial hearing, a newspaper reporter and an investigator from the Public Defender's office testified that he had told them he had "gone berserk" and had had a mental illness. If he had given any inkling of these events in his past in response to the trial court's question, the system might have worked as it is intended to: The court or counsel could have explored the subject more fully and elicited facts on which to base a decision whether to challenge for cause or peremptorily.

" 'Full knowledge of all relevant and material matters that might bear upon possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel to challenge either for cause or peremptorily.' " *Id.* While I might agree with the opinion of the Chief Justice, which agrees with *Williams v. United States,* 418 F.2d 372, 377 (10th Cir.1969), that the fact that defendant might have lost her right to peremptorily challenge Mr. Griego is not *alone* sufficient to reverse her conviction, surely in a case like this, where loss of that right is combined with a showing of actual bias on the part of the juror (to which I shall return below), loss of this important right should be enough to reverse the conviction. As we said in *Fuson,* "prejudice is presumed when the right of peremptory challenge is denied or impaired." 105 N.M. at 634, 735 P.2d at 1140. *See also Swain v. Alabama,* 380 U.S. 202, 219, 85 S.Ct. 824, 835, 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 denial or impairment of the right is reversible error without a showing of prejudice."

II.

More serious even than the plurality's inadequate treatment of what caused the system to go wrong in this case—the juror's incomplete and misleading response to the trial judge's question on *voir dire*—is their confusion of the applicable standard for reversal in a case of alleged juror bias and the resulting disregard of the clear and unmistakable actual bias held by the juror and its effect on the defendant.

Quite simply, the plurality have confused the question of whether there was bias on the part of the juror with the quite different question of whether there was prejudice to the defendant as a result of such bias. The opinion of the Chief Justice states that defendant "has not shown how she was actually prejudiced by the juror's sitting on the jury" and finds "no actual prejudice to [defendant] stemming from the juror's answers on *voir dire.*" In this respect the plurality make the same error committed by the trial court in finding that the defendant had "failed to establish to the court's satisfaction that actual prejudice has been shown by Mr. Griego's having been seated as a juror."

"Actual prejudice" *to the defendant* need not be demonstrated in a case where actual bias *on the part of the juror* has been shown; in such a case prejudice to the defendant is, or should be, *presumed. See Mares; State v. Sacoman,* 107 N.M. 588,

593, 762 P.2d 250, 255 (1988) ("The fundamental right to an impartial jury is violated when one juror is unqualified for the reason that any verdict would thus be less than the unanimous verdict of twelve.") (citation omitted); *State v. Chavez,* 78 N.M. 446, 432 P.2d 411 (1967); *State v. Sims,* 51 N.M. 467, 188 P.2d 177 (1947) (integrity of the jury is destroyed if one of the jurors serves while concealing bias); *State v. Gallegos,* 88 N.M. 487, 542 P.2d 832 (Ct. App.), *cert. denied,* 89 N.M. 6, 546 P.2d 71 (1975) (to allow one unqualified juror to serve would violate state constitutional provisions which secure the right of trial by jury and guarantee an impartial jury); *cf. State v. Coulter,* 98 N.M. 768, 652 P.2d 1219 (Ct.App.1982) (alternate juror's presence in jury room during deliberations creates a presumption of prejudice; since state made no showing to overcome presumption, defendant entitled to new trial). In this case the bias of Mr. Griego, and the ensuing prejudicial impact on the defendant, fairly leap off the pages of the transcript of the post-trial hearing.

First, Mr. Griego revealed deep-seated attitudes on the subject of mental illness, based on his prior experience with it, and a proclivity to arrive at an immediate conclusion about the existence or the non-existence of that condition, and its severity, in the defendant. He was asked when during the course of the trial he arrived at the conclusion that defendant was not insane, to which he replied: "When did I make the conclusion? Since the first day."

Mr. Griego's testimony continued:

Q: And did you tell Mr. Domrzalski [newspaper reporter] that "I have seen people who were ten times worse than she was being in a mental hospital and be cured?"

A: Right.

Q: Did you say that to him?

A: Yes.

* * * * * *

Q: You stated that you have seen people far more crazy than Darci Pierce, far more insane than her, get cured.

A: Yes, I have. Yes, I have. And that has—they have received shock treatments and they were well. They—they have already gotten over it and died, and I have seen them in my lifetime, yes.

* * * * * *

Q: Okay. Again, calling your attention to your conversation with the *Tribune* reporter on the 29th of March, did you tell him that you had—you personally had electric shock therapy?

A: No, I didn't tell him that. I told him—I told him that I had seen people that had electric shock treatments, and they had gotten well. They were worse, ten times, than Darci Pierce.

In addition, the reporter testified:

A: * * * I had asked, "Do you think she could be cured," meaning can Darci Pierce be cured, and he said, "Yes. I have seen people ten times worse than her get into the hospital and be cured." And then he volunteered, said something like, "I was mentally sick" * * *

A: * * * I asked him—this is not on the notes, but I asked him when, how, all that stuff, and he said, "12, or 13 or 14. I had to go into a hospital for a year. That's why it was so easy to judge her case."

* * * * * *

Q: He did state to you, though, that because he was in the hospital, that that is why it was so easy for him to judge her case?

A: Because he had been mentally sick.

In addition to this juror's attitudes on the subject of mental illness, he displayed a willingness to translate those feelings into a premature judgment about defendant's guilt. While it is true that he answered in the affirmative when asked whether he made his decision based on the facts that he heard in evidence in the case, immediately preceding that answer he was asked when he had made up his mind about defendant's guilt or innocence. He answered: "I think I made my mind up about the first—second or first day, because I really looked into the case right there and I said to myself, that person is—I mean, is guilty of murder." Add to these statements the testimony quoted in the Chief Justice's opinion to the effect that he could see the devil in defendant, saw in her "right away" witchcraft, "saw in her murder," and a

clearer case of bias on the part of a juror and resulting prejudicial impact on a defendant can scarcely be imagined.

We have long held that a juror's statement regarding his impartiality is not conclusive. *Mares,* 83 N.M. at 226, 490 P.2d at 668. Since it is not conclusive, an avowal of impartiality is not sufficient to protect the constitutional right to an impartial jury. *Alvarez v. State,* 92 N.M. 44, 46–47, 582 P.2d 816, 818–19 (1978). And, of course, a juror is required to refrain from coming to any decision on the merits of a case until he or she has heard all of the evidence and the case has been submitted. *See* SCRA 1986, 14–101.

For the proposition that a party seeking a new trial because of non-disclosure by a juror during *voir dire* must show actual bias, the opinion of the Chief Justice relies on *Baca v. Sullivan,* 821 F.2d 1480 (10th Cir.1987), which in turn relied on *United States v. Perkins,* 748 F.2d 1519 (11th Cir. 1984). However, *Perkins* also said that "[a]ctual bias may be shown in two ways: 'by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed.' " 748 F.2d at 1532 (quoting *United States v. Nell,* 526 F.2d 1223, 1229 (5th Cir.1976)).

In this case there is no need to presume bias; its existence was manifested unequivocally in the juror's own testimony. That being the case, there was no occasion for defendant to go further and attempt to prove actual prejudice to herself; prejudice is presumed and, moreover, was amply demonstrated by the juror's testimony at the hearing.

The trial court's decision denying defendant's motion for new trial should therefore be reversed and the cause remanded for a new trial, at which, hopefully, the system will function as it is intended to function.

WILSON, J., concurs.

788 P.2d 366

Melisendro F. APODACA, Contestant–Appellant,

v.

Raymond M. CHAVEZ, Contestee–Appellee.

No. 18518.

Supreme Court of New Mexico.

March 7, 1990.

Hinkle, Cox, Eaton, Coffield & Hensley, Paul Kelly, Jr., Frank Bond, Santa Fe, for contestant-appellant.

Potter & Kelly, Earl W. Potter, Kenneth J. Cassutt, Santa Fe, for contestee-appellee.

OPINION

RANSOM, Justice.

Contestant Melisendro F. Apodaca appeals the decision of the trial court that upholds the election of Raymond M. Chavez to the Santa Fe County Board of County Commissioners. The case presents uncontested findings of fact that give meaningful depth to the application of residence requirements under the Constitution and statutes of New Mexico in determining qualifications of a candidate for political office; and the question before us is whether these facts reasonably support the court's decision that Chavez qualified as a candidate for the office of county commissioner. We conclude the court's findings, support its decision and affirm.

For twelve years, without interruption to the present time, contestee Chavez has maintained in Chimayo within Rio Arriba County a home where he resides with his wife and two children. This home is just across the Santa Fe County line. Apodaca testified at trial that, when he and his wife were invited to social gatherings by Chavez and his wife, the gatherings were held at the Chimayo home. Chavez acknowledged on direct examination that he and his wife sometimes entertain at their Chimayo home, that he and his immediate family have celebrated some birthdays and holidays at this home, and that they store many of their personal belongings there. The utilities and telephone for the Chimayo home are in Chavez' name. During this twelve-year period, Chavez has been employed full time in Los Alamos County.

On the other hand, throughout his life Chavez has treated El Portrero, roughly two miles from his Chimayo home and across the county line within Santa Fe County, as his permanent residence. His family has resided there in a placita adjacent to the Santuario de Chimayo [1] for at least 175 years. Chavez spends a substantial portion of his time at El Portrero, working the family farm with his father and brother, helping his parents by paying bills and handling other financial and legal matters, taking meals with his parents, siblings, wife and children, and frequently sleeping in his own room at the house. He also keeps clothing, tools, and other personal belongings at El Portrero. Chavez' father testified that his son sleeps at El Portrero approximately three to four nights per week, and Chavez testified that during the summer months, when there is a great deal of work to be done on the family farm, he spends around seventy percent of his time at El Portrero.[2]

It long has been the understanding of the Chavez family that Chavez, as the youngest son, will inherit the family home and will take responsibility for the welfare of his parents as they grow older. In February 1985, Chavez' parents executed an agreement formalizing their intention to leave to him their home at El Portrero. In July 1988, Chavez' parents deeded to him title to the home. The telephone and utilities remain, however, in the name of Chavez' father.

Chavez obtained the land for his Chimayo home from his godfather. The court found that this was a temporary home, and that it was built in Rio Arriba County because of a lack of space at El Portrero. Chavez and his wife intend to take exclu-

1. The Santuario de Chimayo is a sacred shrine of considerable historical importance. Each year at Easter, thousands of pilgrims travel by foot to the Santuario to worship.

2. We understand this reference to refer to Chavez' time away from work. The time spent traveling to and engaged in work in Los Alamos County appears to be irrelevant to the question of whether Chavez was a resident of Santa Fe County or, as claimed by Apodaca, a resident of Rio Arriba County.

sive possession of the family home at El Portrero upon the death of his parents and use that home as his sole residence. He also intends to divide his Rio Arriba property between his son and daughter.

A member of the Chavez family generally is credited with having built the Santuario as a family chapel in 1816. The trial court found that successive generations of the Chavez family have served as caretakers of the Santuario and that Chavez' parents are now the caretakers of the Santuario. The court also found that Chavez appears to be in line to serve as successor to his parents. Chavez testified that his father sometimes calls him at night for assistance at the chapel, and that during the annual Easter pilgrimage to the Santuario he spends most of his free time there.

Chavez has listed El Portrero as his residence for voter registration purposes, has voted in Santa Fe County for twenty years, and has served on Santa Fe County jury panels. He receives mail at the El Portrero address and uses that address on his driver's license, tax returns, bank accounts and other important documents. The trial court found that Chavez has served on the Santa Fe–Pojoaque Soil and Water Conservation District Board and the Santa Fe City–County Extraterritorial Zoning Commission, has been an elected officer of the Santa Cruz Irrigation District, which services El Portrero, and has served as president of Holy Family Parish in El Portrero. The court also found that Chavez never has served on nor belonged to similar organizations or entities in Rio Arriba County.

The New Mexico Constitution requires county officers to be county residents. The legislature may provide further that county commissioners reside in their respective county commission districts. N.M. Const. art. V, § 13. Pursuant to Section 13, the legislature has declared that, in a county having a population the size of Santa Fe County, each county commissioner shall be a resident of the district from which he is elected and that, if any commissioner permanently removes his residence from or maintains no residence in the district from which he was elected, he shall be deemed to have resigned. NMSA 1978, § 4–38–3(A) (Cum.Supp.1989). The Constitution also provides that, as a condition to holding elective public office, a person must be a legal resident of the State and a qualified elector (voter), who, to be qualified, must reside in the precinct in which he offers to vote for thirty days immediately preceding the election. N.M. Const. art. VII, §§ 1 and 2(A).

Apodaca argues that, since a candidate must be a qualified, registered voter of the precinct where the candidate votes, the criteria for determining the residence of a candidate are contained in the statute setting forth the rules for determining the residence of a voter, i.e., NMSA 1978, Section 1–1–7(A–J) (Repl.Pamp.1985). In pertinent part, that statute provides:

> For the purpose of determining residence for voting, the place of residence is governed by the following rules:
>
> A. the residence of a person is that place in which his habitation is fixed, and to which, whenever he is absent, he has the intention to return;
>
> B. the place where a person's family resides is presumed to be his place of residence, but a person who takes up or continues his abode with the intention of remaining at a place other than where his family resides is a resident where he abides;
>
> C. a change of residence is made only by the act of removal joined with the intention to remain in another place. There can be only one residence;
>
> * * * * * *
>
> F. a person does not lose his residence if he leaves his home and goes to another country, state or place within the state for temporary purposes only and with the intention of returning;
>
> G. a person does not gain a residence in a place to which he comes for temporary purposes only....

Apodaca maintains that, as there can be only one residence (Subsection C), Chavez must be seen as a resident of Rio Arriba County because he has maintained a home there with his wife and children (Subsection B) for twelve years.

Candidate not precluded from maintaining two homes. Acknowledging that a person can register only one residence for voting purposes, Chavez nonetheless argues that a voter or a candidate is not prohibited from maintaining more than one home. Section 1–1–7.1, governing residence for purposes of candidacy, provides:

> For the purpose of determining the residence of a person desiring to be a candidate for the nomination or election to an office under the provisions of the Election Code ..., permanent residence shall be resolved in favor of that place shown on the person's affidavit of registration as his permanent residence, provided the person resides on the premises.

Chavez argues that Sections 1–1–7(C) and 7.1 merely codify this Court's pronouncement in *State ex rel. Magee v. Williams,* 57 N.M. 588, 261 P.2d 131 (1953), and do not preclude the possibility of multiple residences. We agree.[3] In *Williams,* this Court said:

> To interpret the sense in which such a term "reside" is used, we should look to the object or purpose of the statute in which the term is employed. *A man can have only one place of residence for voting purposes* and certain other purposes, but there is no reason, why, within the meaning of the above sections of the constitution, he may not have more than one place to reside in. A man may have a city home, ranch home, summer home, as respondent in the case at bar had, and also a place of permanent abode....
>
> In case of doubt as to a voter's residence, *it is resolved in favor of the permanency of residence in the precinct where he casts his ballot.*

Id. at 592–593, 261 P.2d at 133 (emphasis added). In *Williams,* the candidate maintained multiple homes from the time he arrived in Truth or Consequences, sometimes spent long periods exclusively at his ranch home, and had lived in several different places within the city limits. At the time of the election contest, the candidate still did not reside exclusively at his city home. Dr. Williams maintained his medical practice in Truth or Consequences, however, voted in Truth or Consequences, and intended to remodel his current city home and reside there permanently.

Some cases cited by Apodaca concern situations in which a person occupied two or more residences consecutively, but did not currently maintain a physical presence at more than one residence.[4] *See, e.g.,*

3. Apodaca correctly notes that some sections of Section 1–1–7 go beyond the holding of *Williams* and contain independent legal principles. *See, e.g.,* § 1–1–7(B). We do not agree, however, with Apodaca's argument that Section 1–1–7.1 conflicts with our holding in *Williams.* Apodaca argues that such conflict must be inferred from the replacement by the 1985 legislature of the phrase "in the precinct where the person is registered *and eligible to cast a ballot*" with the phrase "provided the person resides on the premises." *See* 1985 N.M. Laws, Ch. 207, § 1 (emphasis added). We note that, in order to be eligible to cast a ballot, a person must be a resident. Therefore, the question prior to 1985, like the question today, was whether a person resides in the place where that person is registered to vote.

4. Apodaca cites two out-of-state cases involving a candidate who maintained a presence at two residences and sought to base his candidacy on one of the two. *See Mix v. Blanchard,* 318 So.2d 125 (La.App.), *writ refused,* 320 So.2d 547 (1975); *In re Carabello,* 102 Pa.Commw. 129, 516 A.2d 784 (1984). The candidate was unsuccessful in each of these cases in attempting to establish that he resided at his ancestral home and not at the home of his nuclear family. However, neither of these cases convinces us that the trial court erred below, given the facts and the applicable law.

Candidate Carabello claimed to reside at the house of his mother and aunt. He visited this house frequently and sometimes slept there. In addition, he claimed to reside there because, since the recent death of his father, he had become the "padrome" of the extended family. Although the *Carabello* court stated in dictum that it did not believe this evidence established that Carabello was "domiciled" at his ancestral home, the court's holding turned on a statute that *conclusively established* the residence of a married person to be the abode of his or her spouse and children. 102 Pa.Commw. at 132, 516 A.2d at 786. As acknowledged by Apodaca, Section 1–1–7(B) creates only a rebuttable presumption that the person resides with his or her family.

In *Blanchard,* as in the present case, the candidate slept three to four nights a week at the home where he grew up, and where he still maintained two furnished rooms with a private entrance. In 1960, Blanchard moved from New Orleans (where his ancestral home was located)

Kiehne v. Atwood, 93 N.M. 657, 604 P.2d 123 (1979); *Klutts v. Jones,* 21 N.M. 720, 158 P. 490 (1916). Such cases are not controlling when a candidate (or a voter) maintains without interruption a long-term, significant physical presence at multiple residences.

In deciding whether a candidate for political office qualifies under applicable residence requirements, the pivotal question remains, as it was under *Williams:* Does the candidate actually "reside" at the place where the candidate registers to vote? In this sense, when we stated in *Williams* that a person may *have* only one place of residence for voting purposes, 57 N.M. at 592, 261 P.2d at 133, we might have stated more accurately that a person may *register* only one place of residence for voting purposes. The contestant has the burden of showing that the residence relied upon by the candidate as his qualifying residence is a sham, e.g., "nothing less than a deliberate attempt to evade the fundamental eligibility requirements expressly provided by our constitution and statutes." *See Thompson v. Robinson,* 101 N.M. 703, 705, 688 P.2d 21, 23–24 (1984) (by deceiving voters regarding his actual place of residence the candidate committed a fraud).

We assume, but do not decide, that the criteria set forth in Section 1–1–7 apply to determine this question. As discussed below, we believe substantial evidence was presented to establish El Portrero as Chavez' residence under both the voting and candidacy statutes.

Intent and physical presence established El Portrero as a qualifying residence. The dual requirement of intention (as evidenced, e.g., by registration) and physical presence is the long-standing test for determining a candidate's qualifying residence. "There must be the fact of abode and the intention of remaining." *Williams,* 57 N.M. at 593, 261 P.2d at 134; *see also O'Hern v. Bowling,* 109 Ariz. 90, 505 P.2d 550 (1973). Intent may be proved by declarations or by actions manifesting intent. *See Id.* at 92, 505 P.2d at 552.

The issue in the present case, like the issue in *Williams,* arises when a person maintains without interruption a significant physical presence at two or more homes over a long period of time. In such a case the facts, circumstances, and conduct that form the indicia of residence may not point unequivocally to one abode or another, and the determination of residence may turn largely on intent and the objective manifestations of intent found in the individual's actions. *See In re Estate of Elson,* 120 Ill.App.3d 649, 76 Ill.Dec. 237, 458 N.E.2d 637 (1983) (issue of residence is treated as a question of fact, rather than law, because determination of residence often turns on the intent of the party).

The facts reveal a continuous and substantial commitment by Chavez to maintenance of the family home and farm. Chavez' frequent overnight stays, private room, help with work, taking of meals with members of his extended family, use of the El Portrero address for all important documents, and his community associations and record of community service in Santa Fe County, all are consistent with the court's findings that Chavez has maintained a continuous and significant physical

to Chicago, where he lived for six years. However, he claimed to have reestablished his domicile at his old address when he returned to New Orleans in 1966. In 1969, Blanchard moved to another address with his wife and children. Blanchard listed this home, which was outside the district, with the Custodian of National Archives for Orleans Parish as his home address, and used that address for tax purposes and on car registrations. As in the present case, the utilities and telephone were in Blanchard's name at the house where his wife and children resided. The *Blanchard* court concluded that Blanchard was established principally at this residence, not at his ancestral home as claimed.

We note the Louisiana court's reasoning, that the candidate in fact maintained only one true residence, may be seen as somewhat at odds with the tenor of this court's opinion in *Williams.* However, we are not free (nor are we inclined) to readdress the principles established in *Williams* and since adopted by the legislature in the Election Code. We believe, moreover, the facts here provide stronger support to the trial court's judgment than they did in *Blanchard.* We also note that the majority opinion in *Blanchard,* overturning the trial court's decision in the candidate's favor, drew four dissenting opinions.

presence at the family home and has a present intent to make that home his permanent residence. The extent of his family's historical roots in the community and the evidence that Chavez intends to carry on family traditions also are consistent with the existence of an intent to be a resident of El Portrero, as are the longstanding understanding of the Chavez family that Chavez will inherit his parent's house and Chavez' present ownership interest in that house.

Trial court reasonably determined that Chavez resided in Santa Fe County, rebutting any presumption from its finding that Chavez had maintained a home in Rio Arriba County for himself, his wife, and his children for twelve years. Apodaca contends that Chavez failed as a matter of law to rebut the presumption contained in Section 1–1–7(B) that he resided at the abode of his wife and children.[5] In considering this argument, we view the evidence in the aspect most favorable to and indulge all reasonable inferences in support of the judgment, and we resolve conflicts in the evidence in favor of the successful party. *Williams,* 57 N.M. at 591, 261 P.2d at 133.

The fact that Chavez built and maintains a separate home for himself, his wife, and children in Chimayo, whether or not it creates a presumption of residence in Rio Arriba County under Section 1–1–7(B), may be viewed as facially inconsistent with an intent to be a resident of El Portrero. The fact that Chavez has occupied these premises with his nuclear family for twelve years increases the apparent discrepancy between his words and deeds.

However, evidence was presented at trial suggesting that (1) the Rio Arriba home was built for temporary purposes and was not located on Chavez property within Santa Fe County because of a lack of building space; (2) the understanding between Chavez, his parents, and his siblings regarding the inheritance of family property is in keeping with cultural practices in Hispanic communities of Northern New Mexico and Southern Colorado; and (3) individuals in Chavez' position in these communities often take up a new home at marriage, expecting to return to the home of their parents upon the death of the parents. A cultural anthropologist testified that in "Northern New Mexico [Hispanic] communities ... people may live in different houses, but the home is where your parents are, where the succession of title of land and so forth has come down." This evidence reasonably may be seen as corroborating Chavez' declared intent. It suggests that, from Chavez' perspective, maintenance of a home in Chimayo for his nuclear family actually is consistent with an intent to continue residing at the family placita in El Portrero.

Candidate not required to reestablish residence when physical presence there has been uninterrupted and candidate possesses necessary intent. Apodaca argues that Chavez' declared intent to use the El Portrero home as his exclusive residence at some future time does not form a sufficient basis from which to conclude that he has removed his residence from Chimayo to El Portrero. *See* §§ 1–1–7(C) and (G). This argument ignores the evidence of Chavez' continued physical presence at the family home in El Portrero throughout his sojourn in Chimayo and independent corroborating evidence consistent with an intent to reside at the El Portrero home. In short, since substantial evidence supports the inference that El Portrero *always has been* Chavez' residence, it was not necessary for Chavez to prove that he had removed himself from his home in

5. At oral argument, Chavez pointed out that the statutory presumption in Section 1–1–7(B) differs from the statute in *Carabello* in one other respect. Our statute provides that a person's residence is presumed to be "[t]he place where a person's family resides." The Pennsylvania statute established that "the place where the family *of a married man or woman resides*" was the voter's residence. 102 Pa.Commw. at 132, 516 A.2d at 786 (emphasis added). Because Section 1–1–7(B) does not contain reference to marital status, Chavez argues, our statute may be read to refer either to a person's nuclear family or to a person's extended family. We do not reach the question of whether the word "family" in Section 1–1–7(B) refers to the nuclear or extended family, as we conclude that, assuming Chavez bore the burden to show that El Portrero was his permanent residence, he met this burden.

Chimayo in order to establish that he resided in El Portrero.

Participation in community affairs was evidence supporting the determination that Chavez resided in Santa Fe County. Apodaca also argues that Chavez' continued registration as a voter of Santa Fe County over the last twenty years and his past service with governmental entities of Santa Fe County constitute a "flagrant violation" of the election laws. As such, Apodaca reasons, these acts cannot be viewed as evidence supporting Chavez' claim to be a resident of Santa Fe County. We disagree with Apodaca's premises and conclusion.

It is well established that "[t]he words 'residence' and 'resident' have no fixed meaning applicable to all cases, but are used in different and various senses, depending upon the subject matter." *Gallup Am. Coal Co. v. Lira,* 39 N.M. 496, 497, 50 P.2d 430, 431 (1935); *see also Williams,* 57 N.M. at 592, 261 P.2d at 133. The purpose of a residency requirement for candidacy is to insure that the candidate "has knowledge of the problems and the needs of the district...." *State ex rel. Rudolph v. Lujan,* 85 N.M. 378, 379, 512 P.2d 951, 952 (1973).

It follows that the domain of facts material to the determination of a candidate's residence includes facts tending to show the candidate's exposure to the problems and needs of the community he or she seeks to serve. In this sense, a person's "presence" in the community and intent to reside there may be indicated in part by the record of that person's participation in the political life and affairs of the community. Chavez' previous participation in politics and his continued registration as a voter in Santa Fe County reasonably suggest that Chavez remains involved with and is affected by events in Santa Fe County. While such participation, standing alone, would be insufficient to establish a residence, in the context of this case, Chavez' participation in the affairs of his community provides corroboration of his residence in Santa Fe County.

We conclude the trial court's determination that Chavez is a resident of Santa Fe County for candidacy purposes was supported by substantial evidence and comports with the meaning and purpose of the residence requirements of the Election Code and the Constitution.

Trial court did not err in admitting expert testimony. Finally, Apodaca protests the award of witness fees for a land title researcher and a cultural anthropologist on the grounds that their testimony was irrelevant to the question of Chavez' residence in Santa Fe County. *See* SCRA 1986, 11–401. The title researcher presented testimony on the historical roots of the Chavez family and El Portrero, which, as discussed above, corroborated the existence of an intent by Chavez to reside there. Likewise, the testimony of the anthropologist corroborated the existence of Chavez' declared intent by showing that his actions were consistent with relatively common cultural practices and understandings. We conclude the trial court did not abuse its discretion in admitting this testimony.

For the foregoing reasons, the judgment of the trial court is affirmed.

IT IS SO ORDERED.

SOSA, C.J., and WILSON, J., concur.

788 P.2d 372

In the Matter of Richard E. NORTON, Esq. An Attorney Admitted to Practice Before the Courts of the State of New Mexico.

No. 18972.

Supreme Court of New Mexico.

March 15, 1990.

Virginia L. Ferrara, Chief Disciplinary Counsel, Albuquerque, for Board.

Richard E. Norton, Corrales, pro se.

OPINION

PER CURIAM.

This matter is before the court following disciplinary proceedings conducted pursuant to the Rules Governing Discipline, SCRA 1986, 17–101 through 17–316 (Repl. Pamp.1988 & Supp.1989), wherein attorney Richard E. Norton, in accordance with an agreement for discipline by consent, admitted to various violations of the Rules of Professional Conduct, SCRA 1986, 16–101 through 16–805 (Repl.Pamp.1988). Pursuant to Rule 17–211(B)(1)(a), we approve and adopt the Disciplinary Board's acceptance of the Conditional Agreement for Discipline by Consent filed in this matter.

The Specification of Charges filed in these proceedings contained separate counts in connection with two unrelated matters. As to Count II of the charges, involving Norton's representation as a court-appointed attorney for the Receivership of Guaranteed Equities, Inc., Norton admitted violations of Rules 16–102(A), 16–109(A), and 16–304(C), and consented to the Disciplinary Board's issuance of a formal reprimand concerning those violations. Accordingly, the factual basis for such violations will be set out in the formal reprimand rather than in the present opinion.

Count I of the charges involved Norton's purchase and subsequent sale of real estate in a personal business matter wherein the misconduct did not involve a client. Norton admitted violations of Rules 16–804(C), (D) and (H), and consented to his suspension from the practice of law for a definite period of one year on condition that such suspension be deferred pursuant to Rule 17–206(B)(1) under certain terms and conditions.

The facts which Norton admitted and which are the basis for the Conditional Agreement began with his purchase of four acres of land in March of 1985 from Otis and Ruth Morrow pursuant to a real estate contract. As a condition to obtaining a release of the first acre, the contract required a payment sufficient to pay off underlying real estate contracts and thereafter, for each additional one-acre release, a cash payment to the Morrows of $25,000.

During December of 1985, Norton transferred his interest in the Morrow/Norton contract sufficient to pay off the underlying contracts on this property. Norton then sold one acre to Cheri Eicher during January of 1986 under a real estate contract which was escrowed at Plaza National Bank.

During December of 1987, Eicher refinanced the acre by paying off the Norton/Eicher contract and placing a new mortgage on the property. In order to expedite the Eicher transaction, the Morrows executed and delivered partial releases for each of the remaining acres under the Morrow/Norton contract to Southwest Escrow. One of the partial releases was for the Eicher tract, and Southwest Escrow

delivered this to Rio Rancho Title with instructions to apply $26,397.23 of the proceeds to the Morrow/Norton contract in consideration for the release. The Morrows were to receive $25,000 of that amount. Norton was aware of this fact.

The Eicher transaction was closed at Rio Rancho Title, and the funds were delivered to Plaza National Bank (escrow agent for the Norton/Eicher contract) for the purpose of paying off the contract and obtaining the escrowed warranty deed from Norton to Eicher. The funds, however, instead were given directly to Norton by Plaza National Bank personnel, and he placed the money in his children's trust. Norton acknowledged the mistake to counsel for Eicher and the president of Rio Rancho Title, who both demanded that he withdraw the money from his children's trust and properly channel it to the Morrows. Norton refused to rectify the error.

Pursuant to Rule 17–304(B)(1), the Disciplinary Board referred the matter to the prosecutorial authorities in the criminal justice system. During September of 1989, just prior to commencement of grand jury proceedings, Norton agreed to make full and complete restitution to the Morrows in exchange for the agreement of the District Attorney's Office in Sandoval County, not to pursue criminal prosecution. Norton made full restitution in October 1989.

Norton has contended that his refusal to channel the money to the Morrows resulted from a long-term unsatisfactory relationship between himself and Plaza National Bank. He also has insisted that he would not have taken advantage of the error that resulted in his receipt of the Morrow's money if he did not know that the Morrows' property was secured. He further stated that in retrospect he realized he improperly had dragged the Morrows and Cheri Eicher into the dispute between himself and the bank.

By keeping money that erroneously was given to him and then refusing to respond to demands that he properly channel the funds, Norton's conduct creates doubt as to his fitness to practice law. The fact that actions and omissions at issue occurred outside the scope of Norton's professional capacity as a lawyer is immaterial. Rule 17–205 directs any attorney who is licensed by this Court "to conduct himself at all times, both professionally and personally, in conformity with standards imposed upon members of the bar." Acts or omissions which violate the Rules of Professional Conduct provide grounds for discipline "whether or not the act occurred in the course of an attorney client relationship." *See In re Nails,* 105 N.M. 89, 728 P.2d 840 (1986) (paying bill with insufficient funds check and thereafter failing to make efforts to pay bill).

We agree that Norton's conduct is violative of Rules 16–804(C), (D), and (H). We note Norton's lack of any disciplinary record during his fifteen (15) years of practice as worthy of consideration and trust that the misconduct addressed herein will not be repeated in his capacities as both a lawyer and a person who should be trustworthy in all his affairs.

NOW THEREFORE, IT IS ORDERED that with regard to Count I, Richard E. Norton be suspended from the practice of law for a definite period of one year but that such suspension be deferred pursuant to SCRA 1986, 17–206(B)(1), under the following terms and conditions:

a) That he be placed on probation for a period of one year under the supervision of Thomas L. Popejoy, Esq.;

b) That he not violate any of the Rules of Professional Conduct during this probationary period;

c) That he give his full cooperation and assistance to the disciplinary authorities pursuant to SCRA 1986, 16–803(D), during this probationary period;

d) That he take and pass the Multistate Professional Responsibility Examination during this probationary period;

e) That he pay the Morrows additional interest of $2,625.00 by June 15, 1990 for the time the $25,000 was delivered to him until the time it was repaid; and

f) That he pay the legal fees of $250 by June 15, 1990 incurred by Ms. Eicher as a

result of his failure to refund promptly the $25,000 owed to the Morrows.

IT IS FURTHER ORDERED with regard to Count II of the charges and pursuant to SCRA 1986, 17-206(A)(5), that the Disciplinary Board issue a formal reprimand to Richard E. Norton which shall be published in the *Bar Bulletin.*

Costs in the amount of $29.40 hereby are assessed against Norton and should be paid to the Disciplinary Board no later than May 15, 1990.

IT IS SO ORDERED.

788 P.2d 375

STATE of New Mexico, Plaintiff-Appellee,

v.

David K. WATLEY, Defendant-Appellant.

No. 10539.

Court of Appeals of New Mexico.

Dec. 28, 1989.

Certiorari Denied March 7, 1990.

Hal Stratton, Atty. Gen., Margaret B. Alcock, Asst. Atty. Gen. Santa Fe, for plaintiff-appellee.

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

OPINION

MINZNER, Judge.

The convictions in this case arose out of a series of incidents in Albuquerque's Northeast Heights area during January through September 1986. Convicted of various counts of aggravated burglary, kidnapping, and criminal sexual penetration with a deadly weapon in connection with five separate victims, defendant appeals, raising twelve issues. He contends the trial court erred in (1) precluding certain alibi testimony as a sanction for late disclosure; (2) admitting serological evidence that the police department allowed to deteriorate; (3) failing to instruct the jury regarding the state's failure to preserve the serological evidence; (4) running his parole periods consecutive to one another; and (5) failing to suppress evidence and testimony obtained as a result of the stop and search of his vehicle. He also contends (6) there was prosecutorial misconduct in referring to hair comparisons as "identical" and error in admission of hair comparison evidence and that the trial court erred in (7) denying his motion for severance; (8) admitting certain identification testimony; (9) admitting certain testimony from a court services employee; and (10) failing to excuse two jurors for cause. Finally, he contends (11) that there was not sufficient evidence to support his convictions; and (12) that this court should reverse on the basis of cumulative error. 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).

Since the application of law to the facts concerning many issues is clear, only part of this opinion warrants publication. The remainder of the opinion, which is incorporated by reference, will be a memorandum opinion and may not be cited as precedent. We discuss issues (1) through (6) in the portion of the opinion that will be published. We discuss issues (7) through (12) in the portion of the opinion that is not to be published. For the reasons set out below, we affirm defendant's convictions but reverse the judgment and sentence and remand for entry of an amended judgment and sentence.

(1) Preclusion of Alibi Testimony

The prosecutor and defense counsel interviewed Dennis Baca on the evening of the tenth day of trial. During the interview Baca stated that he had attended a March 15, 1989 party in Albuquerque and that defendant was also present at the same party. Baca stated that he had only recently recollected this information. On the morning of the eleventh day of trial, the state moved to exclude Baca's alibi testimony. Defense counsel argued that the testimony should be allowed because both the state and defendant found out about the testimony at the same time. Defense council stated defendant would not object if the court granted a recess in order

to allow the state sufficient time to respond to this testimony. The prosecutor objected to permitting defendant to call Baca as an alibi witness on the grounds that Baca had been on defendant's witness list for about one month and that he was not listed on an alibi notice, including the updated version; therefore, his testimony should be prohibited. The prosecutor also informed the trial court that the state would be required to re-interview all of the witnesses who were at the party, approximately ten to fifteen people, because Baca's testimony made them all potential alibi witnesses, and it would also seek to recall the victim as a rebuttal witness. The prosecutor indicated that it could take a substantial amount of time for the state to prepare to respond to Baca's testimony if the trial court allowed the alibi testimony.

The trial court ruled that Baca would not be allowed to offer alibi testimony, noting that the rules requiring notice of alibi were designed to exclude this sort of "eleventh hour problem." Defense counsel made an offer of proof outside the presence of the jury during which Baca testified that in the early morning of March 15, 1986 he was at a party at which defendant was present. Baca further testified that he left the party shortly before sunrise and defendant was still present at the party.

It is clear that a trial court does have discretion to preclude defense testimony as a sanction for failure to comply with a demand for notice of alibi. SCRA 1986, 5–508(C). In deciding whether to admit alibi evidence when a proper notice has not been served by the defendant, the trial court "should balance the potential for prejudice to the prosecution against the impact on the defense and whether the evidence might have been material to the outcome of the trial." *McCarty v. State,* 107 N.M. 651, 653, 763 P.2d 360, 362 (1988). In considering the potential for prejudice to the prosecution, the trial court must take into account not only the prejudicial effect of noncompliance on the immediate case, but also the necessity to enforce the rule to preserve the integrity of the trial process. The trial judge should consider whether noncompliance was a willful attempt to prevent the state from investigating necessary facts. Ultimately the court must weigh the resulting prejudice to the state against the materiality of the precluded testimony. *Compare Taylor v. Illinois,* 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (holding that the compulsory process clause of the sixth amendment does not create an absolute bar to the preclusion of a defense witness's testimony as a sanction for violating a discovery rule requiring disclosure of witnesses) and *McCarty v. State* (applying *Taylor* to preclusion under the notice-of-alibi discovery rule).

Defendant relies on *McCarty* to support his contention that the trial court abused its discretion in excluding Baca's alibi testimony, but *McCarty* is distinguishable. In *McCarty* the prosecutor admitted that the state was not prejudiced by the late disclosure because the prosecutor had spoken to each of defendant's two witnesses about particular times that defendant was with them. After discussing the issue of prejudice, the prosecutor in *McCarty* even offered to withdraw her objection to the admission of the alibi testimony. In holding that it was error to exclude such testimony, the supreme court noted that the state was cognizant of the particular times defendant's witnesses would testify that McCarty was present with them. The court found that "under the facts and circumstances of this case it would be unreasonable to weigh the balance against the defendant." *Id.* at 655, 763 P.2d at 364.

In the case at hand, the state was not aware that Baca would give alibi testimony and indicated to the trial court that it would be prejudiced in that it would have to re-interview ten to fifteen witnesses in order to adequately respond to Baca's alibi testimony. A continuance would have been necessary to complete these interviews. The issue arose two days after the state had rested its case. Under these circumstances, the trial court was entitled to conclude that granting the request would prejudice the state.

In addition, the alibi testimony excluded was of questionable probative value.

Baca's testimony was that defendant was at a party shortly before sunrise on the morning of March 15. The victim testified that the perpetrator woke her in her apartment at 4:29 a.m. that day, and that he remained in her apartment for about an hour. Defendant's proffered testimony did not exclude the possibility that defendant may have temporarily left the party and returned just before sunrise.

The notice of alibi rule is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. *State v. Smith,* 88 N.M. 541, 543 P.2d 834 (Ct.App.1975). Under the facts of this case, the purpose of the rule would have been frustrated if the trial court had allowed the alibi testimony at the late point in time at which defendant sought to offer it. Based on the above, we cannot say the trial court abused its discretion in excluding Baca's alibi testimony.

(2) & (3) Serological Evidence

Defendant objects to the admission of serological evidence showing that defendant's blood type and the genetic marker phosphoglucomutase (PGM) were consistent with the blood type and PGM found in vaginal swabs and semen stains on clothing and bedding collected from several of the victims. He contends that the procedures used by the Albuquerque Police Department allow deterioration to occur in serological evidence prior to testing, and the use of more stringent procedures to preserve serological evidence might have resulted in test data inconsistent with defendant's PGM, thereby eliminating him as a suspect. He further contends that the failure to use the most up-to-date procedures to preserve serological evidence denied him due process and a fair trial.

The United States Supreme Court recently addressed a similar issue in a case where the failure of police department officials to refrigerate semen-stained clothing of a rape victim resulted in the later inability to perform serological tests on the stains because the semen had deteriorated into too small a quantity to make a valid comparison with defendant's blood type. *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). The Supreme Court recognized in *Youngblood* that it was held that the good or bad faith of the state is irrelevant when the state fails to disclose to defendant material exculpatory evidence. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). New Mexico has followed the approach set out in *Brady* for determining whether deprivation of evidence is reversible error. *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. Lovato,* 94 N.M. 780, 617 P.2d 169 (Ct.App.1980). The Supreme Court now has held, however, that a different result may apply where the evidence before the court indicates only that the state failed to preserve potentially useful evidentiary material, which could have been subjected to testing, where there is a possibility that the test results would have exonerated the defendant. *Arizona v. Youngblood.* In such a situation, unless defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Id.* In the present case, defendant does not contend there was bad faith on the part of the police in storing the evidence in question. We hold the trial court did not err in admitting the serological evidence. *Id.; See also Colon v. Kuhlmann,* 865 F.2d 29 (2d Cir.1988).

Defendant then argues that the trial court erred in rejecting his tendered instructions, modeled after an instruction given in *Youngblood,* instructing the jury that if it found the state had destroyed or lost evidence, they might infer that the true fact existed against the state's interest. The majority in *Youngblood* did not rely on the giving of this type of instruction as a basis for its holding; however, Justice Stevens, concurring in the judgment of the Court, noted that the fact of the instruction tended to support a conclusion that the trial had not been fundamentally unfair. In this case, the trial court

was not required to give such an instruction under the reasoning set out by the majority in *Youngblood,* nor are we persuaded that the absence of the instruction rendered defendant's trial fundamentally unfair.

The instructions requested by defendant single out one item of evidence and comment on how the jury is to consider it. Our supreme court in adopting our Uniform Jury Instructions has indicated that in the absence of good cause, no instructions (beyond those otherwise provided) are to be given concerning the weight or effect to be accorded certain types of evidence. The Commentary to UJI Crim. 14–5011 indicates that such an instruction is not to be given to the jury. *See* SCRA 1986, 14–5011 (jury not to speculate on whether the testimony or evidence not produced would be favorable or unfavorable to party who failed to present evidence of testimony). The philosophy behind the uniform jury instructions is to avoid singling out a particular item of evidence for special treatment and to allow counsel and not the court to make argument to the jury. *See State v. Torres,* 99 N.M. 345, 657 P.2d 1194 (Ct.App.1983). Therefore, we hold the trial court did not err in rejecting defendant's tendered instructions.

(4) Stacking of Parole Periods

Defendant contends, and the state agrees, that the trial court erred in imposing a ten-year parole period. 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 running of any subsequent basic sentence then being served. *Brock v. Sullivan,* 105 N.M. 412, 733 P.2d 860 (1987). Accordingly, we reverse the judgment and sentence and remand for entry of an amended judgment and sentence which sets out a parole period consistent with *Brock. See Gillespie v. State,* 107 N.M. 455, 760 P.2d 147 (1988) (reaffirming *Brock* and holding that where defendant serves consecutive sentences, parole period commences after completion of imprisonment term for each offense rather than at completion of entire sentence); *see also* NMSA 1978, § 31–18–15(C) (Repl.Pamp.1987).

(5) Stop and Search of Defendant's Vehicle

At approximately 3:00 or 4:00 a.m., Officer DeQuack had just received a report of an incident involving criminal sexual penetration in the immediate area he was patrolling, together with a report that a person wearing a ski mask had been seen running north on Sellars Street, when he observed defendant's truck traveling north on Sellars Street. The report also indicated the suspect was Hispanic. DeQuack stopped defendant's truck, testifying that he was looking for anything out of the ordinary, a person walking, any vehicles, or possibly a witness. DeQuack testified that he approached defendant's truck, asked defendant for his driver's license, asked him to step out of the truck, and patted him down for safety purposes. Officer O'Hea arrived at the scene while defendant was getting out of his truck.

Both officers testified that defendant was wearing a gray sweatshirt and jeans, seemed very nervous, and was sweating profusely. Defendant was asked what he was doing in the area. He responded that he had been driving through Los Altos Park to meet someone and that they had not shown up, so he was just driving around and did not know how he had ended up in that area. DeQuack testified that he knew Los Altos Park was closed that night because he had been by there earlier and both entrances were locked. Also, he touched the hood of defendant's truck and found that it was cold. DeQuack testified that he asked defendant if it was okay for him to look in the truck, and defendant responded "yes." DeQuack observed a beige knit cap, a large screwdriver, and black ski gloves inside defendant's truck. The officers requested a further description of the suspect and were informed that the suspect was described as a Spanish male; therefore, they allowed defendant to leave because he did not match the description they received.

In appropriate circumstances and in an appropriate manner a police officer may approach a person for purposes of investigating possible criminal behavior, even though there is no probable cause to make an arrest. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Thus, an officer may stop and detain a citizen if the officer has a reasonable and articulable suspicion that the person stopped is or has been involved in criminal activity. *See State v. Galvan,* 90 N.M. 129, 560 P.2d 550 (Ct.App.1977); *see also United States v. Cortez,* 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), *cert. denied,* 455 U.S. 923, 102 S.Ct. 1281, 71 L.Ed.2d 464 (1982). An investigatory stop requires an assessment that yields a particularized suspicion, one that is based on the totality of the circumstances and that raises a suspicion that the particular individual being stopped is engaged in wrongdoing. *United States v. Cortez.* If officers have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion. *United States v. Hensley,* 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). In making a determination of reasonable suspicion, " 'the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.' " *United States v. Sokolow,* — U.S. ——, ——, 109 S.Ct. 1581, 1587, 104 L.Ed.2d 1, 12 (1989) (*quoting Illinois v. Gates,* 462 U.S. 213, 243–244, n. 13, 103 S.Ct. 2317, 2335, n. 13, 76 L.Ed.2d 527, 552, n. 13 (1983)). In the present case, DeQuack was in the immediate area of a recently-reported rape, and he had been informed that someone reported having seen a person wearing a ski mask running north on Sellars when he observed defendant's truck traveling north on Sellars. Considering defendant was stopped in the early morning hours a short distance from the area where an alleged crime had been committed and where a man had been seen running toward the vicinity where defendant was stopped, DeQuack could reasonably have concluded that defendant may have been involved in the commission of the reported offense.

Defendant argues that because the officers observed that he was a black man, while the description given by the victim was of an Hispanic man, no reasonable suspicion existed to believe that defendant was involved in the reported crime. Under the circumstances of this case, we believe it was entirely reasonable for DeQuack to have stopped the only person he saw on Sellars, notwithstanding the description of the offender as Hispanic, in view of the fact that the person seen running north on Sellars was wearing a ski mask.

Defendant was stopped in the vicinity of a recently reported crime at an hour in the morning when no other vehicles or individuals were present. DeQuack also had reason to believe defendant was not being truthful in his explanation regarding what he was doing in the area since DeQuack knew that Los Altos Park was not open that night, and despite defendant's statement that he had been driving around, the hood of his truck was cold. Under these circumstances it was not improper for the officer to stop defendant briefly in order to investigate. *See People v. Juarez,* 35 Cal. App.3d 631, 110 Cal.Rptr. 865 (1973).

(6) Hair Comparison Evidence and References to Such Evidence

Defendant filed a pre-trial motion to exclude hair comparison testimony which the trial court denied. Melissa Hughes was qualified at trial as an expert in the field of hair and fiber analysis. She testified that in her expert opinion, hair samples collected from clothing or bedding of the victims, or from the victim's person in the cases of J.T., B.B., S.S., and J.K., were consistent in microscopic characteristics with hair samples taken from defendant. In explaining how hair comparisons are done, Hughes noted that she lines up the two hairs being compared under a stereoscopic microscope and looks at them for consistencies. She testified that in doing a hair comparison she is "looking for the twin hair or the hair that looks exactly like the reference collec-

tion," and she oftentimes lines up two hairs:

> [W]hen they are so absolutely consistent as to be what I call a twin, some people call them identical hair, and line them up in the microscope so you don't realize it is, indeed, two hairs, then have people look at them and I had done this in these cases.

Hughes testified that she had not ever had occasion to examine two hairs, each from a different person, and found those two hairs to be consistent with each other. On cross-examination Hughes noted that she was testifying regarding the results of her hair comparisons, she was not telling the jury that defendant committed the crimes with which he had been charged, and she did not know how many other people have hair that is consistent with the hair on defendant's head.

Defendant raises two arguments with respect to the hair comparison evidence presented at trial. He contends first that prosecutorial misconduct occurred when the prosecutor referred to the hair samples as identical or microscopically identical during closing argument. Defendant also contends it was error to admit evidence of the comparison of hair samples because it was unduly prejudicial, thereby violating his right to due process and a fair trial. The portion of this issue pertaining to prosecutorial misconduct was not raised in the docketing statement. Defendant moved to amend the docketing statement to include this issue in his memorandum in opposition, which motion was held in abeyance pending submission of the case to a panel. We deny defendant's motion to amend because there is no record to support this issue, as set out in greater detail below. The portion of this issue pertaining to the admission of hair comparison evidence was originally raised in the docketing statement and is therefore properly before this court.

This case was assigned to the general calendar on July 6, 1988. This court granted defendant's first motion for designation of supplemental transcript in October and November 1988. The transcript was filed in district court on November 23, 1988 and December 6, 1988. The transcript was filed in this court on December 8, 1988 and December 22, 1988. Defendant filed a second motion for designation of supplemental transcript on March 8, 1989, seeking to have the state's closing argument transcribed. A period of approximately three months elapsed from the filing of the transcript to the filing of the second motion for supplemental transcript. Defendant had ample time to check the accuracy of the transcript pursuant to SCRA 1986, 12–211(C)(4). Accordingly, in light of the fact that the motion was filed eighty-eight days into defendant's briefing time, defendant's second motion for designation of supplemental transcript was properly denied. Insofar as defendant moves this court to reconsider its denial of his motion for supplemental transcript, we decline to do so for the reasons stated above.

Insofar as defendant contends it was error to admit Hughes' testimony regarding hair comparisons because it was unduly prejudicial, we are unpersuaded. The fact that evidence prejudices defendant is not grounds for its exclusion. *State v. Hogervorst,* 90 N.M. 580, 566 P.2d 828 (Ct. App.1977). If defendant is contending the mere use of the words "microscopically consistent," "consistent," "twin," or "identical" was prejudicial, we disagree, in light of the fact that the jury had before it testimony explaining the meaning of hair comparison results in terms of establishing identity. *See State v. Golladay,* 78 Wash.2d 121, 470 P.2d 191 (1970), *overruled on other grounds, State v. Arndt,* 87 Wash.2d 374, 553 P.2d 1328 (1976) (En Banc). Moreover, such evidence is relevant even if the expert is unable to opine that the hair found on the victim or at the scene of the crime was from defendant. *See State v. Kersting,* 292 Or. 350, 638 P.2d 1145 (1982). Therefore, we cannot say the trial court abused its discretion in admitting Hughes' testimony.

Conclusion

For the foregoing reasons we affirm defendant's convictions. We reverse the judgment and sentence and remand for re-

sentencing and entry of an amended judgment and sentence and for the imposition of parole periods consistent with this opinion.

IT IS SO ORDERED.

DONNELLY and ALARID, JJ., concur.

788 P.2d 382

Neils Louis JENSEN, Claimant–Appellant,

v.

NEW MEXICO STATE POLICE, Respondent–Appellee.

No. 11454.

Court of Appeals of New Mexico.

Jan. 23, 1990.

Certiorari Denied March 5, 1990.

Martin J. Chavez, Chavez Law Offices, Albuquerque, for claimant-appellant.

John J. Carmody, Jr., Carmody & Associates, P.A., Albuquerque, for respondent-appellee.

OPINION

BIVINS, Chief Judge.

Worker appeals from a judgment denying him benefits under the Workers' Compensation Act. NMSA 1978, §§ 52-1-1 to -70 (Repl.Pamp.1987). This appeal raises the question of whether worker introduced sufficient proof to establish a primary mental impairment under Section 52-1-24(B). We hold he did not, and therefore affirm the judgment below.

Worker began his employment with the New Mexico State Police in 1969 as a state policeman. He performed routine patrol work until 1975, when he transferred to the narcotics division. He worked in that capacity until 1982, when he suffered a serious and disabling vehicular accident unrelated to his work. As worker was unable to return to work as a police officer, the state police assigned him as a communications equipment officer (radio dispatcher). After working several months in this capacity at the Socorro office, worker was transferred to the District 5 office in Albuquerque.

From eight to ten dispatchers worked the Albuquerque office. They operated in three shifts, the daytime shift from 8:00 a.m. to 4:00 p.m.; the evening shift from 4:00 p.m. to midnight; and the graveyard shift from midnight to 8:00 a.m. the following day. When worker commenced his duties at the Albuquerque office, two dispatchers usually handled the evening shift. Only one was needed for the graveyard shift. A dispatcher's duties included receiving calls from officers in the field, dispatching those calls, taking care of visitors, and similar duties. The job of a dispatcher is considered stressful under normal conditions, and even more stressful during the winter because of inclement weather conditions.

Conditions became more difficult in 1987 after two dispatchers left and were not replaced. Because of understaffing, dispatchers could not double up on any of the shifts. Working solo made it difficult, in some cases impossible, to take breaks.

Worker was admittedly slow, but experienced no difficulty in performing his duties until he began feeling stress in June of 1987. Worker's condition progressively worsened. By February 1988, worker left this employment and did not return. Although worker initially failed to return because of strep throat, he eventually sought early retirement for mental health reasons. On February 18, 1988, Dr. J.E. Hall, worker's family physician, wrote the Public Employees Retirement Board, suggesting medical retirement on account of depression.

The other dispatchers in the Albuquerque office worked under the same stressful conditions. One dispatcher said she left because of sexual harassment by a supervisor, low pay, and stress. Another left because of alcoholism unrelated to the job; she said that the job was stressful at times, particularly during bad weather in the winter months. Another worker left for a better-paying job, and one other retired. The duties of all dispatchers were essentially the same.

Worker filed his claim seeking total disability and other benefits based on an alleged primary mental impairment brought on by the stress of understaffing in the Albuquerque office. The workers' compensation judge found:

4. The nature of Claimant's job duties were [sic] stressful and the level of stress increased as a function of understaffing.
5. The stress that understaffing caused was not outside the worker's usual experience nor would it involve significant symptoms of distress in a worker in similar circumstances.

Based on those findings, the hearing officer concluded that worker did not suffer a compensable impairment and was not entitled to compensation. This appeal followed.

Discussion

Section 52-1-24(B) defines "primary mental impairment" as

> a mental illness arising from an accidental injury arising out of and in the course

of employment when the accidental injury involves no physical injury and consists of *a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances,* but is not an event in connection with disciplinary, corrective or job evaluation action or cessation of the worker's employment. [Emphasis added.]

Because Section 52–1–24(B) substantially changes the law, we first examine the 1987 amendment. In interpreting the Workers' Compensation Act provisions after the 1987 amendments, we must bear in mind that "[i]t is the specific intent of the legislature that benefit claims cases be decided on their merits and that the common law rule of 'liberal construction' based on the supposed 'remedial' basis of workers' benefits legislation shall not apply in these cases." § 52–5–1. *See also Garcia v. Mt. Taylor Millwork, Inc.* (Ct.App.1989) (No. 10,996) (holding that Section 52–5–1 calls for a balanced and even-handed construction of the Act), *cert. granted* January 4, 1990.

In 1B A. Larson, *The Law of Workmen's Compensation* Section 42.20 (1987), Professor Larson describes three types of psychic injury: (1) a mental stimulus causing a physical injury; (2) a physical trauma causing a nervous injury; and (3) a mental stimulus causing a nervous injury. *See Consolidated Freightways v. Drake,* 678 P.2d 874 (Wyo.1984). Section 52–1–24(B) concerns the third category. We begin our discussion by examining case law as it existed before enactment of Section 52–1–24(B). Understanding how the law was interpreted before the 1987 amendment helps us understand the significance of the changes and therefore to give effect to legislative intent. *See State v. Chavez,* 77 N.M. 79, 419 P.2d 456 (1966) (the fundamental rule in construing statutes is to ascertain and give effect to legislative intent).

Interpreting the original Act, NMSA 1978, §§ 52–1–1 to –69 (Orig.Pamp.), and particularly Section 52–1–28 thereof, this court in *Candelaria v. General Electric Co.,* 105 N.M. 167, 730 P.2d 470 (Ct.App. 1986) held a psychological injury resulting from either a sudden or gradual emotional stimulus arises out of employment when it is causally related to performance of job duties. In so holding, we rejected the Wisconsin approach that mental injury must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience. *See School Dist. #1 v. Department of Indus., Labor & Human Relations,* 62 Wis.2d 370, 215 N.W.2d 373 (1974). Instead, we applied the same "arising" standard as for other accidental injuries; we did not require stress beyond that encountered in the day-to-day activities of the worker. *Candelaria v. General Elec. Co.*

Noting the lack of differentiation under the original Act between proof required to establish mental injuries as opposed to physical injuries, the *Candelaria* court said it was within the province of the legislature to make changes in coverage if it so desired. In response to *Candelaria,* the legislature, at the session following the filing of the decision in that case, enacted Section 52–1–24. Comparing subsection B of that section with *Candelaria,* it is clear the legislature did indeed make a distinction between physical injuries and mental injuries and adopted specific requirements for proof of the latter. The question we must answer is what proof must be made in order to recover for a primary mental impairment. We now examine Section 52–1–24(B).

"'[P]rimary mental impairment' means a mental illness arising from an accidental injury * * * [that] consists of a *psychologically traumatic event* that is [1] generally outside of a worker's usual experience and [2] would evoke significant symptoms of distress in a worker in similar circumstances * * *." § 52–1–24(B) (emphasis added). In order for there to be a primary mental impairment, first there must be a "psychologically traumatic event." That is the threshold criterion.

Additionally, the psychologically traumatic event must be one that is generally

outside the worker's usual experience and one that would evoke significant symptoms of distress in a worker in similar circumstances. We read these two criteria as further qualifying what is required in order for there to be a psychologically traumatic event. We interpret the first qualifying phrase, "outside of a worker's usual experience," as referring to the employment. What might constitute a psychologically traumatic event in one employment may not in another. We read the second qualifying phrase, "would evoke significant symptoms of distress in a worker in similar circumstances," as establishing an objective standard.

We limit our inquiry in this case to the term "psychologically traumatic event" because, if the stress resulting from understaffing in this case does not qualify as such an event, worker failed to meet his burden of proof. It matters not whether the event giving rise to worker's condition was outside his usual experience, or was one that would evoke significant symptoms of distress in a worker in similar circumstances, if that event was not psychologically traumatic. *Webster's Third New International Dictionary* 2432 (1966) defines "trauma," as relates to a mental condition, as "a psychological or emotional stress or blow that may produce disordered feelings or behavior." *The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders* Section 309.-81 (3rd ed. 1980) provides examples in its discussion of post-traumatic stress disorder. The manual explains:

> The essential feature [of post-traumatic stress disorder] is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience.
>
> * * * * * *
>
> The [psychologically traumatic event] producing this syndrome would evoke significant symptoms of distress in most people, and is generally outside the range of such common experiences as simple bereavement, chronic illness, business losses, or marital conflict. The trauma may be experienced alone (rape or assault) or in the company of groups of people (military combat). Stressors producing this disorder include natural disasters (floods, earthquakes), accidental man-made disasters (car accidents with serious physical injury, airplane crashes, large fires), or deliberate man-made disasters (bombing, torture, death camps). Some stressors frequently produce the disorder (e.g., torture) and others produce it only occasionally (e.g., car accidents).

Id. at 236. We note a marked similarity in the terminology found in that manual and in Section 52–1–24(B).

Dr. Jaramillo, a psychiatrist who treated worker, stated that the stressors in worker's job created or precipitated his symptomatology. However, he conceded that this stress "may not exactly fit the criterion" of post-traumatic stress disorder. He said worker's symptoms "fit more in the depressive criteria." According to Dr. Jaramillo, post-traumatic stress disorder requires "a catastrophic event." Dr. Jaramillo said that worker's motorcycle accident might qualify as a catastrophic event, but he did not say that worker's job stress so qualified.

Section 52–1–24(B) reflects a legislative intent to limit primary impairment to sudden, emotion-provoking events of a catastrophic nature as described above as opposed to gradual, progressive stress-producing causes such as occurred in *Candelaria* (harassment by supervisor over period of time).

The event that precipitated worker's symptoms, understaffing, does not meet the definition of a "psychologically traumatic event" under the facts of this appeal. One would expect most businesses to encounter layoffs, changes in personnel, and other setbacks which from time to time will cause stress to workers. Had the legislature intended this type of event to qualify as a primary mental impairment, we believe it would have chosen different language.

Worker relies on *Swiss Colony, Inc. v. Department of Industry, Labor & Human Relations,* 72 Wis.2d 46, 240 N.W.2d 128 (1976), which held that evidence sustained a finding that the worker was exposed to work stresses and strains that were out of the ordinary day-to-day stresses and strains all employees must experience. *Swiss Colony* is distinguishable as to both the law and the facts.

As to the law, Wisconsin, unlike New Mexico, does not limit liability for mental injuries solely to those which are traumatically caused. *Compare* § 52–1–24(B) *with School Dist. # 1 v. Department of Indus., Labor & Human Relations.* Further, Wisconsin apparently does not require the objective standard that the event is one which would evoke significant symptoms of distress in a worker in similar circumstances.

Even if we were to disregard the additional requirements under the New Mexico statute for establishing a primary mental impairment, the facts in *Swiss Colony,* as concerns the "outside of a worker's usual experience" criterion, do not require a different result than was found by the hearing officer in this case. In *Swiss Colony,* the worker was subjected to mounting pressures due to the growth of the employer's business; she was subjected to harassment by a supervisor; and she was made to work long hours with no vacations. In the case before us, the record shows that worker, during the months of October, November, and December 1987 and January 1988, worked only eleven day shifts and five evening shifts alone. Worker's duty schedule was not disproportionate to the solo shifts worked by other dispatchers.

"One who seeks relief under a statute has the burden of proving that he comes within its terms." *Baca v. Bueno Foods,* 108 N.M. 98, 102, 766 P.2d 1332, 1336 (Ct.App.1988). *See also Luchetti v. Bandler,* 108 N.M. 682, 777 P.2d 1326 (Ct. App.1989). Because worker sought benefits under the statutory provision for primary mental impairment, he had the burden of satisfying the requirements of the statute. Worker did not meet his burden. In reaching this result, we are mindful that the hearing officer did not make an express finding of no psychologically traumatic event, although he did make findings with respect to the two qualifying terms. Worker requested a finding that the reduction in work force constituted a significant traumatic event, and that finding was not given. Where a party has the burden of proof on an issue and requests findings on that issue, which are refused, the legal effect of the refusal is a finding against that party. *H.T. Coker Constr. Co v. Whitfield Transp., Inc.,* 85 N.M. 802, 518 P.2d 782 (Ct.App.1974).

Conclusion

We affirm the findings and decision of the workers' compensation judge.

IT IS SO ORDERED.

ALARID and APODACA, JJ., concur.

[redacted]

788 P.2d 932

STATE of New Mexico,
Plaintiff-Appellee,

v.

Donald ARAGON, Defendant-Appellant.

No. 10989.

Court of Appeals of New Mexico.

Jan. 2, 1990.

Certiorari Denied March 5, 1990.

Hal Stratton, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Peter Rames, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

MINZNER, Judge.

Defendant appeals his convictions after a bench trial on eleven counts of burglary, one count of receiving stolen property, and one count of a felon in possession of a firearm. He also appeals the enhancement of his sentence under the Habitual Offender Act, NMSA 1978, Sections 31–18–17 to –20 (Repl.Pamp.1987) and the amendment of his judgment and sentence to require that he pay restitution. Defendant has moved to amend the docketing statement to add new issues, a motion we now deny. Since the application of law to the facts concerning many issues is clear, only part of this opinion warrants publication. The remainder of the opinion, which is incorporated by reference, will be a memorandum opinion and may not be cited as precedent. We discuss (1) issues abandoned, (2) admission of taped conversation, (3) sufficiency of the evidence, and (4) amendment of sentence in the portion of the opinion that will be published. We discuss (5) the motion to amend and (6) issues answered summarily in the portion of the opinion that is not to be published. We affirm defendant's convictions on all counts, but we reverse the amendment of the sentence and remand for further proceedings.

ISSUES ABANDONED

Defendant's docketing statement attacked the trial court's failure to grant defendant's motion for appellate bond. This issue was not briefed. In addition, at trial and in the docketing statement, defendant argued that there was no probable cause to issue the first search warrant executed by the police. The basis for that claim was defendant's assertion that the affidavit in support of the search warrant provided no information connecting defendant to most, if not all, of the burglaries discussed in the affidavit. Defendant's briefs did not address this issue. Instead, in his briefs defendant attacked the search warrant only on the ground that the affidavit contained a false statement of fact. Therefore, this issue and the appellate bond issue have been abandoned. *See State v. Fish*, 102 N.M. 775, 701 P.2d 374 (Ct.App.1985).

Defendant appears to have made an effort to avoid abandonment of any of his issues by stating, in his brief-in-chief, that the brief incorporates all arguments and authority included in the docketing statement. This is not an acceptable briefing practice, and we hold that it does not operate to preserve any of the issues not specifically argued in the briefs. *See State v. Sandoval*, 88 N.M. 267, 539 P.2d 1029 (Ct. App.1975) (points of error identified in the statement of proceedings but neither briefed nor supported by authority considered abandoned).

The appellate rule concerning briefing does not provide for incorporation of arguments contained in other pleadings. SCRA 1986, 12–213. Allowing such a practice would force opposing counsel and this court to reexamine the docketing statement and other pleadings such as memoranda in opposition to ensure that all of the issues discussed in those documents have been addressed. In addition, it would force this court and opposing counsel to speculate as to which issues a party genuinely wishes to preserve and which the party feels have no merit. Finally, this tactic could be used as a means of avoiding the page limitations placed on briefs by the appellate rules. In sum, to facilitate the opposing party's responses and this court's decision-making process, when a case is decided on a non-summary calendar, it should be decided on the basis of the issues, argument, and authority contained in one manageable set of briefs, as provided for by the rules.

For all of these reasons, defendant's attempt to incorporate arguments and authorities contained in his docketing statement but not in his briefs was ineffective. All issues raised in the docketing statement but not argued in the briefs have been abandoned. *State v. Fish.*

ADMISSION OF TAPED CONVERSATION

Defendant was arrested on September 21. After his arrest, he made several telephone calls to a friend who had been in the

Roswell Correctional Institute with him at some time prior to the burglaries in question. The friend became concerned about getting involved in the matter, and on September 22 he talked to his probation officer about his concerns. Subsequently that same day, the friend informed the police of his conversations with defendant and said that two briefcases containing a number of items stolen in the burglaries could be found in a clump of bushes just south of a radio station. The friend also permitted a police officer to come to his house that evening and tape a conversation between defendant and the friend. Defendant moved to disallow that conversation on sixth amendment right to counsel grounds. The trial court denied the motion.

Once the right to counsel has attached and has been asserted, the state must honor that assertion. *Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). The state may not circumvent the assertion by using cooperative co-defendants or other informants to elicit incriminating statements from a defendant who has previously asserted his right to counsel. *Id.; United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). It does not matter whether the defendant initiated the conversation with the informant or volunteered statements, if the informant took some action beyond merely listening and the state knew or should have known incriminating information was likely to result from the conversation. *Maine v. Moulton; United States v. Henry; cf. Kuhlmann v. Wilson,* 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) (where trial court found informant did no more than listen, appellate court erred in concluding that the police deliberately elicited the incriminating statements; there is no violation of sixth amendment right to counsel in use of defendant's voluntary statements to an informant).

The state contends that defendant's right to counsel was not violated in this case because defendant initiated the conversation and there was no showing the informant, defendant's friend, took any action designed deliberately to elicit incriminating remarks from defendant. As we have already pointed out, however, it does not matter that defendant initiated the taped telephone call. The record reveals that the state knew incriminating statements were likely to result from the conversation, and the informant did more than just listen.

According to the testimony of the officers and of the informant, and as the trial court found, the briefcases containing stolen property had already been located before the conversation was taped. Yet during the conversation the informant pretended they had not yet been found and asked defendant for instructions regarding the location of the items. The informant engaged defendant in a conversation regarding the stolen property and pretended throughout the conversation that he was planning to help defendant by removing the property from the bushes and from a storage locker.[1] The informant asked defendant why he had done "this," and asked whether defendant's girlfriend knew he had done it. On these facts, it is apparent that the informant actively engaged defendant in conversation in a manner which was likely to elicit incriminating statements, and that the state knew or should have known that incriminating statements were likely to result from the conversation.

Nevertheless, we cannot conclude that the state's conduct violated defendant's sixth amendment right to counsel. That right ordinarily attaches when judicial proceedings have been initiated, by way of formal charge, preliminary hearing, indictment, information, or arraignment. *See State v. Sandoval,* 101 N.M. 399, 683 P.2d 516 (Ct.App.1984). With respect to the argument made on appeal in this case, as well, we conclude the right attaches when

1. The record indicates that on defendant's motion the trial court suppressed evidence seized from the storage locker.

judicial proceedings have been initiated. *See Maine v. Moulton,* 474 U.S. at 180, 106 S.Ct. at 489, 88 L.Ed.2d at 499, fn. 16. Thus, it is necessary to determine whether at the time of the taped conversation judicial proceedings against defendant had been initiated with respect to any of the burglary charges. *See People v. Hovey,* 44 Cal.3d 543, 244 Cal.Rptr. 121, 749 P.2d 776, *cert. denied,* 488 U.S. 871, 109 S.Ct. 188, 102 L.Ed.2d 157 (1988).

At the time of the taped conversation, defendant had not been charged with any of the burglaries. He was charged by criminal complaint on October 1; subsequently, on October 29, he was charged by criminal information.

On September 22, when the conversation was taped, defendant was in custody because he had been arrested for violating a condition of parole and held for investigation after his wallet was found at the scene of the burglary charged in count 1 of the criminal information. There is no evidence in the record that he had been formally charged with a parole violation on September 22. Under these circumstances, we conclude that defendant's sixth amendment right to counsel had not attached with respect to any of the burglary counts. *Cf. Kirby v. Illinois,* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion) (a police station showup at which victim identified the defendant, who had been arrested on suspicion of robbing the victim, did not violate the defendant's sixth amendment right to counsel, because the showup took place before defendant had been indicted or otherwise formally charged). The fact that defendant was a prime suspect in the burglaries, was in custody, and thus was under the control of the authorities does not alter the result under the sixth amendment. *Cf. People v. Hovey* (defendant was incarcerated on unrelated charges and was represented by counsel on those charges; he was also a prime suspect in a murder; his statements to a cellmate regarding the murder were admissible at trial because he had not been formally charged with that crime).

We note that defendant has made no claim on appeal that admission of the taped conversation violated his fifth amendment privilege against self-incrimination. Consequently, his reliance on *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), is misplaced. In more recent cases, the United States Supreme Court has construed *Escobedo* not as a vindication of the sixth amendment right to counsel but as an affirmation of the fifth amendment privilege against self-incrimination. *State v. Sandoval.*

SUFFICIENCY OF THE EVIDENCE

■ We begin the analysis with a discussion of the evidence relating to count 1, even though defendant did not challenge the sufficiency of the evidence with respect to that count. We do so for purposes of comparison and because the similarity of modes of entry between this burglary and some of the others was one point upon which the trial court relied. The evidence concerning this count was as follows: (1) the burglar entered through an air conditioning duct on the roof of an office; (2) defendant's wallet was found on the roof next to the duct; (3) a briefcase stolen in the burglary was found in defendant's apartment; and (4) the office was located a few blocks from defendant's home. This evidence was clearly sufficient to support defendant's conviction under count 1.

■ *Counts 2, 3, 4, 7, and 8:* In counts 2 and 3, the perpetrator entered a business through the ceiling; burglarized that business, and then burglarized another business located in the same building; and stole property that was later found in the briefcases near the radio station and in defendant's apartment. The office building is located a few blocks from defendant's apartment. Entry in the count 4 burglary was through the roof of an office, through a skylight. Property stolen in the burglary was discovered in defendant's apartment. The premises were a few blocks from defendant's apartment. Entry in the count 7 burglary was also through the roof of a business, through a vent in the ceiling. The premises burglarized in the count 8 burglary were entered from the

business burglarized in the count 7 burglary. Therefore, the initial entry in the count 8 burglary was also through the roof. Property taken in the count 7 burglary was recovered from the briefcases stashed in the bushes. In the count 8 burglary, only cash was taken; however, it can be reasonably inferred that the same person who committed the count 7 burglary committed the count 8 burglary. The premises were located a few blocks from defendant's apartment. The evidence connecting defendant with these burglaries, then, is that the mode of the initial entry into the premises was similar to that used in the count 1 burglary; that defendant had possession of property taken in these burglaries; that the burglaries occurred a short distance from his apartment; and that all the burglaries occurred within a time span of a few weeks.

In addition, in the taped telephone conversation with the informant defendant made several statements implying that he had committed the burglaries. He discussed amounts of cash that he had stored in the briefcases found behind the radio station, and stated that the cash and the items stored in the storage locker were the only things that could "hurt" him; he told the informant that the money in the shaving kit stored inside one of the briefcases came from "a different job altogether," and said there was nothing to tie him to that job; and, finally, he told the informant that his girlfriend "knows I'm guilty." The contents of this conversation, together with the evidence discussed in the preceding paragraph, constitute sufficient evidence to convict defendant of the burglaries charged in these counts.

Possession of stolen property, standing alone, is not enough to justify a conviction of burglary or larceny. *See State v. Graves,* 73 N.M. 79, 385 P.2d 635 (1963); *State v. Heim,* 83 N.M. 260, 490 P.2d 1233 (Ct.App.1971). Where other circumstances are present linking defendant with the theft, however, possession of the stolen property combined with the other circumstances can justify such a conviction. *State v. Sanchez,* 98 N.M. 428, 649 P.2d 496 (Ct.App.1982). Among the circumstances that can provide the necessary link to a defendant are a similarity in the nature of the crimes, including the type of victim and the method of carrying them out, and a locational or temporal connection between the crimes. *Cf. State v. Tafoya,* 105 N.M. 117, 729 P.2d 1371 (Ct.App.1986), *vacated on other grounds, Tafoya v. New Mexico,* 487 U.S. 1229, 108 S.Ct. 2890, 101 L.Ed.2d 924 (1988), *reaffirmed, State v. Tafoya,* 108 N.M. 1, 765 P.2d 1183 (Ct.App. 1988), *cert. denied,* — U.S. —, 109 S.Ct. 1572, 103 L.Ed.2d 938 (1989).

At trial, defendant argued that the evidence presented established at most that he was guilty of receiving stolen property, but was insufficient to show that he committed the burglaries. We disagree. Although no item of evidence recited above, standing alone, might have been sufficient to establish that defendant committed the burglaries, the combination of factors constituted sufficient circumstances linking defendant to the burglaries to justify his convictions. The taped conversation strongly implies that defendant committed a number of burglaries; the burglaries were committed within a short time span, in a geographically limited area; defendant was in possession of property taken in each burglary; and the method of entry in these burglaries was similar to the method of entry in the count 1 burglary. As we have stated, this provided sufficient evidence for the trial court's determination that defendant was guilty of these burglaries.

Counts 5, 6, 9, 10, and 11: In count 5, entry was through a broken window. In count 6, entry was through a door. In counts 9, 10, and 11, the initial entry was through a broken window, and the subsequent entries were through a connecting door and a sliding door facing a courtyard also faced by the two other offices. Property taken in the burglaries charged in counts 5 and 6 was recovered from defendant's apartment; property taken in the burglaries charged in counts 9 and 10 was recovered from the briefcases stashed in the bushes. No evidence was introduced regarding property taken in the

count 11 burglary, but it can be inferred that the same person who burglarized the businesses in counts 9 and 10 committed the count 11 burglary. All of the premises burglarized were located a few blocks from defendant's apartment, and all of the burglaries charged in these counts were committed in the same two-month period as the burglaries committed in counts 1 through 4 and 7 through 8. The evidence connecting defendant to these burglaries, then, is almost identical to the evidence offered in support of the burglaries discussed in the previous section. The only circumstance missing is a similar mode of entry into the premises—no ceiling entry was involved in these burglaries. Despite the lack of similarity in mode of entry, however, we believe the contents of the taped conversation, the locational and temporal congruity of these burglaries with the others, and defendant's possession of property taken in the burglaries, considered as a whole, provided a sufficient basis for the court's verdicts regarding these counts as well.

Felon in Possession of a Firearm: Defendant argues that the briefcase containing the pistol should have been suppressed, leading to the conclusion that there was no admissible evidence proving this count. This argument is premised on the view that the taped conversation should have been suppressed. We have concluded that defendant's sixth amendment right to counsel had not attached at the time the statements were recorded, and therefore the conversation need not have been suppressed.

Further, the briefcases were discovered prior to the taped conversation, as a result of information volunteered to the informant by defendant in a conversation in which the state had no part. Thus, no violation of defendant's right to counsel occurred when the briefcases were discovered. *See Kuhlmann v. Wilson* (sixth amendment is not violated whenever, by luck or happenstance, the state obtains incriminating information from a defendant through an informant; state must have taken some action designed to elicit the information). Since this claim was the basis of defendant's motion to suppress the briefcases, no grounds exist for such a suppression.

Therefore, the evidence on this point shows that the firearm was stolen in a burglary, and that it was recovered along with other articles of property defendant had stashed in some bushes. This was sufficient to establish that defendant possessed, transported or received the firearm in accordance with NMSA 1978, Section 30–7–16(A) (Cum.Supp.1989).

AMENDMENT OF SENTENCE

The trial court entered an amended judgment and sentence on May 27, 1988. On June 16, defendant filed his notice of appeal. On August 24, the court entered a second amended judgment and sentence, adding a requirement of restitution and ordering that the amounts of money left in defendant's bank accounts be the first installment in the restitution. Defendant maintains that the court lost jurisdiction to amend its May 27 judgment after 30 days had passed. We disagree. The restitution requirement was statutorily mandated, since the trial court suspended part of defendant's sentence. *State v. Lack,* 98 N.M. 500, 650 P.2d 22 (Ct.App.1982). Where a sentence lacks a statutorily mandated provision, the trial court does not lose jurisdiction to amend the sentence to include the provision simply by the passage of thirty days since the sentence was imposed. *See March v. State,* 109 N.M. 110, 782 P.2d 82 (1989); *cf. State v. Acuna,* 103 N.M. 279, 705 P.2d 685 (Ct.App.1985) (court had jurisdiction to amend sentence to include mandatory parole period until parole period expired). This point is without merit.

Although defendant did not raise this issue on appeal, we note that the trial court amended the judgment after defendant had filed his notice of appeal. Therefore, the trial court lacked jurisdiction to amend the sentence. *See generally State v. Garcia,* 99 N.M. 466, 659 P.2d 918 (Ct.App.1983) (pendency of defendant's appeal deprived trial court of jurisdiction to enter valid judgment and sentence, even though first sentence it had entered was not valid); SCRA 1986, 12–216(B) (failure to preserve question for review does not

prevent appellate court from reaching jurisdictional issue). The trial court will not regain its jurisdiction to correct the omission of the restitution requirement until mandate has issued from this court. *See id.*

Defendant argues that the trial court erred in refusing to consider his motion for new trial because a notice of appeal had already been filed. The court's refusal was correct. *See* SCRA 1986, 5–614(C) (if an appeal is pending, the trial court may not act on a motion for new trial based on new evidence until the case is remanded from the appellate court).

CONCLUSION AND DISPOSITION

Pursuant to the foregoing, we affirm defendant's convictions on all counts. We reverse the amendment of the judgment and sentence, and we remand to the trial court with instructions to add the mandatory restitution requirement in accordance with the substantive and procedural provisions outlined in NMSA 1978, Section 31–17–1 (Repl.Pamp.1987).

IT IS SO ORDERED.

ALARID and HARTZ, JJ., concur.

789 P.2d 588

Vincent ZURLA, a/k/a Vincent James Zurla, a/k/a Henry Vialpando, a/k/a Harry Vialpando, a/k/a David Vincent Serna, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 18348.

Supreme Court of New Mexico.

Jan. 25, 1990.

Hal Stratton, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for respondent.

Jacquelyn Robins, Chief Public Defender Wade H. Russell, Asst. Appellate Defender, Santa Fe, for petitioner.

OPINION

RANSOM, Justice.

Vincent Zurla was arrested on a shoplifting charge while on parole for a prior conviction. Nineteen months later his case came to trial, and he was convicted on one count of shoplifting over $100. He appealed to the court of appeals, arguing *inter alia* that his sixth amendment right to a speedy trial had been violated. The court of appeals affirmed the conviction. We granted certiorari and reverse.

Zurla was arrested on December 14, 1985. The following day, he posted a $2,500 bond and was released. On December 16, he was arraigned in metropolitan court. On January 24 or 25, 1986, Zurla's parole was revoked because of the pending charges against him and because he had consumed intoxicating beverages, also in violation of his parole. Between January 27, 1986, and May 22, 1987, Zurla was in the custody of the Department of Corrections on his parole violation. Shortly after returning to prison and with the help of a paralegal at the Department of Corrections, Zurla filed (apparently in metropolitan court) a pro se motion to have his trial set within six months, pursuant to SCRA 1986, 5-604. Zurla testified that the motion listed as his address the Department of Corrections' facility in Los Lunas.

Zurla was indicted in district court on August 26, 1986. The district court was unaware that Zurla was being held in custody for a parole violation and issued a bench warrant for his arrest. Although Zurla's bond was transferred from metropolitan court to district court on September 19, 1986, the bench warrant for Zurla's arrest was not cancelled until the day after he was arraigned in district court. Zurla was not arraigned until March 2, 1987, after the Department of Corrections notified the district court that it was holding him. It was at this time that Zurla first discussed the charges against him with an attorney.

A trial date first was set on a trailing docket for April 27, 1987, but was reset for May 15, 1987. Seventeen months lapsed between Zurla's arrest and the May 15 trial date. This date was continued at defendant's request until July 16, 1987. On July 9, Zurla moved to dismiss the charges for failure to afford a speedy trial as provided in the New Mexico and United States Constitutions.

Evidence was adduced before the trial court that the district attorney's office could have located Zurla simply by placing a phone call to the Department of Corrections' Central Records Office, but apparently this phone call never was made. Moreover, district court employees testified that, unless notified by the district attorney who presents a case to the grand jury, a district court judge often has no way of knowing whether a defendant is being held in custody or has been released on bond when deciding whether to issue a bench warrant or to send notice of arraignment to the defendant.

Zurla also claimed that two potentially exculpatory witnesses had left New Mexico subsequent to his arrest and now could not be located. According to testimony by Zurla and his wife, a neighbor and another woman whom they did not know were waiting in their car in the parking lot of the store when Zurla was arrested by a store security guard. According to Mrs. Zurla's testimony, these witnesses were in the car when, prior to her husband's arrest, she came back to the car in order to get her purse to pay for the goods. Mrs. Zurla also testified, however, that the car was parked some distance from the entrance to the store and was too far away for these witnesses to have seen Zurla's arrest. Thus, it is unlikely that they could have

corroborated the testimony by Mrs. Zurla and her husband that he was apprehended inside the store and had not intended to steal anything. The motion to dismiss was denied on July 16 and Zurla proceeded to trial.

Nature of speedy trial right. The Supreme Court has declared the sixth amendment right to a speedy trial to be a fundamental constitutional right that applies to the states through the fourteenth amendment. *Klopfer v. North Carolina,* 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). In *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Supreme Court set forth a four-prong test as a guide to the determination of speedy trial claims: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530, 92 S.Ct. at 2191; *see also State v. Kilpatrick,* 104 N.M. 441, 722 P.2d 692 (Ct.App.), *cert. denied,* 104 N.M. 378, 721 P.2d 1309 (1986), *on remand from Kilpatrick v. State,* 103 N.M. 52, 702 P.2d 997 (1985).

These four factors, however, have no talismanic qualities; no one factor constitutes either a necessary or sufficient condition to finding a deprivation of the right to a speedy trial. *Barker v. Wingo,* 407 U.S. at 533, 92 S.Ct. at 2193, *see also Moore v. Arizona,* 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) (prejudice not essential to showing deprivation of speedy trial right). In applying this test, "courts must * * * engage in a difficult and sensitive balancing process * * * carried out with full recognition that the accused's interest in a speedy trial is * * * specifically affirmed in the Constitution." *Barker v. Wingo,* 407 U.S. at 533, 92 S.Ct. at 2193

In its memorandum opinion,[1] the court of appeals held that the first three *Barker v. Wingo* factors, i.e., the length of delay, the reason for the delay, and the defendant's assertion of his right, all weighed in favor of Zurla, but not heavily in his favor. The court also held that Zurla failed to show prejudice and on balance had failed to show that his speedy trial rights were violated.

We disagree. We believe the court of appeals incorrectly weighed the first three *Barker v. Wingo* factors too lightly in favor of the defendant and incorrectly concluded the state had prevailed on the prejudice prong of the analysis. As the court of appeals did on direct appeal, we now independently balance the factors considered by the trial court in deciding whether a speedy trial violation has taken place. *See United States v. Loud Hawk,* 474 U.S. 302, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986), *on remand,* 784 F.2d 1407 (9th Cir.1986); *State v. Grissom,* 106 N.M. 555, 746 P.2d 661 (Ct.App.1987).

Length of delay. We note first our agreement with the court of appeals that the seventeen-month delay between arrest and the first trial date in a case as simple as this one was presumptively prejudicial and triggers inquiry into the remaining three factors. *See Grissom,* 106 N.M. at 561–62, 746 P.2d at 667–68 (delay totaling sixteen months that was attributable to state in complex conspiracy and racketeering case sufficient to trigger speedy trial analysis); *State v. Kilpatrick,* 104 N.M. at 444, 722 P.2d at 695 (delay of fifteen months in a simple assault case presumptively prejudicial).

However, we disagree with the court of appeals as to the weight to be given this factor. "[D]elay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker v. Wingo,* 407 U.S. at 531, 92 S.Ct. at 2192. Given the sixteen-month period of time found presumptively prejudicial in *Grissom,* we weigh the seventeen-month delay in this simple shoplifting case somewhat heavily against the state.

1. The court of appeals first assigned Zurla's case to the summary calendar. Upon motion from the Public Defender's Department, the court reassigned the case to the general calendar and, in December 1987, affirmed Zurla's conviction in a memorandum opinion. Upon motion for rehearing, the court issued a second, formal opinion in December 1988, which also affirmed the conviction. After a second motion for rehearing, the court again withdrew its opinion and filed a third, memorandum opinion on March 14, 1989. This third opinion is the opinion on which we directed a writ of certiorari to the court of appeals.

Moreover, we note that the state's chief evidence against Zurla was the testimony of the security guard who alleged he apprehended Zurla attempting to leave the store without paying for merchandise, and that this testimony was available to the state from the day of Zurla's arrest. *See United States v. Butler,* 426 F.2d 1275, 1277 (1st Cir.1970) (absent good reason, delay of nine months overly long in case depending on eyewitness testimony), *appeal after remand,* 434 F.2d 243 (1st Cir. 1970), *cert. denied,* 401 U.S. 978, 91 S.Ct. 1207, 28 L.Ed.2d 328 (1971). *Butler* was cited with approval in *Barker v. Wingo,* 407 U.S. at 531, n. 31, 92 S.Ct. at 2192, n. 31, as an example of a set of circumstances in which courts should tolerate less delay.

Reason for the delay. The court of appeals found the state simply was negligent in failing to locate Zurla and, therefore, did not weigh this factor heavily against the state. We disagree with this result. While *Barker v. Wingo* termed negligent delay a "more neutral reason" that, along with excessive caseload, weighed "less heavily" against the state than intentional delay, 407 U.S. at 531, 92 S.Ct. at 2192, simply denominating the reason advanced by the state as "negligent delay" is not sufficient to fix the weight to be given to this consideration. *See Graves v. United States,* 490 A.2d 1086, 1092 (D.C.App.1984) (en banc) (recognizing an intermediate category of delay for government actions, including failure to take reasonable means to bring a case to trial, that are deemed more culpable than delay due to court congestion and less culpable than tactical delay), *cert. denied,* 474 U.S. 1064, 106 S.Ct. 814, 88 L.Ed.2d 788 *rec'd as overruled in part on other grounds, Sell v. United States,* 525 A.2d 1017 (D.C.App.1987) (*Loud Hawk* mandates reasonable delay to pursue appeal be treated as justifiable delay); *Taylor v. State,* 429 So.2d 1172, 1174 (Ala.Crim.App.) (while state's negligence in bringing defendant to trial did not necessarily tip scales in favor of defendant, sheer bureaucratic indifference weighs heavily against state), *cert. denied,* 464 U.S. 950, 104 S.Ct. 366, 78 L.Ed.2d 326 (1983). In weighing this factor we stress two principles from *Barker v. Wingo:* (1) the four factors are interrelated and must be evaluated in light of the particular circumstances of the case, 407 U.S. at 533, 92 S.Ct. at 2193; and (2) in evaluating speedy trial claims we should compare the conduct of the state and the defendant. 407 U.S. at 530, 92 S.Ct. at 2191.

Here, the extent to which the state's negligence weighs against it is increased by the length of time during which no attempt was made to locate Zurla and by his early, pro se assertion of his right to a speedy trial. The state failed to inquire as to Zurla's whereabouts despite being put on notice that he was demanding his right to a speedy trial, despite notice of his whereabouts, and despite the simple nature of the charges against him.[2] This demonstrates an unacceptable indifference by the prosecution to its constitutional duty "to make a diligent, good-faith effort to bring a defendant to trial." *Smith v. Hooey,* 393 U.S. 374, 383, 89 S.Ct. 575, 579, 21 L.Ed.2d 607 (1969); *see also State v. Harvey,* 85 N.M. 214, 510 P.2d 1085 (Ct.App.1973). "[W]here the [administrative] machinery exists [to secure a defendant's presence at trial], the prosecutor has a constitutional

2. At the district court hearing on Zurla's speedy trial motion, the district attorney took the position that, as the state had no actual knowledge of Zurla's whereabouts, the delay in bringing him to trial did not constitute an "irregularity." The state, however, had the responsibility to manage its case against Zurla in a manner that allowed it to fulfill its constitutional obligation to bring him to trial within a reasonable time. *See Barker v. Wingo,* 407 U.S. at 529, 92 S.Ct. at 2191. The district attorney was chargeable with constructive knowledge of what a reasonable discharge of those case-management responsibilities would have revealed, e.g., the contents of the preindictment metropolitan court file on Zurla's case (including his motion for a speedy trial) and the revocation of his parole. Moreover, the failure of the district attorney's office to alert the district court that Zurla was in custody appears from the record to have created much of the bureaucratic confusion in this case, in which a bench warrant was issued on a defendant who in fact had posted bond and then in fact was in the custody of the Department of Corrections. Had the court properly been informed of Zurla's whereabouts, he could have been arraigned promptly on the pending charges.

duty to attempt to use it." *Id.* at 217, 510 P.2d at 1088.

We believe that bureaucratic indifference should weigh more heavily against the state than simple case overload, particularly when the defendant has attempted to safeguard his rights. *See Commonwealth v. Lutoff,* 14 Mass.App. 434, 440 N.E.2d 52 (1982) (preoccupation with other cases as reason for delay weighs quite heavily against state in case in which defendant made early and persistent efforts to obtain speedy trial).

As pointed out by Judge Chavez' dissent from the court of appeals opinion in this case, previous New Mexico precedent also supports our conclusion that the reason for the delay in bringing Zurla to trial should weigh heavily in his favor. In *Harvey,* the court held that the failure, despite the availability of the necessary administrative machinery, to seek extradition of the defendant from California where he was imprisoned on an unrelated charge weighed heavily against the state. *See also Dickey v. Florida,* 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970); *Smith v. Hooey,* 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969). We believe failure to make an effort to locate a defendant who is imprisoned in the state's own corrections facilities and who has attempted while in prison to obtain an early confrontation with his accusers also must weigh heavily against the state. The court in *Raburn v. Nash,* 78 N.M. 385, 387, 431 P.2d 874, 876, *cert. dismissed,* 389 U.S. 999, 88 S.Ct. 582, 19 L.Ed.2d 613 (1967) noted:

> A prisoner does not forfeit his right to a speedy trial solely because he is confined in the penitentiary under sentence for another offense * * * * This is particularly true when the state that holds him in prison is the same state that presents the indictments.

(Citations omitted).

Assertion of the right. As discussed above, Zurla made a pro se motion to be tried within six months, pursuant to SCRA 1986, 5-604, shortly after his parole was revoked and he was placed into custody by the Department of Corrections. Before his trial in 1987, Zurla's attorney made a motion to dismiss the charges against him for failure to afford a speedy trial.

A defendant does not have a duty to bring himself to trial, and a speedy trial violation may be found even when the defendant has not asserted the right. *Barker v. Wingo,* 407 U.S. at 527-28, 92 S.Ct. at 2190-91. Nevertheless, the assertion of the right is entitled to strong evidentiary weight in deciding whether a speedy trial violation has taken place. *Id.* at 531-32, 92 S.Ct. at 2192. Under the circumstances described above, we believe this factor weighs substantially in Zurla's favor. An early assertion of the speedy trial right indicates the defendant's desire to have the charges resolved rather than gambling that the passage of time will operate to hinder prosecution. The strength of a defendant's assertions of the right (i.e., early and/or frequent) also indicates the probable extent to which the defendant has suffered from the inevitable burdens that fall upon the target of a criminal prosecution, burdens the speedy trial right was intended to minimize. *Id.* at 531, 92 S.Ct. at 2192.

Prejudice to the defendant—General considerations. Barker v. Wingo identified three different types of prejudice to the defendant that the sixth amendment right to a speedy trial was intended to minimize or prevent: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) the possibility of impairment to the defense. 407 U.S. at 532, 92 S.Ct. at 2193. Of these, the Supreme Court believed impairment of the defense to be the most serious prejudice, because it "skews the fairness of the entire system." *Id.*

The court of appeals held that Zurla failed to demonstrate any of these elements of prejudice. The court held that he had not been subjected to oppressive pretrial incarceration. Zurla was released on bond the day after his arrest. Unlike the defendant in *State v. Kilpatrick,* who lived under restrictions on his liberty imposed along with a $2,500 bond the entire time the charges were pending against him, Zurla lived under similar restrictions only a

short time prior to the revocation of his parole, albeit the bond itself appears to have remained in effect while he was in the custody of the Department of Corrections. *Cf. State v. Kilpatrick,* 104 N.M. at 445–46, 722 P.2d at 696–97. Moreover, the court noted, Zurla was subject to revocation of his parole regardless of how the charges pending against him were resolved. Further, the court held, loss of the *possibility* of serving concurrent sentences did not constitute an aspect of prejudice because Zurla did not have a "*right* to being sentenced" to serve concurrent terms, citing *State v. Tarango,* 105 N.M. 592, 734 P.2d 1275 (Ct.App.), *cert. denied,* 105 N.M. 521, 734 P.2d 761 (1987), and *State v. Powers,* 97 N.M. 32, 636 P.2d 303 (Ct.App.1981). Finally, the court held, Zurla failed to demonstrate impairment to his defense because the evidence, at best, was conflicting as to whether these witnesses did see the events giving rise to his arrest, and because he failed to make a showing of his attempts to locate these witnesses.

We disagree that Zurla did not suffer oppressive pretrial incarceration and that his defense was not impaired, although we conclude that the degree of prejudice under the facts was minimal.

—*Oppressive pretrial incarceration.* We believe loss of the possibility of serving concurrent sentences did constitute an aspect of prejudice.[3] In *Smith v. Hooey,* the Supreme Court noted that "the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed." 393 U.S. at 378, 89 S.Ct. at 577. Loss of this possibility is therefore to be considered an element of oppressive pretrial incarceration. *Id.*

Citing *Smith v. Hooey,* Judge Lopez wrote in *Harvey* that, although not weighing heavily in the defendant's favor, loss of the possibility of concurrent sentencing "denied [the defendant] the *opportunity* to sever a substantial portion of his New Mexico sentence [and this] is enough to prejudice him." 85 N.M. at 218, 510 P.2d at 1089 (emphasis in the original); *see also Taylor v. State,* 429 So.2d 1172 (Ala.Crim. App.), *cert. denied,* 464 U.S. 950, 104 S.Ct. 366, 78 L.Ed.2d 326 (1983); *State v. Holmes,* 643 S.W.2d 282 (Mo.App.1982). Although concurring in the result of Judge Lopez' opinion, the two other members of the *Harvey* panel did not concur in Judge Lopez' discussion of prejudice, concluding that "the three factors of length of delay, reason for delay and defendant's assertion of his right ... clearly outweigh the State's equivocal showing that defendant was not prejudiced...." 85 N.M. at 219, 510 P.2d at 1090.

We note that the opinions in *Powers* and *Tarango,* cited by the court of appeals in this case, failed to cite *Smith v. Hooey* or mention the court's apparent disagreement over this issue in *Harvey.* To the extent these cases suggest a rule different from that in *Smith v. Hooey,* these cases are overruled. We hold that loss of the possibility of concurrent sentencing constitutes an aspect of prejudice as defined under the sixth amendment.

—*Impairment of the defense.* We also disagree with the court of appeals' analysis of and conclusion on the issue of impairment of the defense. Citing *State v. Tartaglia,* 108 N.M. 411, 773 P.2d 356 (Ct. App.), *cert. denied,* 108 N.M. 318, 772 P.2d 352 (1989), the court held that Zurla had the burden of proving his speedy trial rights were violated and failed to establish the existence of any prejudice. Arguably, *Tartaglia* may be read to hold either that the defendant bears "the burden of proof" to show prejudice, or that he bears simply "the burden of producing evidence," and not the burden of persuasion, as suggested by the court of appeals. "Since defendant claims his sixth amendment rights have been violated, *he should bear the burden of producing evidence to support his*

3. We note that, while the court held incarceration on a parole revocation did not amount to prejudice, the court failed to address whether Zurla's liberty interests nevertheless were impaired during this period because of the $2,500 bond. We find, however, little if any additional impairment to these interests under the circumstances.

claim." *Tartaglia,* 108 N.M. at 414, 773 P.2d at 359 (emphasis added); *see generally Mortgage Inv. Co. of El Paso v. Griego,* 108 N.M. 240, 771 P.2d 173 (1989) (on distinction between burden of production and burden of persuasion).

The reason advanced in *Tartaglia* for placing the burden of production on the defendant with respect to the prejudice prong of the speedy trial analysis was that

> it is difficult to conceive of how the state could come forward and effectively rebut a presumption of prejudice * * * without knowing * * * how defendant claims he was prejudiced. For example, how could the state rebut a claim that a potential exculpatory witness has disappeared * * * when the state may be unaware of the existence of such a person?

108 N.M. at 415, 773 P.2d at 360. For similar reasons, the state was held to bear the burden of advancing reasons to justify any delay found to be presumptively prejudicial. *Id.* at 414, 773 P.2d at 359. *Tartaglia* also noted that the defendant did not have to establish "actual prejudice" as in a due process claim for preindictment delay; rather, he had to present specific corroboration of his allegations of prejudice. *Id.* at 416, 773 P.2d at 361; *cf. Smith v. Hooey,* 393 U.S. 374, 384, 89 S.Ct. 575, 580, 21 L.Ed.2d 607 (1969) (Harlan, J., separate opinion) (accused must establish prima facie showing of prejudice). *But cf. Dickey v. Florida,* 398 U.S. at 53–57, 90 S.Ct. at 1576–78 (Brennan, J., concurring) (consistent with other sixth amendment rights, once defendant has made prima facie case by showing government-caused delay beyond point at which a probability of prejudice arose, burden should shift to government to establish necessary delay or harmless error), *cited with approval in Barker v. Wingo,* 407 U.S. at 530, n. 30, 92 S.Ct. at 2191, n. 30.

Although the reasons discussed in *Tartaglia* for placing the burden of production on the defendant are cogent, this does not provide an appropriate basis to shift to the defendant the burden of persuasion. Once the defendant has demonstrated presumptively prejudicial delay and thus triggered the *Barker v. Wingo* analysis, the presumption of prejudice does not disappear. Rather, the burden of persuasion rests with the state to demonstrate that, on balance, the defendant's speedy trial right was not violated. To the extent it suggests the state does not have this burden, *Tartaglia* is overruled. Of course, as the court pointed out in *State v. Ackley,* 201 Mont. 252, 258, 653 P.2d 851, 854 (1982), "The State's burden to show a lack of prejudice becomes considerably lighter in the absence of evidence of prejudice * * * *" *See also State v. Mascarenas,* 84 N.M. 153, 500 P.2d 438 (Ct.App.1972) (alternate holding that once defendant established presumptively prejudicial delay, state bore burden of showing absence of prejudice); *Graves v. United States,* 490 A.2d at 1091 (delay of more than a year creates presumption of prejudice and shifts burden to state to justify delay); *Smith v. United States,* 418 F.2d 1120 (D.C.Cir.) (one-year delay created rebuttable presumption of prejudice), *cert. denied,* 396 U.S. 936, 90 S.Ct. 280, 24 L.Ed.2d 235 (1969); *Smallwood v. State,* 51 Md.App. 463, 443 A.2d 1003 (1982) (in sixth amendment cases, prejudice may be presumed from delay, but, in preindictment delay cases, prejudice may not be presumed but must be proved).

We note this interpretation to be consistent with general principles regarding claims of prejudice to a criminal defendant's constitutional rights. *See Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (when defendant raises reasonable possibility of constitutional error affecting verdict, presumption of prejudice arises that state must rebut beyond a reasonable doubt); *Manlove v. Sullivan,* 108 N.M. 471, 775 P.2d 237 (1989) (same burden when error affects appeal). We believe to apply a different rule to speedy trial claims would place an inappropriate burden on a criminal defendant in a system that "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial." *Barker v. Wingo,* 407 U.S. at 529, 92 S.Ct. at 2191.[4]

4. We do not decide in this case the weight of the burden that the prosecution must meet. *Chap-*

[redacted] We now apply these principles to Zurla's allegations that his defense was impaired by the loss of two witnesses. The state maintains the missing witnesses were not in a position to see Zurla's arrest by the store security guard, and, therefore, loss of their testimony did not impair the defense. However, even if they could not have testified as to whether Zurla's arrest took place inside or outside the store, according to Mrs. Zurla's testimony these witnesses were waiting in Zurla's car when, prior to her husband's arrest, she came back to the car to get her purse in order to pay for the goods her husband subsequently was accused of stealing. While their testimony was not conclusive on the question of Zurla's guilt or innocence, these witnesses could have corroborated Mrs. Zurla's story and helped to create a reasonable doubt whether Zurla intended to shoplift. The state's argument fails to rebut this possibility.

Nonetheless, the only evidence adduced at Zurla's hearing bearing on whether an attempt had been made to locate the witnesses was the testimony that one witness had moved to California, along with Mrs. Zurla's testimony that she could not get in touch with either witness. Zurla, the state argues, has failed to make an affirmative showing that his inability to locate the witnesses was attributable to the delay in bringing his case to trial. *See Grissom,* 106 N.M. at 563, 746 P.2d at 669 (evidence destroyed before delay became inordinate does not establish impairment of defense); *cf. State v. Evans,* 19 Or.App. 345, 527 P.2d 731 (1974), *cert. denied,* 423 U.S. 843, 96 S.Ct. 77, 46 L.Ed.2d 63 (1975) (prejudice not found when defendant made no efforts to obtain lost evidence to defend himself).

As we have noted, absent such corroborating evidence, "[t]he State's burden to show a lack of prejudice becomes considerably lighter * * * *" *Ackley,* 201 Mont. at 258, 653 P.2d at 854. By implication, even when the state does not carry completely its burden of persuasion to show an absence of prejudice, the extent to which the defendant can be said to have prevailed on this issue lessens substantially in the absence of corroborating evidence. *See State v. Holtslander,* 102 Idaho 306, 629 P.2d 702, 709 (1981) (presumption of prejudice entitled to little weight when defendant has neither alleged nor produced evidence of prejudice). The evidence Zurla adduced at

man held that, generally, if the prosecution can prove *beyond a reasonable doubt* that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand. 386 U.S. at 24, 87 S.Ct. at 828. *Manlove* applied the same standard to the question of whether an alteration of the record deprived the petitioner of his right to an appeal. 108 N.M. at 477, 775 P.2d at 243. The Supreme Court also has applied the *Chapman* burden in some sixth amendment contexts. *See Satterwhite v. Texas,* 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) (psychological evaluation of future dangerousness obtained in violation of right to counsel in capital murder case).

In other cases, when the alleged constitutional violation did not implicate the reliability of the judicial process, the Court has applied a *preponderance of the evidence* standard. *See, e.g., Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (admissibility of evidence alleged to be fruits of an illegally obtained confession); *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) (fourth amendment suppression hearings); *Lego v. Twomey,* 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) (hearings on whether confession was voluntary). In *Lego,* for example, the Court noted that involuntary confessions often are reliable. 404 U.S. at 485–86, 92 S.Ct. at 624–25. Moreover, the Court noted, regardless of the trial court's determination of admissibility, the jury still has before it evidence of the circumstances surrounding the confession by means of which to determine the weight to be given to that confession. *Id.*

In considering these principles in the present context, we note the compound nature of the interests protected by the speedy trial right. Two of the subparts to the prejudice analysis—oppressive pretrial incarceration and the anxiety and concern of the accused—have little if anything to do with the reliability of the judicial process. The third variety of prejudice, however, is impairment of the defense. As discussed in the body of this opinion, impairment of the defense was seen as the most important type of prejudice by the Court in *Barker v. Wingo* because it "skews the fairness of the entire system." 407 U.S. at 532, 92 S.Ct. at 2192. Thus, a strong argument exists for applying the *Chapman* burden at least in the analysis of impairment of the defense. We do not decide this question, however, because we conclude that the state has failed to carry its burden of persuasion even under the lesser preponderance standard.

the hearing does not show clearly the extent of his efforts, if any, to locate the witnesses. Nor did he present evidence sufficient to show the existence of a causal relationship between the unjustified delay and the loss of these witnesses' testimony.

Yet, neither has the state shown how the evidence controverts the "presumption of prejudice" as applied to the loss of this testimony, which, as noted above, was facially material to Zurla's defense. Instead, the state rests on its argument that, absent additional evidence of attempts to locate these witnesses, there is no basis from which to conclude that Zurla's defense was impaired. We hold on balance that the state has failed to carry its burden of persuasion to show that Zurla's defense was not impaired. However, in the absence of corroborating evidence of attempts to locate the missing witnesses sufficient to establish whether or not the loss of their testimony was due to the unjustified delay, the issue of impairment to the defense weighs only slightly in Zurla's favor.

■ *Conclusion.* In reweighing the factors considered by the court of appeals, we conclude that Zurla's sixth amendment rights were violated by the seventeen-month delay in this case. The *Barker v. Wingo* factors of length of the delay, reason for the delay, and assertion of the right all weigh either substantially or heavily in Zurla's favor. Although we do not believe the loss of the possibility of concurrent sentences nor the loss of the two witnesses weighs heavily in Zurla's favor, these factors nevertheless constitute some degree of prejudice. We thus face a set of circumstances not unlike the one considered by the court in *Harvey,* in which three factors weighed heavily in favor of the defendant and the record on the issue of prejudice was "equivocal." 85 N.M. at 219, 510 P.2d at 1090. In balancing these factors we reach the same result as did the court there.

We believe that when the state unjustifiably has delayed a defendant's trial beyond a reasonable time, disregarding the defendant's demand for an early trial, undue emphasis should not be placed on whether the defendant is able to adduce evidence of identifiable prejudice. To hold otherwise would in effect attribute to this factor "talismanic qualities" antithetical to the understanding that animated *Barker v. Wingo.* 407 U.S. at 533, 92 S.Ct. at 2193. We find fully applicable to this case the principles articulated by Justices White and Brennan:

> [Prejudice is] inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty. It is also true that many defendants will believe that time is on their side and will prefer to suffer whatever disadvantages delay may entail. But, for those who desire an early trial, these personal factors should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial case loads. A defendant desiring a speedy trial, therefore, should have it within some reasonable time; and only special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if such special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defendant at trial. "[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States v. Marion, supra* [404 U.S. 307,] at 320 [92 S.Ct. 455, at 463, 30 L.Ed.2d 468 (1971)].

Id. at 537–38, 92 S.Ct. at 2195 (concurring opinion).

Based on the foregoing considerations, the opinion of the court of appeals is reversed, and we remand this case to the district court with instructions to set aside the judgment and sentence and dismiss the charges against the defendant.

IT IS SO ORDERED.

SOSA, C.J., and MONTGOMERY, J., concur.

BACA, J., dissents.

WILSON, J., not participating.

BACA, Justice (Dissenting).

I respectfully dissent from the majority opinion. I hereby adopt the court of appeals opinion (filed March 14, 1989) as my dissent.

STATE of New Mexico,
Plaintiff–Appellee,

vs.

Vincent ZURLA, a/k/a Vincent James Zurla, a/k/a Henry Vialpando, a/k/a Harry Vialpando, a/k/a David Vincent Serna, Defendant–Appellant.

No. 10230.

Court of Appeals of New Mexico

March 14, 1990.

MEMORANDUM OPINION

DONNELLY, Judge.

On motion for rehearing our prior opinion is withdrawn and the following is substituted.

Defendant, Vincent Zurla, appeals from a felony conviction for shoplifting over $100, contrary to NMSA 1978, Section 30–16–20(B)(2) (Repl.Pamp.1984). He claims the trial court erred by refusing to dismiss the indictment against him on: (1) speedy trial grounds and (2) due process grounds. We affirm.

FACTS

Defendant was arrested and placed in custody on December 14, 1985, for shoplifting. The next day he posted a $2,500 surety bond and was released. On either January 24 or 25, 1986, his parole on a previous conviction was revoked because of his consumption of intoxicating beverages and because of the shoplifting charge. Several days later, defendant was incarcerated in a facility of the Department of Corrections (DOC) on the prior conviction as a result of the parole revocation. A short time later defendant filed a pro se motion to be tried on the shoplifting charge within six months.

On August 26, 1986, defendant was indicted for shoplifting over $100, count I, and conspiracy to commit shoplifting, count II. The following month, the bond that defendant had posted in metropolitan court on the shoplifting arrest was transferred to district court. For some unexplained reason, defendant was not arraigned in district court until March 2, 1987, over six months after indictment. Defendant's trial was set for April 27, 1987, and at his request it was continued to July 16, 1987. On May 22, 1987, defendant was released from custody.

On July 9, 1987, defendant filed a motion to dismiss the indictment against him on speedy trial and due process grounds because of the preindictment and postindictment delays. The trial court denied defendant's motion. At trial, defendant was found guilty on count I and acquitted on count II.

I. CLAIM OF DENIAL OF SPEEDY TRIAL

Claims alleging denial of a right to a speedy trial under the sixth amendment of the United States Constitution and Article II, Section 14 of the New Mexico Constitution are decided on a case-by-case basis. *See Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *State v. Grissom,* 106 N.M. 555, 746 P.2d 661 (Ct. App.1987); *State v. Kilpatrick,* 104 N.M. 441, 722 P.2d 692 (Ct.App.1986). Proof of the passage of time, without more, is not determinative of allegations of denial of a speedy trial. *Barker v. Wingo.* In *Barker,* the Supreme Court enumerated four factors for courts to consider in reviewing speedy trial claims, the first of that is the length of delay. A delay which is sufficient to give rise to a presumption of prejudicial delay must exist before the other *Barker* factors—reason for the delay, assertion of the right to a speedy trial, and prejudice to defendant—are evaluated to determine whether a defendant has been denied his right to a speedy trial. *State v. Grissom; State v. Kilpatrick.* In this balancing test, the conduct of both the prosecution and the defense are weighed. *See*

id. The weight to be assigned to these factors depends upon the particular facts and circumstances of the case. *See Barker v. Wingo.* A finding in favor of one party on any one of these factors is not necessarily dispositive of the speedy trial claim; rather, these factors are interrelated and must be considered in toto, together with other relevant circumstances of the case. *See id. See also Moore v. Arizona,* 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973). Since a fundamental right is involved, courts must engage in a sensitive and difficult balancing process. *Id.* On appeal, we independently balance the factors the trial court considered in deciding whether a defendant's right to a speedy trial has been violated. *State v. Grissom.*

Defendant has the burden of proving that his constitutional right to a speedy trial has been denied. *State v. Tartaglia,* 108 N.M. 411, 773 P.2d 356 (1989). In this case, the state and defendant agree that the length of delay gives rise to a presumptively prejudicial delay that is sufficient to trigger an inquiry into the other *Barker* factors. *See State v. Kilpatrick.* They also agree that the reasons for the delay and assertion of the right factors should be weighed in the defendant's favor. They disagree on the evaluation of and weight to be given to the remaining *Barker* factor—prejudice to defendant.

We have independently reviewed the evidence on the first three factors, and agree with the parties that they should be weighed in defendant's favor. We note, however, that the reason for delay is not weighed heavily against the state since the delay was negligent, not deliberate. *See State v. Kilpatrick.* Because there is no dispute as to these factors, we need examine only the prejudice factor, and then balance all four factors.

Prejudice to Defendant

In conducting this analysis we recognize that "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971). Prejudice to defendant should be assessed in light of the interests the speedy trial right was designed to protect, and include undue or oppressive pretrial incarceration, the anxiety and concern of defendant accompanying public accusation, and the possibility of impairment to the defense. *See Barker v. Wingo. See also United States v. Marion.*

The state argues that if we find no prejudice to defendant, this finding should weigh more heavily than the other factors and thus tip the scales in the state's favor. The state urges us to follow the rule of the Eleventh Circuit that unless the other *Barker* factors weigh heavily against the state, defendant must demonstrate actual prejudice to prove a speedy trial violation. *See United States v. Mitchell,* 769 F.2d 1544 (11th Cir.1985), *cert. denied,* 474 U.S. 1066, 106 S.Ct. 819, 88 L.Ed.2d 792 (1986). We decline to adopt such a rule on an inflexible basis because *Barker* does not indicate that any one factor should carry more weight than any other factor. Rather, *Barker* instructs that no single factor is either a necessary or sufficient condition to a finding of a speedy trial violation, and that all of the factors are related and should be considered together, along with other relevant facts and circumstances of the case. 407 U.S. at 533, 92 S.Ct. at 2193.

We do not apply the same test for proving a claim of denial of speedy trial as is required for proving a claim of due process violation under the fourteenth amendment of the United States Constitution and New Mexico Constitution, Article 2, Section 18. *See State v. Grissom* (in proving a claim of preindictment delay in a due process claim, defendant must show actual prejudice as a result of the delay by showing how his defense would have been more successful absent the delay. The state's conduct is then weighed against the actual prejudice to determine if defendant has been substantially prejudiced by the delay). Different purposes underlie the speedy trial right and the due process clause as those provisions relate to a claim of prosecutorial delay. The underlying purpose of the speedy trial right is the orderly expedition of the criminal process, while the due process

clause is primarily intended to prevent prejudice to the defense because of the passage of time. *See State v. Kilpatrick.*

Defendant claims that both the entire seventeen months of his incarceration on the parole revocation and the bond's impairment of his liberty constitute oppressive pretrial incarceration. The state claims the incarceration should not be considered because defendant would have been confined as a result of the parole violation regardless of whether or not he was timely tried on the new charges. We decline to adopt a fixed rule on this factor and, pursuant to *Barker,* decide the issue under the particular facts existing in each individual case.

In weighing the element of the restraint on defendant's liberty in this case, we determine that defendant has failed to establish the existence of any prejudice arising from his pretrial incarceration due in part to a parole revocation stemming from an unrelated offense. *See Mackey v. State,* 279 Ark. 307, 651 S.W.2d 82 (1983) (although trial commenced a year after defendant's arrest, he was not denied a speedy trial where, following his arrest, his parole was revoked, but he was not jailed solely on the pending charge). *See also State v. Dudley,* 433 A.2d 711 (Me.1981); *State v. Harvey,* 184 Mont. 423, 603 P.2d 661 (1979).

Defendant argues that his incarceration on an unrelated offense should be counted in evaluating his speedy trial claim, relying upon *Raburn v. Nash,* 78 N.M. 385, 431 P.2d 874 (1967) and *State v. Harvey,* 85 N.M. 214, 510 P.2d 1085 (Ct.App.1973). In *Raburn* the court held that a prisoner does not forfeit his right to a speedy trial solely because he is confined in the penitentiary under sentence for another offense. Similarly, in *Harvey* (Wood, C.J. and Hendley, J., specially concurring), this court found an accused's incarceration in another state does not restrict his speedy trial claim.

However, these cases do not answer the question before us, that is, whether the incarceration for the parole violation should be considered as oppressive pretrial incarceration for *this* crime. Under the record before us we find no prejudice to defendant resulting from his pretrial incarceration. The only period of restraint on defendant's liberty solely resulting from the shoplifting charge was less than one and one-half months from the date of his posting bond to his incarceration for the parole violation. *See State v. Kilpatrick* (the restrictions imposed by bond on defendant's freedom of movement are factors to be considered in evaluating a claim of denial of a speedy trial). The time from his release from DOC until the second trial setting two months later should not be considered because defendant was responsible for the delay during this period. *See State v. Grissom.*

In evaluating this factor, we find that the time period during which defendant was incarcerated or subject to pretrial incarceration did not constitute an oppressive period of time. *Cf. Barker v. Wingo* (minimal prejudice to defendant resulting from delay of over five years even though he was incarcerated ten months of this period and then released on bail); *State v. Ackley,* 201 Mont. 252, 653 P.2d 851 (1982) (forty-one days of actual pretrial incarceration is not a determinative factor in considering defendant's claim of denial of speedy trial right).

a. Anxiety and Concern of the Accused

Defendant argues the delay deprived him of the opportunity to seek concurrent sentences for the term left on his prior conviction and for the term on the shoplifting charge. The possibility of serving a sentence concurrently has been held not to be a right and that factor alone cannot amount to prejudice. *State v. Tarango,* 105 N.M. 592, 734 P.2d 1275 (Ct.App.1987). *See also State v. Powers,* 97 N.M. 32, 636 P.2d 303 (Ct.App.1981). Under the facts before us, we do not weigh this element in favor of either party.

b. Impairment to Defense

Defendant argues that the delay caused two witnesses to become unavailable when they *might* otherwise have provided testimony favorable to the defense. The evidence was, at best, conflicting as to wheth-

er these witnesses did see the events giving rise to defendant's arrest. *Cf. State v. Lucero,* 91 N.M. 26, 569 P.2d 952 (Ct.App. 1977) (claim of prejudice because of lost witnesses is insufficient where defendant made no showing as to their lost testimony). The mere possibility that these witnesses may have appeared and testified on defendant's behalf had the delay been shorter is insufficient to establish an impairment to the defense. *See State v. Tartaglia.* In addition, defendant made no showing of his attempts to locate these witnesses. *See State v. Evans,* 19 Or.App. 345, 527 P.2d 731 (1974), *cert. denied,* 423 U.S. 843, 96 S.Ct. 77, 46 L.Ed.2d 63 (1975) (no prejudice where defendant does not show his efforts to obtain lost evidence to defend himself). Therefore, we weigh this element in the state's favor.

Our evaluation of the fourth balancing factor discloses that defendant has failed to establish that he sustained any prejudice.

In summation of the speedy trial claim, the length of prosecutorial delay was sufficient to raise a presumption of prejudice, thereby triggering our evaluation of the remaining *Barker* factors in light of the facts and circumstances of this case. Although the first three *Barker* factors are weighed in favor of defendant we do not weigh them heavily against the state. In weighing the fourth factor we find that any prejudice to defendant as a result of the delay was not significant. *See Barker v. Wingo. Cf. United States v. Avalos,* 541 F.2d 1100 (5th Cir.1976), *cert. denied,* 430 U.S. 970, 97 S.Ct. 1656, 52 L.Ed.2d 363 (1977) (describes the three levels of prejudice that may require reversal of a conviction: (1) a showing of actual prejudice even when the three remaining factors are not weighted heavily in favor of accused; (2) deliberate and lengthy government delay for tactical advantage; and (3) when the three other elements of the *Barker* test are heavily weighted in favor of the accused, accused does not need to demonstrate any prejudice); *State v. Harvey,* 85 N.M. 214, 510 P.2d 1085 (Wood, C.J. & Hendley, J., specially concurring) (an inadequately explained twenty-six-month delay and assertion of a speedy trial right by defendant required dismissal on speedy trial grounds despite an equivocal showing of prejudice).

Thus, in the instant case in balancing the *Barker* factors, we do not find that the first three factors weigh heavily in favor of defendant. Coupled with the fact that defendant has not presented proof of any prejudice resulting from the delay, we conclude the trial court properly denied defendant's claims of denial of speedy trial.

II. CLAIM OF DENIAL OF DUE PROCESS

Defendant also asserts the approximately eight-month delay between his arrest in December 1985 and his indictment in August 1986 deprived him of due process because the "unavailability" of two potential witnesses impaired his defense. At the July 1987 pretrial hearing on defendant's motion to dismiss the indictment, defendant's wife testified that a friend, Flora Garcia, and another woman unknown to the Zurlas waited in the car while she and defendant were in K–Mart. Garcia moved to California at some unspecified time after defendant's arrest. Defendant argues the delay caused prejudice to his defense because Garcia was no longer available at the time of trial. He argues the prejudice exists because she "might have seen the arrest" and thus corroborate his story that he was arrested inside the store. However, none of the testimony at the hearing supports his contention. There was no evidence presented that Garcia or the other unknown woman saw anything. In fact, Mrs. Zurla testified upon direct examination that the car was parked "a little bit far," so the two women could not have seen the store doors. Defendant admitted in his brief that he "could not establish conclusively what these witnesses would have been able to testify about."

To prevail on a claim that prosecutorial delay caused a deprivation of due process, the defendant must show the delay caused substantial prejudice, that is, his defense would have been more successful absent the delay. *State v. Duran,* 91 N.M. 756, 757, 581 P.2d 19, 20 (1978); *State v. Lewis,*

107 N.M. 182, 754 P.2d 853 (Ct.App.1988). Substantial prejudice means "actual prejudice to the defendant together with unreasonable delay of the prosecution." *State v. Duran,* 91 N.M. at 757–58, 581 P.2d at 20–21. Lapse of time alone is insufficient to establish prejudice. *Id.* at 757, 582 P.2d at 20; *State v. Jojola,* 89 N.M. 489, 490, 553 P.2d 1296, 1297 (Ct.App.1976).

Defendant has failed to show the substantial prejudice required to obtain dismissal of the indictment under the fourteenth amendment. Defendant has made no showing that the potential defense witnesses were unavailable because of the delay or that he made any attempt to contact them. Moreover, the record does not reflect when Garcia left New Mexico. More importantly, defendant has not shown how the witnesses' absence prejudiced his defense. He has only made vague, unsupported allegations that they "might have seen" the arrest and, thus, might have been able to corroborate his version. As noted above, there is no evidence in the record to support this allegation, since defendant's wife admitted that the women were too far from the crime scene to have observed anything. Proof of prejudice must be definite and not speculative. *State v. Lewis.* The mere possibility of the existence of exculpatory evidence cannot suffice to show prejudice to the defense. Rather, defendant must "establish with specificity the critical testimony which [he] assert[s] has been lost or whether this evidence is available from other sources." *State v. Grissom,* 106 N.M. at 566, 746 P.2d at 672. Because defendant has failed to do so, the trial court properly denied his motion to dismiss on due process grounds.

CONCLUSION

The trial court did not err in denying defendant's motion to dismiss the indictment on either speedy trial grounds or due process grounds. Accordingly, defendant's conviction is affirmed.

IT IS SO ORDERED.

BIVINS, C.J., concurs.

CHAVEZ, J., dissenting.

CHAVEZ, Judge (dissenting).

I cannot agree with the majority's application of the *Barker* factors in this case. I find the seventeen (17) month delay to be inexcusably long in such a simple case. Defendant was in the custody of DOC during most of the delay period. He asserted his right shortly after his arrest. He lost the opportunity for concurrent sentencing and might have had his defense impaired due to the delay.

A finding in favor of one party on any one of the four factors is not necessarily dispositive of a speedy trial claim, *see, Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *State v. Kilpatrick,* 104 N.M. 441, 722 P.2d 692 (Ct. App.1986); *State v. Tartaglia,* 108 N.M. 411, 773 P.2d 356 (1989). Rather, they are related factors and should be considered together, along with any other relevant circumstances. *See Barker, Kilpatrick, Tartaglia.* I disagree that the first three factors do not weigh heavily in favor of defendant.

LENGTH OF THE DELAY

The length of the delay serves a dual role in the analysis of the right to a speedy trial. *State v. Holtslander,* 102 Idaho 306, 629 P.2d 702 (1981); *Barker v. Wingo.* First, it is a triggering mechanism for screening frivolous cases. Second, it is one of the factors to be considered in the balancing process. Thus, the seventeen-month delay in this case should weigh heavier than a ten-month delay. *State v. Kilpatrick* (over ten months of pre-indictment delay was excessive in a simple assault case). Here, over eight months elapsed between arrest and indictment on a simple shoplifting charge. Defendant was not arraigned until seven months after the indictment and the first trial setting was nine months after the indictment. A total of seventeen-month delay from arrest to trial in an uncomplicated case should be afforded more weight than that given by the majority.

ASSERTION OF THE RIGHT

A defendant's assertion of his speedy trial right is entitled to strong evidentiary

weight. *Barker v. Wingo.* Here, defendant asserted his right in a *pro se* motion a short time following his arrest. This assertion reflects that defendant wanted a timely resolution of the charges against him and was not gambling that a delay might work to his advantage due to loss of memory, loss of evidence or witness unavailability. I would weigh this factor heavily in defendant's favor.

REASON FOR THE DELAY

The reason for the delay offered by the state was that it was unaware of defendant's incarceration for much of the time in question. A prisoner does not forfeit his right to a speedy trial solely because he is incarcerated under sentence for another offense, particularly when the state that holds him in prison is the same state that is prosecuting him on the present offense. *State v. Harvey,* 85 N.M. 214, 510 P.2d 1085 (Ct.App.1973); *Raburn v. Nash* 78 N.M. 385, 431 P.2d 874 (1967). In *State v. Harvey* defendant made demands for determination of pending charges while he was incarcerated in California. The state did not seek to extradite him so he could be tried on the New Mexico charges. We held that where the administrative machinery exists, incarceration in a foreign jurisdiction does not provide an adequate reason for the delay and we weighed this factor heavily against the state. Here, defendant was being held in the custody of the state because his parole was revoked. This was partially due to the arrest on the present charge. The state should know the whereabouts of a defendant when it is holding him in custody. According to the testimony of a secretary at the district attorney's office, one phone call to Central Records would have informed the district attorney whether the defendant was being held in custody in any facility in the state. When the machinery exists, the prosecutor has a constitutional duty to attempt to use it. *State v. Harvey.* Upon demand of an accused who is incarcerated, the state must at least make "a diligent, good-faith effort" to obtain his presence for the purpose of trial. *Smith v. Hooey,* 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1968). It would have required minimal effort on the part of the prosecutor to find that the state was holding him in custody. Thus, I would weigh the reason for the delay heavily against the state.

PREJUDICE TO DEFENDANT

The majority rejects defendant's claim that he suffered prejudice due to the delay. In *Smith v. Hooey,* the U.S. Supreme Court specifically addressed how an unreasonable delay can harm an accused who is incarcerated in another jurisdiction. Many of the same considerations apply to one who is incarcerated in the same jurisdiction. The Court stated:

> First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.
>
> . . . . .
>
> . . . his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired.

Id. at 378–80, 89 S.Ct. at 577–78. Here, defendant lost the opportunity to receive a sentence partially concurrent with the one he was serving. The majority is correct that receiving a concurrent sentence is not a right and does not constitute actual prejudice. *State v. Powers,* 97 N.M. 32, 636 P.2d 303. But an accused is entitled to have something less than actual prejudice weigh in his favor under a speedy trial analysis. *Tartaglia.* If defendant had received concurrent sentencing, he would have spent less time in custody. A trial court has discretion to impose concurrent or consecutive sentences. *State v. Mayberry,* 97 N.M. 760, 643 P.2d 629 (Ct.App.1982) The state's delay, however, took that discretion from the court and guaranteed that defendant would serve a longer sentence. This constitutes enough prejudice in my

opinion to have the oppressive incarceration and anxiety subfactors weigh slightly in favor of defendant, or at least, to make them neutral.

Defendant also claims he lost track of two witnesses who could have corroborated his testimony. He made no definite showing as to what their testimony would be. But did he have opportunity to confer with them, in view of his incarceration? After his release, he was unable to locate them. Had the state brought this case to trial at a reasonable time, the witnesses may have been available to testify regarding what they saw, if anything.

Defendant's assertions as to the lost witnesses may be insufficient to establish an impairment to his defense but this subfactor should not be allowed to tip the scales. *Moore v. Arizona,* 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973). The majority, however, rules that defendant's speedy trial right was not violated although the only factor in favor of the state was the impairment of the defense.

By placing undue emphasis on the prejudice factor, the majority rules, in effect, that there is little difference between the application of the speedy trial right and the due process right of an accused. "[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense". *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971). A defendant is not required to show actual prejudice in order to have this factor weigh in his favor. *State v. Tartaglia.* That is the standard for due process, not speedy trial claims. *See, e.g., State v. Duran,* 91 N.M. 756, 581 P.2d 19 (1978). The underlying purpose of the right to a speedy trial is the orderly expedition of the criminal process. *Kilpatrick.* It is not rooted in the prevention of prejudice to a defendant but is "directed principally toward the protection of other interests". *Kilpatrick,* 104 N.M. at 444, 722 P.2d 692.

CONCLUSION

In *Kilpatrick* there was a total of fifteen-month delay between arrest and trial. Defendant did not assert his right until thirteen months after his arrest. He was out on bond the entire time. A witness died two months after the arrest. The only evidence as to the witness's testimony was defendant's affidavit. Yet, in *Kilpatrick* we found a speedy trial violation. By comparison, the present case warrants weighing the factors more in defendant's favor than that afforded defendant Kilpatrick, and by no means should there be a different result.

In the speedy trial balancing process, the conduct of both the prosecution and the defendant are weighed. *Barker v. Wingo, State v. Grissom, State v. Kilpatrick.* It is the state's responsibility to bring an accused to trial within a reasonable time given the circumstances of the case and the complexity of the charges. *Barker, Kilpatrick.* In the balance, this case violated defendant's speedy trial right and the expectations of society in the orderly expedition of the criminal process. *State v. Kilpatrick, State v. Mascarenas,* 84 N.M. 153, 500 P.2d 438 (Ct.App.1972)

I therefore dissent.

789 P.2d 603

STATE of New Mexico
Plaintiff-Appellee,

v.

Robert HENDERSON, Jr.,
Defendant-Appellant.

17638.

Supreme Court of New Mexico.

March 27, 1990.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Appellate Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Freedman, Boyd & Daniels, P.A., Nancy Hollander, Albuquerque, John D.B. Lewis, New York City, amicus curiae, Ass'n on American Indian Affairs, Nat. Youth Council and Jake Whitecrow, Director of the Nat. Indian Health Bd.

Hal Stratton, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Chief Justice.

The State's motion for rehearing having been granted, our opinion as follows shall be substituted for our original opinion filed on December 4, 1989.

Defendant-appellant, Robert Henderson, Jr., was convicted by a jury sitting in Ber-

nalillo County of first degree murder, criminal sexual penetration (CSP), kidnapping, aggravated burglary, and larceny. During the sentencing phase of trial, the jury gave Henderson the death penalty for first degree murder. In arriving at its sentence the jury found three aggravating circumstances: (1) murder of a witness, (2) murder during the commission of CSP, (3) murder during the commission of kidnapping. We find Henderson's attack on his convictions to be without merit. However, we reverse the sentence of death and remand to the trial court for a new sentencing determination on the first degree murder conviction.

FACTS

The victim was discovered by her son on July 18, 1986, lying dead and unclothed on the living room floor in her home. Upon entering the home, the victim's son noticed a smell of gas and saw that the back bedroom window had been broken out and that the bedroom was in a state of disarray. The victim was an eighty-nine year old widow known to have hired transients to do odd jobs around her house and to have taken transients into her home to feed them. The victim's son found only two items missing from his mother's home, a suitcase and a quilt.

Medical testimony established that the victim had received several blows to the head. Her ribs were fractured, presumably by someone pushing on her chest or crushing her. In addition, the victim had been strangled manually. Examination of the victim's vaginal area suggested forcible penetration, but no remains of sperm were discovered. The victim probably still was alive during the sexual assault and during the time when she sustained the rib fractures. Death resulted from a combination of strangulation and the blows to her chest.

After his arrest, Henderson told police that on the night of the murder he went to the victim's house at dark, looked into the house, heard sounds, and went around to knock on the front door. Henderson said that he had known the victim since 1977 and that they frequently had engaged in sexual intercourse. On the night in question, Henderson stated that the victim let him in, prepared food for him, and then voluntarily had sexual intercourse with him. Henderson stated that the victim then had a seizure, and that he attempted to administer manual resuscitation, or "CPR." Henderson said he then carried her into the living room, falling as he did so. In the living room he again pressed on the victim's stomach and chest in order to revive her. When Henderson saw that the victim was dead, he said he panicked and tried to wipe any trace of his fingerprints from the scene. The next day he returned, entered by breaking out the back window, tried to wipe off more fingerprints, turned on the gas, and stole the suitcase with the quilt in it. At trial, Henderson testified that he had lied when he told police that he had a sexual relationship with the victim. When asked if he had raped the victim, he answered, "Yes," and when asked if he had beaten her, he answered, "Yes." At the same time, he maintained that he did not remember having committed those crimes and that he "must have" raped and beaten the victim during an alcoholic blackout. Henderson repeated that he had tried to administer CPR to the victim.

Henderson is a thirty-four year old Navajo Indian who first began drinking at age eleven. After his mother's death he lived in boarding schools around the country. By age twenty he was a chronic alcoholic, getting drunk nearly every day. Henderson became a drifter, unable to hold a job. When he could not afford liquor, he drank mouthwash, aftershave, or cleaning fluid to obtain alcohol. Medical testimony at trial established that Henderson was alcohol dependent and was required to use alcohol as self medication in order to function. After three days without alcohol Henderson could die. While incarcerated, Henderson required medication to prevent fatal alcohol withdrawal. Henderson was prone to blackouts, panic attacks, compulsive behavior, and rash impulses. During blackouts he still could walk around and talk, and it is possible that during a blackout period he could have committed the crimes for which he was convicted.

During voir dire, Henderson's counsel elicited responses from several prospective jurors concerning their attitudes toward parole of capital offenders sentenced to life imprisonment. One prospective juror, subsequently excused for cause, stated that convicts serving a life term usually get out in ten years and that was wrong. Another prospective juror said that a death penalty was more effective in deterring crime because some life felons get out in five or six years. This person stayed on the jury. Another prospective juror stated, "[L]ife imprisonment means ten years and they parole out. Is anybody kept in prison for life?" The court instructed this prospective juror, "[T]he only tools that you will have to answer the question * * * is [sic] the instructions that I give you. Those instructions will say that the sentence you are to consider is life in prison and death." This person sat on the jury.

One eventual alternate juror stated that perhaps the best thing to do is to put to death a life felon who would kill again. Another eventual alternate juror questioned whether a life felon could not be paroled and released. When the court instructed this person during voir dire that the only sentence she could consider would be life or death and asked her if she could follow the court's instructions, she answered, "I think so." Other prospective jurors on voir dire, who stayed neither as jurors nor alternates, likewise expressed reservations about the possibility that a life felon would be paroled.

During the penalty phase of trial, Henderson's counsel requested an instruction be given to the jury as follows:

> An inmate of [the state penitentiary] who was sentenced to life imprisonment as the result of the commission of a capital felony becomes eligible for a parole hearing after he has served thirty years of his sentence.

The court denied this requested instruction.

ISSUES RAISED ON APPEAL

On appeal, Henderson raises twenty-two issues, the following of which we find to be dispositive. These issues may be phrased as follows:

(1) Did the trial court err in rejecting Henderson's proffered jury instruction to the effect that a person sentenced to life imprisonment would be eligible for parole in thirty years?

(2) Did the trial court err in allowing the jury to consider murder of a witness as an aggravating circumstance?

(3) Did the trial court err in allowing the jury to consider murder during the commission of a kidnapping as an aggravating circumstance?

(4) Did the trial court err in denying Henderson's motion to require the court to sentence him for his collateral noncapital convictions prior to the jury's deliberation on the sentence to be given him for the first-degree murder conviction?

We answer questions one and three in the affirmative, and question two in the negative. Our answer to question number four is rendered superfluous by our resolution of question number one, as shall be stated in our opinion herein. However, we conclude nonetheless that the option of prior sentencing on the noncapital offenses is a valid option available to a defendant who, in proper circumstances, requests such sentencing.

I. HENDERSON'S REQUESTED INSTRUCTION ON PAROLE ELIGIBILITY

We base our decision herein on the fundamental fairness, due process and eighth amendment rationales implicit in the decision in *California v. Ramos,* 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), to the effect that " 'the jury [must] have before it all possible relevant information about the individual defendant whose fate it must determine,' " *id.* at 1003, 103 S.Ct. at 3454 (quoting *Jurek v. Texas,* 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976)), and in *McCleskey v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), to the effect that states cannot limit the sentencer's consideration of any relevant circumstance that could "cause it to *decline to impose* the death sentence." *Id.*

at 304, 107 S.Ct. at 1773. Nothing in our decision in *State v. Clark*, 108 N.M. 288, 772 P.2d 322, *cert. denied*, — U.S. —, 110 S.Ct. 291, 107 L.Ed.2d 271 (1989), detracts from our belief that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *Caldwell v. Mississippi*, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985) (quoting *California v. Ramos*, 463 U.S. at 998–99, 103 S.Ct. at 3452).

The requested instruction would have given the jury accurate information on what a life sentence actually means and would have served to correct misimpressions in some jurors' minds that a life sentence means "five or six" years or some other erroneously conceived period of time. In actuality, Henderson received fifty-one years and six months imprisonment on the other convictions, to be served consecutively to the death penalty. We cannot believe that, had the jury known ahead of time that a life sentence actually meant a minimum of twenty-five years and nine months (assuming all meritorious deductions), plus another thirty years before Henderson even would be eligible for parole, it would not have been more likely to impose a life sentence instead of a death sentence. This particular jury had members on it who thought that life meant as little as "five or six years." Such a jury was oriented impermissibly toward the death penalty even before it began its deliberations, and thus it was error for the court not to have restored a proper balance to the jury's orientation by instructing it according to the requested instruction.

II. HENDERSON'S MOTION FOR PRIOR SENTENCING ON THE COLLATERAL NONCAPITAL OFFENSES

In *Clark*, we held that it is not error for the trial court to refuse to impose sentence for the noncapital offenses before the capital sentencing phase *if* the jury is instructed on the range of sentences available and if the jury is allowed to consider that range as a mitigating circumstance (always, at the defendant's request). We now hold that it *is* error to refuse an instruction such as the one considered in Point 1 above, pertaining to the meaning of a life sentence. We further hold that the court should, if requested, either impose sentence on the collateral noncapital offenses or give the range of sentences on those offenses as in *Clark*.

We conclude, however, that the better course of conduct for a trial court to follow would be first to sentence the defendant on the noncapital offenses if requested. Here, of course, Henderson has already been sentenced correctly and validly on his noncapital offenses. On remand, the court should simply inform the jury as to the sentences it earlier gave Henderson on his noncapital offenses. Further, the defendant is also entitled, at his request, to have an instruction read to the jury on parole eligibility following a life sentence, as discussed in Point I above.

To clarify further the distinction between *Clark* and our present opinion, in *Clark*, the defendant requested the court to sentence him on the collateral noncapital offenses before the jury deliberated on the capital offense. While the court denied this motion, it did present to the jury a stipulated instruction on the range of sentencing options available for the collateral offenses. Unlike the present case, Clark did not request an instruction on the meaning of a life sentence. Instead, Clark introduced "expert" testimony and argued this issue to the jury. The *Clark* majority concluded that, although such evidence and argument were improper and prejudicial, they amounted to invited and not fundamental error. 108 N.M. at 297–98, 772 P.2d at 331–332.

III. THE AGGRAVATING CIRCUMSTANCES

Henderson asserts error in the trial court's allowing three aggravating circumstances to be considered by the jury in its deliberations on the death penalty. As provided in NMSA 1978, Section 31–20A–2 (Repl.Pamp.1987), aggravating circum-

stances are to be weighed against mitigating circumstances. What constitutes an aggravating circumstance is set forth in NMSA 1978, Section 31-20A-5 (Repl.Pamp. 1987). Subsections B and G, respectively, of Section 31-20A-5, provide that two of the aggravating circumstances to be considered by the sentencing court or jury are that, "the murder was committed with intent to kill in the commission of or attempt to commit kidnapping * * *; [and] the capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding * * *." Kidnapping is defined, in pertinent part, as "the unlawful taking, restraining or confining of a person, by force or deception, with intent that the victim * * * be held to service against the victim's will." NMSA 1978, § 30-4-1 (Repl.Pamp.1984).

In *Clark*, where we addressed this same issue, we noted that evidence was presented to the effect that Clark told others he had to kill his victim or it "would be the end for him." 108 N.M. at 304, 772 P.2d at 338. While the same degree of certainty does not exist in the case before us as to the separate motives behind Henderson's killing of his victim and his killing her *as a witness*, we nonetheless conclude that a plausible motive for the murder in this case was either a murder to silence a witness, or a murder to overcome the resistance of the rape victim. The lack of any other plausible motive, together with the acts of the defendant in attempting to avoid detection by destroying evidence at the scene that would tie him to the crime, convinces us that a jury could have reasonably inferred from the evidence that the murder was committed to prevent the victim from reporting the crime.

There is evidence in the record of a struggle by the victim. There is also evidence that immediately following the killing Henderson attempted to wipe his fingerprints from the scene. There is further evidence in the record that on the day following the murder Henderson returned to the scene, broke out a window to gain entrance, attempted once again to wipe the scene clean of any incriminating fingerprints, and turned on the gas jets in an effort to obliterate the entire crime scene. We believe that this evidence, along with other evidence in the record, was sufficient to establish the aggravating circumstance of murder of a witness.

The State has thus shown, insofar as this aggravating circumstance is concerned, why a more severe sentence should be imposed on Henderson compared to others found guilty of murder, as required by the holding in *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983); *See State v. Guzman*, 100 N.M. 756, 676 P.2d 1321, *cert. denied*, 467 U.S. 1256, 104 S.Ct. 3548, 82 L.Ed.2d 851 (1984).[1]

The legislature has given us the responsibility to review death sentences on appeal and determine whether the evidence supports the jury's finding of a statutory aggravating circumstance. NMSA 1978,

1. The State argues that our decision on this issue is controlled by our holding in *State v. Guzman*, 100 N.M. 756, 676 P.2d 1321, *cert. denied*, 467 U.S. 1256, 104 S.Ct. 3548, 82 L.Ed.2d 851 (1984). In that case we upheld a death sentence arrived at by a jury that considered and found the same three aggravating circumstances found by the jury here. In both the present case and *Guzman*, there was a single murder victim. In *Guzman*, however, the facts surrounding the murder are different than here.

In *Guzman*, there was a separate and distinct kidnapping, which took place a definite period of time before the murder occurred. The defendant in that case ordered his murder victim and her companion to drive him around in his car for some time before he forced them to get out. He then ordered one of the women to disrobe so that he could rape her. Thus the kidnapping already had been completed before the CSP and murder occurred.

Further, it is clearer in *Guzman* than in the present case that the defendant killed his victim in order to prevent her from becoming a witness against him. First, in *Guzman* there were two potential witnesses and thus twice the possibility that someone would report the defendant. Second, the murder victim's companion escaped, and the defendant chased her down and stabbed her repeatedly, leaving her for dead and without having raped her. This woman managed to survive. This pattern of conduct arguably makes it more certain that the defendant in *Guzman* wanted to kill his victims *in order* to prevent them from reporting him or testifying against him.

§ 31–20A–4(C)(1) (Repl.Pamp.1987). In assessing the death penalty we must apply that "greater degree of scrutiny" called for by the Constitution. *Ramos,* 463 U.S. at 999, 103 S.Ct. at 3452. In exercising that greater degree of scrutiny here, we conclude that the evidence as presented was sufficient to permit the jury to consider murder of a witness as an aggravating circumstance. On remand, the State may again present evidence on this question and the jury may again be permitted to consider murder of a witness as an aggravating circumstance, should the State once again carry its burden of proving this circumstance.

We reach a contrary conclusion, however, with respect to the aggravating circumstance of killing during the commission of a kidnapping. On oral argument on appeal, the State argued that one transaction can support proof of more than one crime. This is accurate. However, simply because there are sufficient elements present to prove more than one crime in the same transaction does not mean that more than one aggravating circumstance has been proven. While the same elements may be present in both instances, and here we do not find that this is the case, establishing the elements of an aggravating circumstance is not the same thing as establishing the elements of a crime.

Since the State made its case on kidnapping by arguing that in raping his victim Henderson simultaneously kidnapped her, the kidnapping and rape in this case, unlike the kidnapping and rape in *Guzman,* are inseparable. If we were to follow the State's reasoning, however, virtually every rape would be simultaneously a kidnapping, and while that may be true to establish elements of two different crimes in one transaction, such reasoning does not suffice to establish the statutory aggravating circumstance. It does not necessarily follow, simply because Henderson raped his victim and then killed her, that Henderson possessed the "intent to kill in the commission of ... kidnapping" as required by Section 31–20A–5(B). In *Guzman* it was obvious that the defendant intended to kill his kidnapped victim during the course of the kidnapping. Here, however, assuming *arguendo* that rape unequivocally means kidnapping, it is not clear to us that Henderson intended to kill his victim during the commission of a kidnapping. We find it more likely that he intended to kill the victim because she was a potential witness against him. We find, in other words, that the evidence as presented does not establish the statutory aggravating circumstance of killing in the commission of a kidnapping, and thus the trial court erred in allowing the jury to consider this aggravating circumstance. On remand, as we shall discuss below, the State is barred by double jeopardy considerations from once again presenting evidence on the aggravating circumstance of killing during the course of kidnapping.

The State asserts that a harmless-error rationale may be applied here, relying on *Clemons v. State,* 535 So.2d 1354, 1361–64 (Miss.1988), *cert. granted in part,* —— U.S. ——, 109 S.Ct. 3184, 105 L.Ed.2d 693 (1989), and *Pinkney v. State,* 538 So.2d 329, 355–57 (Miss.1988), *petition for cert. filed,* May 12, 1989. The State contends that when one of several aggravating circumstances is found invalid by a reviewing court, it is harmless error so long as one or more other aggravating circumstances properly have been considered by the jury. We now address the State's argument on this point.

The court in *Zant,* 462 U.S. at 884, 103 S.Ct. at 2746, held that, under Georgia's death penalty statute, invalidation of one aggravating circumstance did not invalidate automatically the sentencing proceeding. The Georgia sentencing statute is, however, unlike the New Mexico statute in that the use of statutory aggravating circumstances in Georgia is limited to the narrowing of the class of first degree murders to those that are capital offenses, subject to the death penalty. Thereafter, the jury does not consider the statutorily defined circumstances in deciding whether a particular individual should receive the death penalty. By contrast, New Mexico requires the jury to weigh aggravating and

mitigating circumstances in deciding whether to impose the death sentence. The *Zant* court carefully observed that it did "not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its [sentencing] discretion * * *." 462 U.S. at 890, 103 S.Ct. at 2749.

In *Barclay v. Florida,* 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), and *Wainwright v. Goode,* 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), however, the Court addressed the question it had avoided in *Zant.* Both of these cases dealt with the Florida statute, pursuant to which a judge had entered written findings of aggravating *and* mitigating circumstances before imposing the death sentence. Both cases also concerned a subsequent determination that one of the aggravating circumstances was invalid *under the state statute.* In *Barclay,* the Court approved the use of a harmless-error analysis when the trial court had found several aggravating factors but no mitigating factors; in *Goode,* the Court approved of independent reweighing of the findings by the appellate court when both aggravating and mitigating factors had been found by the trial judge.

These cases are distinguishable from the case before us. First, in New Mexico, while the jury does return special interrogatories on aggravating circumstances, it does not return special interrogatories that reveal whether it found any mitigating circumstances. Thus, it is not possible to tell on appeal whether any mitigating circumstances were found, or what weight they were given relative to the aggravating circumstances. While, in deciding some constitutional issues, this court does reweigh or balance facts found at trial, here we also would be required to reweigh the evidence itself.

Second, the challenges to the instructions in this case are *constitutional* challenges, not *statutory* challenges. In *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the Court affirmed reversal of a death sentence under Oklahoma law, after one of the aggravating circumstances was determined to be unconstitutionally vague. Oklahoma, like New Mexico, requires the jury to weigh aggravating and mitigating circumstances in exercising its sentencing discretion. Writing for the Court, Justice White noted that Oklahoma appellate courts do not attempt to save a death penalty when an aggravating circumstance has been found invalid or unsupported by the evidence, and reasoned that the Tenth Circuit Court of Appeals "cannot be faulted for not itself undertaking what the state courts themselves refused to do." *Id.* at 365, 108 S.Ct. at 1860. The case was remanded to the Oklahoma appellate court for further proceedings under state law to determine the appropriate sentence.

Maynard, although affirming reversal of the sentence at issue, leaves unanswered whether, under a sentencing statute such as New Mexico's, a death sentence must be overturned when one of the aggravating circumstances is invalidated on constitutional grounds. As New Mexico courts do not ordinarily "reweigh" evidence on appeal, *cf. Goode,* 464 U.S. at 86–87, 104 S.Ct. at 383, (findings reweighed on appeal), we believe such a procedure to be particularly inappropriate as a means of "saving" a death sentence in light of our statutory duty to exercise special scrutiny of death sentence determinations. *See Guzman,* 100 N.M. at 761, 676 P.2d at 1326 (it is not this court's duty to retry sentencing phase for what may be a better result); *State v. Garcia,* 99 N.M. 771, 781, 664 P.2d 969, 979, *cert. denied,* 462 U.S. 1112, 103 S.Ct. 2464, 77 L.Ed.2d 1341 (1983); NMSA 1978, § 31–20A–4 (Repl.Pamp.1987). Under our statutory scheme, and because the record will not and does not reveal the basis of the jury's decision, we never could conclude beyond a reasonable doubt that, absent consideration of the invalid circumstance, the jury would have reached the same result.

In other words, in a state such as New Mexico where aggravating and mitigating

circumstances are weighed by the jury, when one or more of the aggravating circumstances is found to be invalid the entire death penalty sentence cannot be saved. The harmless error rationale put forth in *Clemons* and *Pinkney* would not be applicable to the specific statutory scheme in New Mexico where one cannot tell from the judgment of the jury what mitigating circumstances, if any, were found. This court has no reliable method of weighing the effect of the invalidity of one aggravating circumstance in the minds of the jurors without this information. Hence we reject the State's harmless-error argument.

The eighth amendment mandates that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia,* 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (discussing the holding in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)).

Statutory aggravating circumstances serve to channel the jury's sentencing discretion in a manner that meaningfully distinguishes capital offenses in terms of the degree of culpability of the murderer. These circumstances must "reasonably justif[y] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant,* 462 U.S. at 877, 103 S.Ct. at 2742. As it is the duty of this court under our death penalty statute to assure proportionality in sentencing, *see* Section 31–20A–4(C)(4), it is appropriate for us to inquire in this case whether instructing the jury on particular aggravating circumstances "genuinely narrow[ed] the class of persons" to those upon whom imposition of the death penalty was appropriate. *Zant,* 462 U.S. at 877, 103 S.Ct. at 2742. "[I]f a state wishes to authorize capital punishment it has a constitutional responsibility to tailor *and apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia,* 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980) (emphasis added).

Double jeopardy bars resubmission of aggravating circumstances as to which no substantial evidence was presented. Finally, at a new sentencing hearing, the prosecution may not again submit instructions on the aggravating circumstance of murder committed in the course of a kidnapping. Our determination that this aggravating circumstance was submitted erroneously to the jury because of insufficient evidence raises double jeopardy consequences for the prosecution on remand.

In *Poland v. Arizona,* 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986), the defendant's death sentence was overturned on appeal because insufficient evidence supported the aggravating circumstance of an especially heinous, cruel, or depraved killing. However, the trial court had refused to consider the circumstance of a murder for pecuniary gain because of an erroneous belief that this circumstance only applied in cases of murder-for-hire. The Supreme Court held that Double Jeopardy did not bar a new sentencing proceeding on the murder for pecuniary gain, but its holding implied that the new proceeding should be limited to this aggravating circumstance.

Writing for the majority, Justice White reasoned:

> It is true that the sentencer must find *some* aggravating circumstance before the death penalty may be imposed, and that the sentencer's finding, albeit erroneous, that no aggravating circumstance is present is an "acquittal" barring a second death sentence proceeding.... [However, while the] defendant may argue on appeal that the evidence presented at his sentencing hearing was as a matter of law insufficient to support the aggravating circumstances on which his death sentence was based * * * the Double Jeopardy Clause does not require the reviewing court, if it sustains that claim, to ignore evidence in the record supporting another aggravating circumstance which the sentencer has erroneously rejected * * *. We hold, therefore, that

> the trial judge's rejection of the "pecuniary gain" aggravating circumstance in this case was not an "acquittal" *of that circumstance* for double jeopardy purposes, and did not foreclose its consideration by the reviewing court * * * [nor] foreclose a second sentencing hearing * * *.

Id. at 156–57, 106 S.Ct. at 1755–56 (second emphasis added). *See also State v. Silhan,* 302 N.C. 223, 275 S.E.2d 450 (1981) (under North Carolina statute requiring jury to find and weigh statutory aggravating circumstances against mitigating circumstances in arriving at its decision whether to impose death penalty, State is proscribed from again presenting evidence of aggravating circumstances at new sentencing proceeding if: (1) insufficient evidence was presented at the preceding hearing; (2) the jury at the preceding hearing after considering evidence failed to find that circumstance existed; or (3) there would be other legal impediment such as felony-murder merger rule to its use, but state may rely at new death sentence proceeding on any aggravating circumstance as to which it offered sufficient evidence at hearing from which appeal taken); *see generally Arizona v. Rumsey,* 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) (sentencer's finding, albeit erroneous, that no aggravating circumstance is present is an "acquittal" barring a second death sentence proceeding); *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) (double jeopardy bars prosecution from seeking second conviction when a reviewing court finds evidence insufficient to support judgment against defendant just as it does when there has been an acquittal by the trial court). *Cf. Zant v. Redd,* 249 Ga. 211, 290 S.E.2d 36 (1982), *cert. denied,* 463 U.S. 1213, 103 S.Ct. 3552, 77 L.Ed.2d 1398 (1983); *Brasfield v. State,* 600 S.W.2d 288 (Tex.Crim.App.1980) *overruled on other grounds, Janecka v. State,* 739 S.W.2d 813 (Tex.Crim.App.1987). *See generally,* Bennett, *Double Jeopardy and Capital Sentencing: The Trial and Error of the Trial Metaphor,* 19 N.M.L.Rev. 451 (1989).

As we specifically have held that the court erred in instructing the jury on the aggravating circumstance of murder during the commission of kidnapping, because the State failed to present substantial evidence on this circumstance, the State is precluded from again seeking to so instruct the jury.

To clarify, on remand the jury may consider the existence of two aggravating circumstances only. In other words, it is open to the jury on resentencing to determine, in addition to the alleged aggravated circumstance of killing during the commission of CSP, that the victim's murder was "murder of a witness to a crime," *provided* the State satisfies the jury beyond a reasonable doubt that the killing was committed during CSP and "for the purpose of preventing report of that crime." *See Clark,* 108 N.M. at 304, 772 P.2d at 338.

However, it shall not be open to the State to attempt to prove on remand that independent facts exist which support murder during the course of kidnapping. Finally, on remand, the new sentencing jury should be instructed that it need not unanimously find the existence of a mitigating circumstance before considering it. *See Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). We disapprove of any language in *Clark* to the contrary.

For all these reasons, we reverse the death sentence and remand this case to the trial court for a new sentencing hearing to be conducted in a manner that is not inconsistent with our conclusions above.

IT IS SO ORDERED.

BACA and WILSON, JJ., concur.

RANSOM and MONTGOMERY, JJ., Concur in part, Dissent in part.

RANSOM, Justice (concurring in part, dissenting in part).

I concur in the reversal of the sentence and in the remand for a new sentencing determination with instructions to the jury on the meaning of the alternative sentence of life imprisonment, and on the time the sentence would begin in relation to sentences to be served on collateral offenses.

However, in deference to "meaningful distinctions" necessary to achieve proportional sentencing among persons who receive the death penalty and those who do not, and for many of the reasons stated by Justice Montgomery in his partial dissent, I would limit the jury's consideration of aggravating circumstances to murder during the commission of criminal sexual penetration. I concur in all other aspects of the majority opinion except as follows:

Intent is a false issue. I do not agree with any inference that may be drawn from the majority opinion that Section 31–20A–5(B) requires proof of a specific intent for the aggravating circumstance of kidnapping. The majority refers to *Guzman,* in which "it was obvious that the defendant intended to kill his kidnapped victim during the course of the kidnapping," arguably attributing to the kidnapping a specific intent to commit the further act of murder. The majority then relies on a lack of evidence that Henderson "intended to kill his victim during the commission of a kidnapping." [1]

The requirement of specific criminal intent is distinguished from the requirement of general criminal intent by "defendant's intent to do some further act or achieve some additional consequence." *State v. Bender,* 91 N.M. 670, 671, 579 P.2d 796, 797 (1978) (quoting *People v. Hood,* 1 Cal.3d 444, 456, 462 P.2d 370, 378, 82 Cal. Rptr. 618, 626 (1969)). For example, a specific intent is required for a finding of the aggravating circumstance of murder of a witness *to prevent the report of a crime. See* § 31–20A–5(G). I do not believe a similar specific intent has been articulated by the legislature with respect to the felonies in Section 31–20A–5(B). There, the required intent is only a general criminal intent.

Underlying facts and circumstances of kidnapping are not separate from criminal sexual penetration. The rationale upon which I rely for finding a lack of evidence to support the aggravating circumstance of intent to kill in the commission of kidnapping was set forth in my specially concurring opinion to the original opinion, filed December 4, 1989. That "meaningful distinction" rationale has been adopted by the majority in the last two paragraphs of its Point III as an appropriate inquiry under this Court's duty to assure proportional sentencing.

From the perspective of proportionality, it was error to instruct on kidnapping as an aggravating circumstance. Each potential aggravating circumstance must point to separate underlying facts or circumstances in the transaction setting of the murder and must serve to distinguish the degree of culpability of the murderer under different murder scenarios.[2] The fact that the defendant in *Guzman initiated* the kidnapping well before and separately from his commission of another felony arguably suggests a degree of deliberation or otherwise distinguishes a transaction sequence that sets his crime apart from other cases of rape-and-murder.

Although our statute does not require the jury to attach any particular weight to aggravating circumstances, there may be a natural tendency to attach greater significance to a set of facts that supports two instructions than to one supporting only a single instruction. Channelling the jury's consideration to both criminal sexual penetration and kidnapping amounted to double counting. When instructions fail to sort out events and circumstances in a meaningful way, but instead direct the jury's attention twice to a single set of

1. It is noted that, because of identity of facts used to establish kidnapping and criminal sexual penetration, the majority by this reasoning should reach the same result as to both aggravating circumstances. The aggravating circumstances to be considered under Section 31–20A–5(B) may include *either* "intent to kill in the commission of * * * kidnapping * * * *or* criminal sexual penetration." (Emphasis added.)

2. The problem encountered in this case with factual identity between two potential aggravating circumstances appears to be limited to kidnapping and CSP or kidnapping and certain instances of criminal sexual contact with a minor because, given the definition of kidnapping, virtually every case supporting one of the latter aggravating circumstances also would support charges of kidnapping.

events and circumstances as "aggravating," the result is an unacceptable risk that the jury will be oriented unreasonably towards choosing death over life imprisonment. Because the state failed to introduce evidence of sufficient separate facts to support an instruction on kidnapping as well as an instruction on criminal sexual penetration, it was error to submit both instructions to the jury.

Length of incarceration is a mitigating factor. Today, we reach a different result than reached by the majority in *State v. Clark,* 108 N.M. 288, 772 P.2d 322 (1989). While it is possible to draw facial distinctions between the two cases, I believe ultimately they cannot be harmonized because they take fundamentally irreconcilable stands on the relevance under the eighth amendment of "the sentencing prerogatives of the trial judge, or the possible length of a life sentence." *Clark,* 108 N.M. at 295, 772 P.2d at 329. It was on this point, of course, that this Court split in *Clark,* with the majority holding these issues to be irrelevant. *Compare id.* at 294, 772 P.2d at 328 ("We do not agree that the potential period of confinement of a capital defendant sentenced to life imprisonment is a mitigating circumstance under the eighth amendment jurisprudence of the United States Supreme Court.") *with id.* at 312, 772 P.2d at 346 (Sosa, C.J., specially concurring) ("The Supreme Court has held that consideration by the jury of a convicted capital felon's future dangerousness and the relationship of that dangerousness to the length of time he must serve in prison * * * is a proper subject for the jury's deliberation when it sits to decide whether the defendant should receive the death penalty. *California v. Ramos,* 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983); *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).") *and id.* at 316, 772 P.2d at 350 (Ransom, J. dissenting in part) ("*Lockett* and its progeny require that the defendant be allowed to place before the jury any relevant mitigating circumstance. 'States cannot limit the sentencer's consideration of any relevant mitigating circumstance that would cause it to decline to impose the [death] penalty.' *McCleskey v. Kemp,* 481 U.S. 279, 306 [107 S.Ct. 1756, 1774, 95 L.Ed.2d 262] (1987).").

Moreover, once it is acknowledged that the length of incarceration is relevant as mitigation under the eighth amendment, it cannot be maintained that the judge nevertheless retains discretion to choose whether to instruct the jury on the actual collateral sentence decided upon by the court or merely on the range of possible collateral sentences. There simply exists no acceptable reason to allow the introduction of added uncertainty and the concomitant possibility of jury error that may attend a complex instruction of the second sort. *See Eddings v. Oklahoma,* 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982) (O'Connor, J., concurring) (as much as humanly possible, death sentence determinations must not be based on whim, passion, prejudice, or mistake); *McCleskey,* 481 U.S. at 335, 107 S.Ct. at 1789 (Brennan, J. dissenting) (Supreme Court has demanded a uniquely high degree of rationality in imposing the death penalty).[3]

MONTGOMERY, Justice (concurring in part and dissenting in part).

I join in the opinion of the Chief Justice, except that I dissent from the ruling that there was sufficient evidence of the aggravating circumstance of murder of a witness to permit the jury to find and consider that circumstance at the sentencing hearing. I would vacate the sentence and remand for resentencing with instructions that, because of double jeopardy, the state may not resubmit the issues of murder of a witness and murder during the commission of a kidnapping as aggravating circumstances.

In the original opinion in this case filed December 4, 1989, the Chief Justice, Justice Ransom and I ruled that the answer to question (2)—"Did the trial court err in

3. Based on this same principle, I do not believe length of incarceration to be subject to proof by testimony or documents, nor do I believe it to be the proper subject of attorney argument. To this extent, I agree with the majority in *Clark,* and believe that portion of the *Clark* opinion is not contradicted by our decision today.

allowing the jury to consider murder of a witness as an aggravating circumstance?" —was in the affirmative. Now the Court rules that it is in the negative. In my opinion, nothing has been presented to warrant this change of position. While I fully respect the prerogative of any Justice to change his mind after the filing of a motion for rehearing, I observe that the state did not even draw into question, in its motion for rehearing, our original ruling on this issue. I believe that the disposition of the issue in the original opinion was correct, and I therefore disagree with the Court's reversal of its conclusion in the opinion on rehearing.

In the discussion of this issue in the original opinion, we first contrasted this case with *State v. Guzman,* 100 N.M. 756, 676 P.2d 1321, *cert. denied,* 467 U.S. 1256, 104 S.Ct. 3548, 82 L.Ed.2d 851 (1984), in the same way as does the opinion on rehearing in footnote 1. We then said:

> In the present case we have nothing like the certainty in the factual pattern that we had in *Guzman* to establish three separate and distinct aggravating circumstances. Here we simply have a murdered and raped victim. The State infers from the evidence that Henderson killed the victim in order to keep her from testifying against him. We cannot say, however, that the evidence conclusively establishes the separate and distinct aggravating circumstance of killing a witness.

Contrasting the present case with *State v. Clark,* 108 N.M. 288, 772 P.2d 322 (1989), we went on to note, as does the opinion on rehearing, that "[t]he same degree of certainty does not exist in the case before us as to the separate motives behind Henderson's killing of his victim and his killing her *as a witness.*" (Emphasis in original.) The original opinion continued:

> In other words, the State has not shown, insofar as this aggravating circumstance is concerned, why a more severe sentence should be imposed on Henderson compared to others found guilty of murder, as required by the holding in *Zant v. Stephens,* 462 U.S. 862, 877 [103 S.Ct. 2733, 2742, 77 L.Ed.2d 235] (1983). Here, for example, while the State may have shown that Henderson killed the victim and that the victim was a potential witness against him, the State has not shown necessarily that Henderson killed the victim "for the purpose of preventing report of the crime" as the statute requires. *See* § 31–20A–5(G). As we stated in *Clark,* "Many killings of kidnap victims, but by no means all, may be motivated by the desire to escape criminal prosecution." 108 N.M. at 305, 772 P.2d at 339.
>
> Here, it seems to us that Henderson's intent to conceal his crime was more fully formed on the day after the murder, as shown by his return to the crime scene to wipe off fingerprints, turn on the gas, etc. Had he possessed the intention at the time of the victim's death to eliminate all traces of his presence from the scene of the crime, it seems more likely that he would have accomplished this on the same night when the victim died, rather than by returning to the scene to continue eradicating evidence of his presence.

The opinion on rehearing concludes that a "plausible" motive for the murder in this case was *either* to silence a witness *or* to overcome the resistance of the rape victim. Given the fact that we have upheld, as supported by sufficient evidence, submission to the jury of the aggravating circumstance of murder during the commission of CSP, I do not see how the Court can conclude that there was *also* sufficient evidence to find, beyond a reasonable doubt, that Henderson murdered the victim for the purpose of preventing her report of the crime. Conceivably, one or the other, but not both, of these aggravating circumstances could be submitted to the jury. The evidence convinces me, however, that the jury could reasonably find, beyond a reasonable doubt, that the victim was murdered during the commission of CSP; but in light of the considerations quoted above from the original opinion, and given the "greater degree of scrutiny" required in death-penalty assessments, I believe that there was insufficient evidence to permit

the jury to find that the victim was murdered for the purpose of preventing her report of the crime. *See State v. Williams,* 304 N.C. 394, 284 S.E.2d 437, 456 (1981) (evidence of post-killing attempts to avoid detection insufficient for inference that killing was motivated by desire to avoid arrest).

789 P.2d 616

STATE of New Mexico, Plaintiff–Appellee,

v.

Martha RUFFINS, Defendant–Appellant.

No. 18587.

Supreme Court of New Mexico.

April 11, 1990.

Jacquelyn Robins, Chief Public Defender, Jerry Todd Wertheim, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen., Margaret McLean, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WILSON, Justice.

The court of appeals certified this matter to us, pursuant to NMSA 1978, Section 34–5–14(C) (Repl.Pamp.1981), to clarify the elements required to prove a completed forgery. We determine: (1) whether the crime of forgery requires physical delivery, the passage of interests to a holder, or delivery and the passing of interests to a holder; (2) if physical delivery is sufficient, whether the delivery must be accepted; and (3) if delivery is not sufficient, whether the common law crime of uttering is included in NMSA 1978, Section 30–16–10(B)

(Repl.Pamp.1984). We conclude that either physical delivery or the passing of an interest, whether accepted or not, is sufficient to complete the crime of forgery. Given our holding, we need not address the third issue presented.

BACKGROUND

This case arose from the following facts. On December 18, 1986, Martha Ruffins (Ruffins), defendant-appellant, and three male companions visited an Allsups store and asked the night clerk, Pauline Halley (Halley), for directions. The four left the store and later returned. During the second visit Halley scolded Ruffins for walking behind the counter area, which was prohibited to customers. The four then left the store. After Ruffins's second visit Halley noticed her purse, which contained her checkbook, was missing and called the police.

On December 19, 1986, Ruffins and her companions visited Cook's Truck Stop (Cook's). Ruffins handed the cashier, June Sonnemaker (Sonnemaker), a two-party check to cash. Ruffins's companions indicated that she wanted to cash the check to pay for gas while they waited for food at the restaurant. The check, drawn from Daniel and Pauline Halley's account, was payable to Ruffins for $80 and was signed "Mrs. Pauline Halley." Ruffins insisted that Sonnemaker cash the check, claiming she knew the restaurant's cook and had identification. Sonnemaker refused to cash the check, gave it back to Ruffins and canceled the foursome's food order. The four then left Cook's, presumably taking the forged check with them.

Ruffins was charged with forgery and larceny under $100, based on these events. A jury acquitted Ruffins of the larceny charge, but convicted her of forgery. Ruffins was sentenced to one year imprisonment, to be served concurrently with a one year habitual offender enhancement, and two years suspended. Ruffins appealed her conviction and sentence to the court of appeals, which then certified this matter to us to resolve conflicts in New Mexico's legal requirements for a completed forgery.

ISSUES

On appeal Ruffins claims: (1) her acts constituted attempted forgery and her counsel's failure to request such a jury instruction rendered him ineffective; and (2) the State's failure to introduce the forged check precluded her conviction. We examine each issue in turn.

I. FORGERY

(A) *Statutory Elements of Forgery*

Under our statute, forgery consists of:

A. falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or

B. knowingly *issuing or transferring* a forged writing with intent to injure or defraud.

NMSA 1978, § 30-16-10 (Repl.Pamp.1984) (emphasis added). New Mexico Uniform Jury Instruction SCRA 1986, 14-1644, defines "issuing or transferring" as knowingly *giving or delivering* a false instrument to a victim, with intent to injure, deceive or cheat. A committee commentary to this instruction states that it contains all the elements of forgery and requires the jury to determine only physical delivery. The commentary also notes that the court of appeals, relying on Uniform Commercial Code (UCC) definitions of the forgery statute's terms, has held that forgery additionally requires an "issuing or transfer of an interest and not merely a physical transfer." *See also State v. Linam,* 90 N.M. 729, 730, 568 P.2d 255, 256 (Ct.App.), *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977); *State v. Tooke,* 81 N.M. 618, 619, 471 P.2d 188, 189 (Ct.App.1970).

(B) *New Mexico Case Law*

Several New Mexico cases construe our forgery requirements. In *State v. Tooke* the court of appeals upheld a conviction of attempted forgery where the defendant presented a forged check to a clerk to cash, and the clerk told the defendant the check must be "okayed." The defendant then physically gave the check to the "okayer," who held the check while calling "Safety Check" to verify its validity. The "okayer"

then refused to cash the check. *See Tooke,* 81 N.M. 618, 471 P.2d 188 (1970).

In applying the forgery statute to these facts, the court interpreted the statute's terms "issuing" and "transferring" to "encompass a delivery to one who is a holder with the passing of interests from one to another." *Id.* at 619, 471 P.2d at 189. In interpreting the forgery statute, the court relied on the following UCC definitions:

(1) "issue" is "the first delivery of an instrument to a holder," NMSA 1978, Section 55–3–102(1)(a);

(2) "delivery" is a "voluntary transfer of possession," NMSA 1978, Section 55–1–201(14) (Cum.Supp.1989);

(3) A check's "holder" is one who has legally acquired its possession by indorsement *or* delivery, NMSA 1978, Section 55–1–201(20) (Cum.Supp.1989); and

(4) A "transfer" occurs when an instrument vests the transferor's rights in the transferee, NMSA 1978, Section 55–3–201(1).

Based on the above considerations, the court of appeals concluded that the defendant's physical transfer of the check to the "okayer" did not pass any interests in the check. Thus, the crime of forgery was incomplete and the defendant was properly convicted of attempted forgery.

Seven years later in *State v. Linam,* 90 N.M. 729, 730, 568 P.2d 255, 256 (Ct.App.), *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977), the court of appeals upheld a defendant's forgery conviction on facts similar to those in *Tooke.* In *Linam,* the defendant physically gave a forged check to a bank teller to cash. The teller questioned the check's validity and took it to her supervisor. The supervisor compared the payor's indorsement on the check with that on the signature card, and concluded they did not match. The police were then called and arrested the defendant. The defendant argued that the evidence only supported a conviction for attempted forgery, since the facts in his case were indistinguishable from those in *Tooke.* The court of appeals disagreed and reasoned that in this case "interests" passed to the teller, who had immediate authority to cash the check; whereas in *Tooke,* the check was referred to an "okayer" as a preparatory step to cashing the check. The fact that the teller referred the check to her supervisor did not convert the forgery into an attempt. Thus, the defendant was properly convicted of forgery.

Judge Sutin, specially concurring in *Linam,* determined that the court's distinction between *Tooke* and *Linam* was "a distinction without a difference." In his view, the defendants' actions in these two cases were virtually identical and both defendants should be guilty of the same offense. Judge Sutin reasoned that *Tooke* was overruled by the jury instruction requiring the jury to determine only physical delivery, and a transfer of interests was not required to prove forgery. *See Linam,* 90 N.M. at 731, 568 P.2d at 257.

(C) *Clarification*

In our view, a forgery is completed when a defendant possessing the requisite intent: (1) falsely makes or alters a writing which purports to have legal efficacy; (2) physically delivers a forged writing; *or* (3) passes an interest in a forged writing. *See* NMSA 1978, § 30–16–10(B) (Repl.Pamp. 1984). Only the second and third methods of forgery are at issue in this case.

(1) *Delivery*

Under our statute, physical delivery of a forged instrument is sufficient to constitute "issuing or transferring" a forged instrument and no "interests" need pass. Section 30–16–10(B) clearly states that a forger may either issue *or* transfer a forged writing. We agree with Judge Sutin that the defendants' actions in *Tooke* and *Linam* are indistinguishable and the crimes in each case should be the same. We further agree that Ruffins's actions in the present case are indistinguishable from those of the defendants in *Tooke* and *Linam.* In each case the defendant physically delivered a forged instrument to another for cashing, but the prospective cashiers refused to cash the check.

The court of appeals' requirement that interests must pass to complete a forgery appears to be based on the UCC's definition of "transfer" as an occurrence which vests the transferor's rights in the transferee. *See* NMSA 1978, § 55–3–201(1). By requiring both delivery *and* the passing of an interest, the court effectively substitutes the word *and* for *or* in the statutory phrase "issuing *or* transferring." *See* § 30–16–10(B). "The word 'or' is given a disjunctive meaning unless the context of the statute demands otherwise." *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n,* 106 N.M. 622, 624, 747 P.2d 917, 919 (1987).

While examination of the UCC definitions is illuminating, in a criminal case it is even more important that a person of ordinary intelligence have adequate warning of what conduct is forbidden. When a statute does not define its terms, general rules of statutory construction dictate that we interpret those terms in the common, ordinary sense. *United States v. Mayberry,* 774 F.2d 1018, 1020 (10th Cir.1985), *superseded on other grounds,* 18 U.S.C. § 3013(d) (1988); *United States v. Austin,* 614 F.Supp. 1208, 1218 n. 66 (D.N.M.1985); *Security Escrow Corp. v. Taxation & Revenue Dep't,* 107 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct.App.1988). Here the court of appeals, rather than the legislature, specifically defined the terms "issue" and "transfer"; thus, we look to the ordinary meanings of these words. "Issue" is ordinarily defined as the act of giving out, making available, or offering for action or distribution. *See* Webster's Third New International Dictionary 1201 (1971). "Transfer" is ordinarily defined as "the conveyance of right, title, or interest." *Id.* at 2427. Such definitions of these terms are not only consistent with those of the UCC, but accurately reflect the ordinary meanings of those terms as understood by persons of common intelligence.

Applying these definitions to our statute, a defendant *issues* a forged writing when he or she knowingly physically delivers the false instrument, offers the false instrument, or otherwise makes the false instrument available for action. A defendant *transfers* a forged writing when he or she knowingly conveys an interest contained in the false instrument. For instance, a stock certificate may be forged to indicate a false owner. The false owner could then transfer the ownership of the forged stock by a written assignment. Although the forged certificate itself would not be physically delivered to the party to be defrauded, the assignment of ownership would be a transfer of interest in a forged instrument, and the crime of forgery would be complete.

Therefore, a defendant may issue or transfer a forged writing either by a physical delivery of the forged instrument for action by a third party *or* by passing an interest in the forged instrument to a third party. Accordingly, we overrule *Tooke* and *Linam* to the extent they conflict with this opinion.

(2) *Acceptance of Delivery*

Forgery is complete when the false instrument is issued or transferred with the requisite intent, regardless of its acceptance. *State v. Garcia,* 26 N.M. 70, 72, 188 P. 1104 (1920); 37 C.J.S. *Forgery* § 3 (1943). Our forgery statute does not require that the defendant gain, or that the prospective victim experience a loss or injury to complete the crime. *See Linam,* 90 N.M. at 730, 568 P.2d at 256. A prospective victim's refusal to accept a forged check, does not change the fact that the defendant offered it for action as genuine. In that situation, the defendant's actions would constitute forgery rather than an attempt. Thus, we conclude that acceptance of a forged instrument is unnecessary to complete the crime of forgery. We overrule *State v. Lopez,* 81 N.M. 107, 464 P.2d 23 (Ct.App.1969), *cert. denied,* 81 N.M. 140, 464 P.2d 559 (1970), to the extent it suggests otherwise.

Under our forgery statute, as clarified, Ruffins's actions constituted the completed crime of forgery and she was not entitled to a jury instruction for attempted forgery. Ruffins was not denied effective assistance of counsel. Having found that physical

delivery is sufficient to complete the crime of forgery, we need not address whether our forgery statute encompasses uttering.

II. FAILURE TO INTRODUCE THE FORGED CHECK

Ruffins next contends that the prosecution's failure to enter the forged check into evidence at trial precludes her conviction for the offense. Ruffins relies on *Woods v. State,* 142 Tex.Crim. 569, 155 S.W.2d 615 (1941) to support her position. In *Woods,* the check was available, the State marked it as an exhibit, and a witness identified it. However, the State did not formally introduce the check into evidence, as Texas law required.

New Mexico law allows proof of a material fact by circumstantial evidence and inference. *State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984). Thus, a forged check proven by these means need not be introduced into evidence. In this case the forged check was returned to Ruffins and was not available at trial. However, Sonnemaker's description of the check's contents was sufficient proof under New Mexico law. Adopting the Texas rule would preclude convicting all forgers wise enough to regain possession of their forged checks when potential victims refused to cash them. We conclude that the State's failure to introduce the forged check at trial did not preclude Ruffins's conviction for forgery. We affirm Ruffins' conviction and sentence.

IT IS SO ORDERED.

SOSA, C.J., and RANSOM, BACA and MONTGOMERY, JJ., concur.

789 P.2d 620

The CITIZENS BANK OF CLOVIS, a New Mexico corporation, Plaintiff–Appellee,

v.

James L. RUNYAN, Jr., George McLiney and John Wilson, individually and doing business as a partnership, Defendants–Appellants,

and

Don Carlos Ranch, a partnership, and W. Dwight Clower, Defendants–Appellees,

Paul C. Dean, Michael D. Hobbs, and all Unknown Claimants of Interest in the Premises Adverse to Plaintiff, Defendants.

No. 18780.

Supreme Court of New Mexico.

April 12, 1990.

Rehearing Denied April 25, 1990.

Keleher & McLeod, Kurt Wihl, Albuquerque, for defendants-appellants.

Lynell G. Skarda, Clovis, for plaintiff-appellee.

Atwood, Malone, Mann & Turner, Victoria S. Arends, Roswell, for defendant-appellee Don Carlos Ranch.

OPINION

SOSA, Chief Justice.

James L. Runyan, Jr. (Runyan) appeals a partial summary judgment, made final by the trial court, in favor of The Citizens Bank of Clovis (CBC). At issue is a sum of money, more than $400,000, placed in an interest-bearing account with CBC pending resolution of a controversy over who is entitled to the account. The facts behind the creation of the account are as follows.

I.

FACTS

Runyan bought cattle from one Paul Dean, an experienced cattle merchant doing business on both sides of the Rio Grande. Runyan, who was domiciled in Missouri, agreed to pay Dean a certain purchase price for 1,867 head of Mexican cattle. Runyan further agreed with Dean to permit Dean to pasture the cattle in New Mexico for a given period and to pay Dean a surcharge for any weight the cattle gained while being pastured.

Dean then sold a disputed number of cattle to one Dwight Clower, a farmer in Roosevelt County. It is likely that some 1,196 head of cattle were exchanged. Runyan alleges that some of the cattle sold to Clower were steers which Runyan had purchased from Dean. Clower admittedly did not receive bills of sale from Dean for the cattle he bought from Dean. However, Clower did receive shipping invoices. At least two of these invoices indicated that the cattle he was receiving from Dean had been shipped under Runyan's name. Further, a buy-back agreement, discussed below, between Dean and Clower, contained the following language: "This contract shall include all merchantable cattle bearing the slash cross bell brand, purchased from Mike Hobbs and Dean Land and Cattle."

The brand in question—"slash-cross-bell"—was owned by a company represented by Runyan. There is no dispute that the brand was used to identify cattle belonging to Runyan. Mike Hobbs was Dean's agent, and acted to sell certain of the cattle to Clower and on occasion received payment from CBC on Dean's behalf. In his deposition testimony, Clower testified that he "rarely ever" looked at the documents pertaining to the cattle delivered to him by Hobbs. When asked if he recognized Jim Runyan's name on certain of the documents, he answered, "Now I would say that's Jim Runyan, yes, which meant nothing to me at the time."

When asked about his previous dealings in cattle sales, Clower answered that at least twice he purchased cattle from "Mid-Ark Cattle Company out of Meridian, Mississippi." Any other dealings he had in cattle sales he couldn't remember "off the top of my head," but he "could look and see" if he still had records of such dealings. Clower had been ordered by subpoena to bring these records to his deposition, but did not comply, and the court issued its partial summary judgment without Clower's having produced records of any past dealings as a cattle merchant.

Clower proceeded to pasture the cattle he bought from Dean through Hobbs on his farm lands in Curry and Roosevelt Counties. Hobbs, acting on Dean's behalf, negotiated with Clower a buy-back agreement in which Clower would sell to Dean some of the cattle Clower had just bought, including cattle branded with Runyan's slash-cross-bell brand. During this period CBC had been advancing Clower money to purchase the cattle from Dean. A CBC vice-president at one point visited Clower's farm to inspect the cattle. Following questions by counsel at his deposition hearing,

Clower's testimony on this visit was as follows:

> Did anybody from the bank ever come to look at the cattle?
>
> Yes
>
> * * * * * *
>
> And at that point, some of [the cattle] had been branded?
>
> Yeah.
>
> With the Slash Cross Bell?
>
> Right, Slash Cross Bell [and some with Clower's own brand].
>
> * * * * * *
>
> It's your understanding the reason [the bank official] came out in March was to look at the cattle they were loaning money on?
>
> Uh-huh [yes].

Clower testified that his foreman branded "800, approximately" of the cattle with Runyan's brand before returning them to Dean, and that he then informed CBC's vice-president of the buy-back agreement. The buy-back agreement contained the following language: "1,100 total cattle with a [slash-cross-bell brand drawn in]. Buy back to include 900 head balance sold to Dwight Clower." CBC duly filed financing statements pertaining to its security interest in the subject cattle, describing the cattle by reference to Clower's brand but not to the slash-cross-bell brand. Clower then sold some 115 head of cattle to Dean without CBC's knowledge and another 880 head to Clifton Cattle Company, also without CBC's knowledge.

Some six months later, Runyan, after investigating the whereabouts of his cattle, contacted Clower and claimed ownership of some of the cattle on Clower's property. Clower professed ignorance and contacted CBC. CBC's counsel then contacted Runyan's counsel to determine if an equitable settlement of the dispute over ownership of the cattle could be reached. As the facts of Dean's swindle came to light, with Dean nowhere to be found, counsel for CBC and Runyan, respectively, agreed that Clower could sell another 736 head of cattle to Clifton Cattle Company and that the proceeds of this sale would be placed in the account which is the subject of this lawsuit, pending resolution of the parties' dispute.

CBC filed suit, naming Runyan and Clower, *inter alia,* as defendants, seeking clear title to the fund represented by the account. Runyan counterclaimed, seeking ownership of the fund. In granting partial summary judgment in CBC's favor, the trial court ruled:

> [NMSA 1978] Sections 55–2–403(2) and (3) state that a person who entrusts possession of goods to a merchant who deals in goods of that kind, gives that merchant the power to transfer all rights of the entrustee to a buyer in the ordinary course of business. The facts quite clearly show that Dean is the merchant who is entrusted with the cattle by Runyan, the entruster, and that the buyer in the ordinary course of business was Mr. Clower.
>
> Alternatively, [CBC] is entitled to summary judgment, because it appears to the Court that Mr. Dean had a voidable title to the cattle and that he had power to transfer good title to the good faith purchaser for value, even though it appears to the Court that the delivery of the cattle was procured through fraud, punishable as larcenous under the criminal law.

The court awarded the money in the account to CBC and dismissed Runyan's counterclaim. It further ruled that Runyan had no interest in another 114 head of cattle sold by Clower to defendant Don Carlos Ranch, even though Runyan and Don Carlos Ranch had filed no crossclaims against each other pertaining to the cattle sold to Don Carlos Ranch.

II.

ISSUES RAISED, HOLDING ON APPEAL

CBC maintains that the court's judgment should be affirmed because Runyan, being a knowledgeable, experienced dealer in cattle, chose to entrust his cattle to Dean, who defrauded Runyan. The issue, according to CBC, does not involve balancing the equities between innocent, defrauded par-

ties. Rather, the issue involves interpretation of the Uniform Commercial Code. The Code clearly contemplates such a set of facts as the one before the court, and the Code has chosen to protect good faith purchasers, and buyers in the ordinary course of business, such as Clower and CBC, thereby assuring the widest possible range of commercial intercourse. Runyan's misfortune, CBC contends, should have no bearing on the court's disposition of the contested account.

Runyan argues that in issuing its ruling the trial court of necessity found certain facts in CBC's favor which Runyan insists are still at issue. For example, Runyan contends that Clower was not a buyer in the ordinary course of business, and that Dean did not have power to transfer Runyan's ownership rights in the cattle to Clower. Runyan asserts that Clower was a cattle merchant and, as such, to be in good faith he was required to observe reasonable commercial standards of fair dealing in the trade. Neither Clower nor CBC, Runyan argues, was a good faith purchaser for value as defined by the Code. Finally, the court's ruling on the cattle sold to Don Carlos Ranch was essentially an "advisory opinion" and should be vacated on remand.

Upon considering the parties' arguments and the record below, we reverse the partial summary judgment and remand the cause to the trial court for further proceedings not inconsistent with our holding herein.

III.

DISCUSSION OF LEGAL ISSUES

We agree with CBC that resolution of the issues raised by the parties depends on application of the Uniform Commercial Code to the facts of the case, or more particularly, on the application of Article Two, NMSA 1978, Sections 55–2–101 to –2–725 (Orig.Pamp & Cum.Supp.1989). Thus we disagree with neither CBC's nor the trial court's discussion of Article Two and the application of Article Two to the facts of this case. What we disagree with is the trial court's making legal conclusions on issues which appear to us to be clearly in dispute. From our reading of the record, we cannot conclude that CBC has shown "that there is no genuine issue as to any material fact and that [CBC] is entitled to a judgment as a matter of law." SCRA 1986, 1–056(C).

For example, Clower's cavalier attitude in receiving cattle without studying shipping documents or asking for a bill of sale, or without making any inquiry about whose brand he was being asked to put on the cattle, raises a serious question in our minds whether Clower was a buyer in the ordinary course of business as the trial court ruled. As the Code requires, a buyer in the ordinary course of business must be "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course * * *." NMSA 1978, § 55–1–201(9). We think the factfinder might find that Clower should have been alerted by the peculiar facts surrounding Dean's transfer of the cattle to him to have made inquiry concerning ownership of the cattle.

Likewise, Clower's somewhat furtive conduct in dealing with CBC and his failure to perform various of his contractual obligations pertaining to the cattle would permit the trier of fact to consider as unresolved the issue of Clower's good faith with respect to his purchases of cattle from Dean. The entire climate of Clower's conduct raises questions concerning his knowledge of Dean's underlying purpose in selling Clower the cattle. Good faith is defined as "honesty in fact in the conduct or transaction concerned." *Id.*, (19). In *McKay v. Farmers & Stockmens Bank of Clayton*, 92 N.M. 181, 585 P.2d 325 (Ct. App.), *cert. quashed*, 92 N.M. 79, 582 P.2d 1292 (1978), involving proof of good faith for purposes of permitting a bank's acceleration of promissory notes, it was held that " 'good faith' is not generally a question of law, but is usually a question of fact." *Id.* 92 N.M. at 183, 585 P.2d at 327.

In *McKay* the court of appeals reversed a summary judgment awarded to a bank that argued it had exercised good faith in declaring itself insecure and foreclosing on certain secured chattels. The court of appeals restated the long-standing rule on the granting of summary judgment by writing, "The question before us is whether the evidence in the entire record shows that there exists material issues of fact as to the Bank's good faith or lack of good faith in the acceleration of McKay's notes." *Id.* By analogous reasoning, in our opinion there exist material issues of fact as to Clower's good faith in dealing with Dean.

We likewise agree with Runyan that a material issue of fact remains concerning whether Clower's status was that of a cattle merchant or an ordinary buyer. The trial court should have inquired into Clower's failure to produce any documents he may have had detailing his past dealings in cattle sales. Such documents were relevant to the court's resolution of the motion because the Code holds merchants to a higher standard than ordinary purchasers when it comes to good faith, demanding of merchants "the observance of reasonable commercial standards of fair dealing in the trade." NMSA 1978, § 55-2-103(1)(b).

CBC argues that our holding in *O'Brien v. Chandler*, 107 N.M. 797, 765 P.2d 1165 (1988), is supportive of its position on appeal. Because we decide this case on the procedural question of whether material issues of fact remain to be resolved rather than on the substantive questions argued by the parties, we pass no judgment at this point on the relevance of *O'Brien*, as there was no question that the defaulting purchaser, Chandler, entered into a transaction with a *good faith* purchaser for value, the bank. Here Runyan has raised a reasonable challenge to Clower's good faith in his dealings with Dean. Further, in *O'Brien*, McCoy's interest in the cattle was obviously "hidden" from the bank. Here, Runyan has raised a reasonable challenge to Clower's good faith in his dealings with Dean. It is more doubtful that Runyan's interest in the cattle was hidden from either Clower or CBC, or at least, such is the lingering issue of material fact left to be resolved.

Without examining every remaining point raised by Runyan on appeal, we hold he sufficiently has demonstrated that this case should be remanded for proof on the issues raised in the pleadings. At trial, Runyan might not prevail; but here, as the party opposing the motion, he should have been given the benefit of all reasonable doubts by the court in its determination of whether genuine issues exist to be tried. *See Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972). Because the court did not give Runyan that benefit, we reverse and remand the case to the trial court for further proceedings not inconsistent with our opinion herein.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

789 P.2d 624

Robert PENNINGTON, Claimant-Appellee,

v.

CHINO MINES, Kennecott and Mitsubishi Partnership, Keenan & Associates, Respondents-Appellants.

No. 11533.

Court of Appeals of New Mexico.

March 1, 1990.

Beverly J. Singleman, Hubert & Hernandez, P.A., Las Cruces, Frederick H. Sherman, Sherman & Sherman, P.C., Deming, for claimant-appellee.

Charles E. Stuckey, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for respondents-appellants.

OPINION

ALARID, Judge.

Appellant Chino Mines (employer) appeals the hearing officer's award of attorney's fees to appellee Pennington (claimant) under the interim provisions of the Workers' Compensation Act. NMSA 1978, § 52-1-54(C)(2) (Cum.Supp.1986). Employer challenges the hearing officer's judgment on the grounds that the evidence does not support the findings that employer acted in reckless disregard of the rights of claimant and that claimant suffered an economic loss. Claimant argues, in part, that employer's failure to submit findings and conclusions prior to entry of the judgment and order precludes evidentiary review by this court. We agree with claimant and affirm the hearing officer's decision. In addition, claimant requests we remand for determination of the issue of prejudgment interest. We find the hearing officer decided the issue and that remand is unnecessary.

This matter came before the hearing officer on March 3, 1989. The hearing officer indicated the proceedings would be bifurcated, and the issues of bad faith and economic loss were argued on that date. Arguments as to the total dollar amount of attorney's fees and a motion to supplement the record, together with closing arguments, were left for a later date. Claimant filed his petition for attorney's fees on March 17, 1989, filed a motion to supple-

ment the record on March 27, 1989, and filed requested findings of fact and conclusions of law on April 14, 1989.

Claimant's petition for attorney's fees and motion to supplement were argued at a hearing which occurred on April 18, 1989. At that time, the hearing officer indicated the parties could anticipate receiving a decision within approximately a week. The hearing officer entered findings and conclusions on April 25, 1989, and rendered a judgment and order on May 10, 1989. Employer then filed requested findings and conclusions on May 12, 1989.

We first note that under the Interim Act a hearing officer's decision is reviewable by this court "in the manner provided for other cases." NMSA 1978, § 52–5–8(B) (Cum.Supp.1986). In cases tried to the district court, a party must tender requested findings of fact and conclusions of law prior to the entry of judgment. *University of Albuquerque v. Barrett,* 86 N.M. 794, 528 P.2d 207 (1974); *Gilmore v. Baldwin,* 59 N.M. 51, 278 P.2d 790 (1955). We apply a similar rule to administrative proceedings tried by hearing officers of the workers' compensation division. Under Section 52–5–7(B), following an evidentiary hearing, a workers' compensation hearing officer is required to file a decision with the director within thirty days, unless the time for filing the decision is extended by the director. The decision also is required to contain findings of fact and conclusions of law. The failure of a party to file a timely request for findings of fact and conclusions of law, precludes evidentiary review by this court. *See Macnair v. Stueber,* 84 N.M. 93, 500 P.2d 178 (1972); *see also* SCRA 1986, 1–052(B)(1)(f).

Employer submits, and we agree, that Rule 1–052(B)(1)(h) requires that counsel be allowed a reasonable opportunity to submit requested findings and conclusions. However, we disagree with employer's contention that since the hearing officer did not specify a date for the submission of requested findings and conclusions, employer's failure to timely make such requests should not preclude review of the evidence in this case. Employer was aware that claimant's requested findings and conclusions were filed on April 14, 1989, and that a decision from the hearing officer was forthcoming within approximately a week of the April 18, 1989 hearing. Moreover, as noted above, Section 52–2–7(B) requires the hearing officer to file a written decision, including findings of fact and conclusions of law, within thirty days. Employer had ample opportunity to submit requests. Nothing in the record before us indicates employer was deprived of the right to submit requests to the hearing officer and have them considered prior to entry of judgment. *See Gillit v. Theatre Enter., Inc.,* 71 N.M. 31, 375 P.2d 580 (1962).

Employer also argues that requested findings were submitted in sufficient time to allow the hearing officer to amend his findings or make additional findings pursuant to Rule 1–052(B)(2). We find this argument without merit. Employer made no motion pursuant to Rule 1–052(B)(2) or any applicable statutory provisions. *See Kipp v. McBee,* 78 N.M. 411, 432 P.2d 255 (1967). Further, nothing in the record indicates employer's requests were in any way brought to the attention of the hearing officer or that the hearing officer took any action concerning the issues now on appeal subsequent to the entry of judgment on May 10, 1989. *See Gillit v. Theatre Enter., Inc.* Accordingly, we decline to review the evidence in this case due to employer's failure to timely submit requested findings and conclusions for the hearing officer's consideration prior to entry of judgment.

In his answer brief, claimant argues the hearing officer erred by failing to decide the issue of prejudgment interest and requests we remand for determination of that issue. Claimant submitted proposed findings and conclusions on the issue of prejudgment interest and argues the hearing officer failed to rule on the issue in his decision since there are no specific references to prejudgment interest in the hearing officer's adopted findings and conclusions.

The hearing officer's final adopted conclusion of law states that any findings and conclusions "not expressly adopted are hereby expressly rejected." Further, failure to make a specific finding of fact is regarded as a finding against the party with the burden of establishing that fact. *Gibbons & Reed Co. v. Bureau of Revenue,* 80 N.M. 462, 457 P.2d 710 (1969); *Brundage v. K.L. House Constr. Co.,* 74 N.M. 613, 396 P.2d 731 (1964). The hearing officer's express rejection of findings not adopted and his failure to include findings regarding prejudgment interest indicate rejection of the factual basis for claimant's argument. We do not address the correctness of the hearing officer's decision because the only question claimant properly brings before us is whether the issue was decided. Thus, the issue of prejudgment interest was decided by the hearing officer, and claimant's request for remand is denied.

For the above reasons, the judgment of the hearing officer is affirmed. Claimant is awarded $1,000 in attorney's fees, to be paid by employer, for defending this appeal.

IT IS SO ORDERED.

DONNELLY and APODACA, JJ., concur.

789 P.2d 627

STATE of New Mexico, Plaintiff-Appellant,

v.

Boyd BARTLETT, Defendant-Appellee.

No. 10994.

Court of Appeals of New Mexico.

March 6, 1990.

Hal Stratton, Atty. Gen. and Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Penni Adrian and Ron Koch, Pros. Attys., Albuquerque, for defendant-appellee.

OPINION

ALARID, Judge.

The opinion filed in this case on February 27, 1990, is hereby withdrawn and the following opinion is substituted therefor.

The state appeals the dismissal of a charge filed against defendant. The dismissal was based on the state's failure to comply with a discovery order. We reverse.

Defendant was charged with criminal sexual penetration based on an incident that occurred on August 13, 1987. The victim was interviewed by a detective on August 14 and again on September 3, and gave a description of her attacker at both interviews. The district court later determined that both interviews were taped. Despite numerous requests by defendant's counsel, however, the state was unable to produce the tape of the first interview. Subsequently, defendant was tried for the offense. The jury was unable to reach a verdict in that trial. Following the state's indication that it intended to re-try defendant, defendant moved to compel production of the missing tape of the August 14 interview. The trial court held a hearing on the matter, apparently determined that the tape had existed at one time, and ordered the state to produce it. The state did not do so, and the court dismissed the case for the state's failure to comply with its order.

DISCUSSION

Sanctions for violations of discovery orders are discretionary with the trial court. *State v. Tomlinson,* 98 N.M. 337, 648 P.2d 795 (Ct.App.), *rev'd on other grounds,* 98 N.M. 213, 647 P.2d 415 (1982). A defendant is not entitled to a dismissal or other sanctions upon a mere showing of violation of a discovery order. Instead, the defendant must establish prejudice resulting from the violation. *Id.* Where the violation results from lost or destroyed evidence, as in this case, a three-prong test has been established for determining appropriate sanctions. *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). The test requires a court to balance three different considerations in deciding what, if any, sanctions should be imposed: (a) whether the state breached a duty or intentionally deprived defendant of the missing evidence; (b) whether the missing evidence was material to the case; and (c) whether defendant was prejudiced by the absence of the evidence. *See id.* Factors bearing on these issues include the presence of negligence or bad faith on the part of the state, the importance of the evidence to the defendant's case, and the amount of other evidence of guilt adduced at trial. *See id.* (discussing, with approval, federal cases); *State v. Fero,* 105 N.M. 339, 732 P.2d 866 (1987) (citing *Chouinard* and stating that the importance of the lost evidence depends on many factors, including the weight of other evidence introduced). We emphasize that since this is a discovery sanctions case, not a due process case, the analysis is somewhat different than that employed in *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). Although due process considerations are intertwined with the issue of appropriate discovery sanctions, especially where the sanctions result from lost or destroyed evidence, the trial court's discretion to apply such sanctions is greater than would be afforded by a pure due process analysis. For that reason, we believe the balancing test discussed in this opinion is a more appropriate means of analyzing discovery sanctions imposed by a trial court.

We start our analysis of this case with the premise that dismissal is an extreme sanction to be used only in exceptional cases. *Cf. State v. Chouinard,* 96 N.M. at 662, 634 P.2d at 684 (laying out alternatives when the loss of evidence is discovered before trial: either exclusion of all evidence which the lost evidence might have

impeached, or admission of that evidence with full disclosure of the loss and its relevance and import; dismissal is not one of the options discussed); *see also United States v. Miranda,* 526 F.2d 1319 (2d Cir. 1975) (case involving lost tape of conversation between informant and defendant; while discussing trial court's refusal to suppress testimony regarding that conversation, the court observed that possible sanctions include, in exceptional circumstances, dismissal of the indictment), *cert. denied,* 429 U.S. 821, 97 S.Ct. 69, 50 L.Ed.2d 82 (1976): *United States v. DePalma,* 476 F.Supp. 775 (S.D.N.Y.1979) (stating that dismissal is a most drastic remedy and must be reserved for extremely rare cases). Dismissal is appropriate only if the defendant can show he will be deprived of a fair trial if he is tried without the missing evidence. *See United States v. Heath,* 147 F.Supp. 877 (D.Haw.1957) (defendant unable to prepare a defense without the missing evidence, so fair trial impossible; indictment dismissed): *see also United States v. Banks,* 374 F.Supp. 321 (D.S.D. 1974) (dictum to the effect that dismissal is appropriate only if the evidence is so vital to defendant that a fair trial cannot be held without it). Therefore, the relevant factors must weigh heavily in favor of defendant to justify dismissal instead of some lesser sanction.

[redacted] The issues of deliberate misconduct or bad faith on the part of the state were not explicitly determined at the proceeding below. The trial court did express concern about the possibility that the evidence was deliberately lost, but added that it was not necessarily saying that had occurred in this case. Rather than remand for a specific determination as to whether loss of the tape was deliberate or inadvertent, we presume for purposes of this opinion that some degree of deliberate fault on the part of the state was present. Given the trial court's failure to explicitly find such fault, however, and the absence of any real indication that loss of the tape was deliberate, this fault weighs against the state only slightly more than negligent loss of evidence. As we discuss below, balancing this fault with the other factors, and with the fact that dismissal is an extreme sanction, leads to the conclusion that dismissal was not warranted in this case.

The missing tape satisfies the materiality requirement of *Chouinard* because the victim's initial descriptions of her attacker, as outlined in the police report and the victim's preliminary hearing testimony, varied somewhat from her description at trial and from defendant's appearance at trial. The contents of the tape bear on the accuracy of the victim's identification of defendant as her attacker and upon her credibility, and are thus material. *Cf. Chacon v. State,* 88 N.M. 198, 539 P.2d 218 (Ct.App. 1975) (undisclosed witness statement bearing on method of entry in burglary case is material).

The prejudice prong of the *Chouinard* test contains at least two components: the importance of the missing evidence to defendant, and the strength of the other evidence of defendant's guilt. *See id.* Since the jury was unable to reach a verdict at the first trial, the latter component is not obviously present in this case. Resolution of this case rests on a determination of the importance of the tape to defendant's defense, and a decision as to whether he could receive a fair trial without it.

Defendant's defense at trial was that the victim's identification was mistaken or a fabrication, and that the variances in her descriptions raised at least a reasonable doubt as to whether he was involved in the attack. Defendant argues the tape is crucial because it concerns the conflicting descriptions the victim gave of her attacker, and thus her credibility in identifying defendant as that attacker. Without the tape, argues defendant, he cannot establish what the victim told the investigating detective at the first interview. We agree that the tape is important to defendant. We do not agree, however, that it is so important as to deprive defendant of a fair trial.

At the first trial, defendant pointed out the various inconsistencies in the descriptions given by the victim. There were inconsistencies in the description of the at-

tacker's hair and eye color and the presence or absence of facial hair in the initial police report, in the description the victim gave at the preliminary hearing, and in the description she gave at trial. Defendant focused heavily on those inconsistencies in his cross-examination of the victim and of the investigating detective. Defendant extensively argued the issues of the missing tape and the inconsistent descriptions in his closing argument. The inability to review the missing tape may have weakened defendant's defenses of mistaken identity or fabrication, but he was still able to vigorously raise and pursue those defenses. We cannot say, therefore, that the tape was so important to defendant as to require dismissal upon the state's inability to produce it. *See United States v. Miranda* (dismissal would be unduly heavy sanction for loss of evidence concerning a subject on which other primary evidence was available and adduced, and where defendant was able to raise issue of lost tape at trial); *State v. Fero* (ability to cross-examine witnesses concerning lost evidence is factor to be considered in assessing importance of evidence). Under the circumstances of this case, the missing tape simply does not constitute the type of crucial evidence the absence of which would mandate dismissal.

As we have discussed above, the missing evidence was not so important to defendant that his defense was greatly prejudiced by its absence. Similarly, the presumed degree of fault on the part of the state, in the absence of indications of more culpable behavior, was not egregious. Given the fact that dismissal is appropriate only in the rarest of cases, we hold that it was too severe a sanction in this case.

To the extent that defendant is arguing he would be deprived of due process if retried without the missing tape, we disagree. Our discussion of the sanctions issue has already established that the missing tape was not of such crucial importance that defendant cannot receive a fair trial without it, and the same factors we considered in that discussion apply to a claimed violation of the right to due process. *See State v. Chouinard* (interweaving due process concepts with issue of appropriate sanctions to apply in the event evidence is lost). We note that a defendant arguing that retrial should be precluded as a result of a due process violation should properly have a heavier burden to bear than a defendant contending only that his conviction should be reversed—preclusion of a retrial is obviously a much more onerous sanction than mere reversal. *Cf. State v. Lovato,* 94 N.M. 780, 617 P.2d 169 (Ct. App.1980) (finding due process violation in state's failure to preserve blood for testing, but remanding for retrial without use of the blood tests performed by the state). Finally, as we discuss below, appropriate sanctions other than dismissal may be applied to at least partially alleviate the effects of the loss of the tape. Where such effective sanctions are available, a claim of violation of due process is less persuasive. We conclude that defendant's right to due process will not be violated if he is retried without having access to the lost tape.

Our holding does not preclude the trial court, on remand, from imposing lesser sanctions upon the state. Without meaning to restrict the court's discretion in any manner, we can envision several types of sanctions that might be appropriate. For example, the court might attempt to replace the missing tape by requiring the jury to find that the description given in the August 14 interview was consistent with that contained in the initial police report. Alternatively or in addition, the court might preclude the state from arguing that the inconsistencies were the result of translation error, since the absence of the tape precludes defendant from establishing that no such error occurred.

Based on the foregoing, we hold that the sanction of dismissal was not appropriate under the circumstances of this case, and we reverse and remand.

IT IS SO ORDERED.

BIVINS and APODACA, JJ., concur.

789 P.2d 1250

SUNDANCE MECHANICAL & UTILITY CORPORATION, a New Mexico corporation, Plaintiff,

v.

Marvin F. ATLAS, and Carole J. Atlas, husband and wife, et al., Defendants-Appellants,

v.

Eric MENTER, d/b/a Creative Carpentry, Defendant-Appellee.

No. 18077.

Supreme Court of New Mexico.

April 2, 1990.

Threet & King, Martin E. Threet, Robert G. Kavanagh, Albuquerque, for defendants-appellants.

Toulouse & Associates, P.A., Charlotte M. Toulouse, Phillip Baca, Albuquerque, for defendant-appellee.

OPINION

MONTGOMERY, Justice.

This little case raises large issues concerning the jurisdiction of our courts, the relationship between jurisdiction and a complaint's failure to state a claim upon which relief can be granted, and the power of a district court to enter a default judgment when the complaint fails to state a cause of action. The principal specific question for decision is whether the trial court could properly reinstate a default judgment against a homeowner in a subcontractor's suit to foreclose on his mechanic's lien when his complaint (actually, his crossclaim) failed to allege that he held a valid contractor's license. We hold that the trial court could do so, and we therefore affirm.

I.

The subcontractor is Eric Menter, d/b/a Creative Carpentry, the crossclaimant and appellee in this appeal. The homeowners are appellants Marvin and Carole Atlas. They contracted in 1986 with Robert J. Eden, d/b/a R.J. Eden Construction Co. (the general contractor), for the construction of a single-family residence in Albuquerque. Menter held a subcontract to install wood trim and door frames. Toward the end of construction of the house a dispute arose, and on November 24, 1986, the subcontractor filed a claim of lien against the homeowners' property.

Some time before the subcontractor filed his lien, the homeowners completed payments to the general contractor in an amount which was later determined, in an arbitration proceeding between the homeowners and the general contractor, to have exceeded the contract price.

After completion of the project, this litigation began. It was commenced on March 19, 1987, by the filing of a complaint by another lien claimant, Sundance Mechanical & Utility Corp. (not a party to this appeal), to foreclose on that party's own mechanic's lien. The homeowners, the general contractor, the subcontractor in this case (Menter), and various other lien claimants were all joined as defendants. The subcontractor here, Menter, duly answered

the complaint and filed a crossclaim against the homeowners, seeking judgment of $1,628 plus interest, costs and attorney's fees as compensatory damages, $10,000 as punitive damages, and foreclosure on his mechanic's lien.

Although they did file an answer to the original plaintiff's complaint, the homeowners did not answer the crossclaim filed by the subcontractor. The situation seems to have been confused by various events and proceedings: The homeowners' attorney withdrew from the action; the homeowners appeared *pro se* (through Mr. Atlas, who is a retired New York state judge); and the arbitration proceeding was commenced and litigated. On March 1, 1988, the subcontractor filed a notice of intent to apply for a default judgment, serving the homeowners by mail. The homeowners did not respond to this notice, and the court entered a default judgment against them for $2,227.66 (representing the amount of the subcontractor's claim plus interest and attorney's fees) on March 11, 1988. Shortly after that, the homeowners, still acting *pro se,* filed a motion to set aside the default judgment. A hearing was held on April 4, 1988, at which the homeowners were represented by new counsel. The court granted the motion to set aside the default and entered an order on April 19, 1988, providing: "Defendants are directed to immediate [sic] and forthwith to [sic] file their answer herein."

A period of four months then elapsed, during which the homeowners failed to file an answer. On August 26, 1988, the subcontractor filed a motion for reinstatement of the default judgment. Finally, on September 1, 1988, fifteen and one-half months after filing of the subcontractor's crossclaim, the homeowners filed their answer. They denied various allegations in the crossclaim, denied personal liability to the subcontractor, asserted that the subcontractor's lien had been discharged by full payment to the general contractor, and raised the defense that the subcontractor's crossclaim had failed to allege that he was a duly licensed contractor. The subcontractor moved to strike the answer, and on October 6, 1988, the court granted the motion and entered its order reinstating the default judgment.

On appeal from this order the homeowners challenge the jurisdiction of the court to enter the order and otherwise assail the propriety of that order. Their jurisdictional challenge consists of two arguments. First, they maintain that when they made their final payment to the general contractor in an amount later determined to have exceeded the contract price, the subcontractor's lien was discharged by operation of NMSA 1978, Section 48–2–10.-1(A) (Repl.Pamp.1987) (repealed 1989 N.M. Laws, ch. 301, § 13), and that the trial court therefore lacked jurisdiction to entertain the subcontractor's claim for foreclosure of his mechanic's lien and to award a default judgment on that claim. The second basis for the homeowners' jurisdictional argument is that the crossclaim failed to state a claim upon which relief could be granted, in that it did not allege that the crossclaimant held a contractor's license, and that this failure to state a claim deprived the trial court of jurisdiction.

As additional grounds for attacking the trial court's order the homeowners contend that a personal judgment against them was improper, inasmuch as they had no direct contractual relationship with the subcontractor, and that the trial court abused its discretion in reinstating the default judgment and refusing to permit their belated answer to be filed.

We consider these various arguments in the order in which they are asserted.

II.

The homeowners' first jurisdictional argument may be disposed of without much difficulty. It is, again, that their final payment to the general contractor of an amount in excess of the contract price, at a time when they had no notice of any

mechanics' or materialmen's liens, operated to discharge the subcontractor's lien, so that his subsequent filing of a claim of lien was a "nullity" with respect to the homeowners' property. Therefore, the homeowners argue, when the subcontractor sought to foreclose upon his claimed mechanic's lien by filing a crossclaim against the homeowners, the court had no jurisdiction to entertain this claim because the lien upon which it was founded had been discharged.

As support for their argument the homeowners cite *Sundance Mechanical & Util. Corp. v. Armijo,* 106 N.M. 249, 741 P.2d 1370 (1987), and *Aztec Wood Interiors, Inc. v. Andrade Homes, Inc.,* 104 N.M. 45, 716 P.2d 236 (1986). In those cases we construed Section 48–2–10.1 [1] as discharging a mechanic's or materialman's lien claimed upon a residence containing not more than four dwelling units when a claim of lien has not been filed prior to the owner's final payment to the general contractor and the owner has received no notice of the potential lien claim by the lien claimant. Nothing in the statute, however, relates to the jurisdiction of a court when suit is brought to enforce a claimed lien.[2] Nor do the homeowners cite any other authority for their rather unusual theory that the district court's jurisdiction is affected by this statute dealing with the circumstances under which a lien claim is treated as paid. Of course, when an argument is not supported by citation of authority, this Court is free to disregard it. *In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984).

The homeowners do cite previous decisions of this Court in support of the following proposition: "There are three jurisdictional essentials necessary to the validity of every judgment: jurisdiction of parties, jurisdiction of subject matter and power or authority to decide the particular matter presented." *Heckathorn v. Heckathorn,* 77 N.M. 369, 371, 423 P.2d 410, 412 (1967); *In re Field's Estate,* 40 N.M. 423, 427, 60 P.2d 945, 947 (1936). *See also Elwess v. Elwess,* 73 N.M. 400, 404, 389 P.2d 7, 9 (1964); *State v. Patten,* 41 N.M. 395, 398, 69 P.2d 931, 933 (1937). Since there is no question in this case as to jurisdiction of the parties, the element lacking here, according to the homeowners' argument, must be lack of subject-matter jurisdiction or lack of power or authority to decide the particular matter presented, namely, the matter of foreclosure of the subcontractor's mechanic's lien.

Despite the well-settled character of the statement just quoted from *Heckathorn* and *Field's Estate,* it is not easy to discern the difference between lack of subject-matter jurisdiction and lack of power or authority to decide the particular matter presented. The difference, if any, is not recognized in our Rules of Civil Procedure for the District Courts, which refer only to "jurisdiction over the subject matter" of the action, *see* SCRA 1986, 1–012(B)(1), 1–012(H)(3) (Cum.Supp.1989); and we know of no case in which this difference has been explained. Possibly it relates to Article VI, Section 13, of our Constitution, which confers upon the district court "original jurisdiction in all matters and causes not except-

1. This section, repealed in 1989, is mirrored in a comparable provision now contained in NMSA 1978, Section 48–2A–11(A) (Cum.Supp.1989).

2. Before its repeal, Subsection 48–2–10.1(A) read:

> Payment by the owner or his successor in interest to any person entitled to such payment of all amounts due and owing for any construction, improvement, landscaping or other actions the performance of which could give rise to a lien pursuant to Section 48–2–2 NMSA 1978 to be performed upon a residence containing not more than four dwelling units shall discharge all such liens unless prior to such payment any person who is entitled to such lien has filed for record his lien pursuant to Section 48–2–6 NMSA 1978....

Subsection 48–2–10.1(B), also involved in *Sundance* and *Aztec,* requires a general contractor to notify the owner, at the time he presents his bill for final payment, of the existence of any potential lien claims and provides that an owner who is given such notice and who pays the general contractor in full prior to the expiration of twenty days after receiving the notice shall not be entitled to the benefits of Subsection A.

ed in this constitution," and also grants "such jurisdiction of special cases and proceedings as may be conferred by law * * *." *See, e.g., Postal Finance Co. v. Sisneros,* 84 N.M. 724, 507 P.2d 785 (1973) (garnishment is "special case or proceeding" over which district court has only such jurisdiction as is conferred by statute). "Jurisdiction over the subject matter" is commonly treated as a unitary topic, *see, e.g.,* T. Occhialino, *Walden's Civil Procedure in New Mexico* at I–3 to I–8 (2d ed. 1988), and at this stage in the development of the law one may doubt that the distinction serves any useful purpose.

Although they do not spell out their argument, it may be that the homeowners' purpose in referring to the three elements of jurisdiction is to suggest that, since the second element, subject-matter jurisdiction, is clearly present, something is missing in the third element by way of the particular authority in the district court to adjudicate a claim for foreclosure on a mechanic's lien. The homeowners point out that mechanic's liens were unknown to the common law and are creatures of statutory law, citing *United States ex rel. Sunworks Division v. Insurance Co. of North America,* 695 F.2d 455, 458 (10th Cir.1982) (interpreting New Mexico law). The argument thus seems to be that where a statute, already in derogation of the common law, governs the validity or invalidity of a claim, the court's "power or authority" to determine the claim depends on there being a valid claim in the first instance.

If this is in fact the homeowner's argument, it obviously cannot succeed, since it would make jurisdiction turn on the underlying validity *vel non* of a claim—the very question to be determined by the court in the exercise of its jurisdiction. This Court has repeatedly noted that the jurisdiction of a district court does not depend on how the court decides a contested issue submitted to it; the test "is whether or not it had power to enter upon the inquiry; not whether its conclusion * * * was right or wrong." *Patten,* 41 N.M. at 399, 69 P.2d at 933; *see also Field's Estate,* 40 N.M. at 432–33, 60 P.2d at 950–951.

Thus, contrary to the homeowners' argument, there is no "statutory limitation on the jurisdiction of the trial court" inhering in Section 48–2–10.1. The court has subject-matter jurisdiction under Article VI, Sections 1 and 13 of the Constitution, and no provision of law purports to limit that jurisdiction in actions to enforce a mechanic's lien. We therefore find the homeowners' first jurisdictional argument to be without merit.

III.

Their second jurisdictional argument is more troublesome. As noted previously, the subcontractor in his crossclaim did not allege that he was a duly licensed contractor at the time his cause of action arose. His crossclaim therefore failed to comply with NMSA 1978, Section 60–13–30(A) (Repl.Pamp.1989), which reads:

> 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.[3]

We assume that the subcontractor here was required to be licensed under the Construction Industries Licensing Act at the time his alleged cause of action arose. We further assume—and this Court has so held on several occasions—that a complaint which does not allege licensure when required by the statute fails to state a claim upon which relief may be granted. *See, e.g., American Builders Supply Corp. v. Enchanted Builders, Inc.,* 83 N.M. 503, 504, 494 P.2d 165, 166 (1972) (defense treat-

3. Subsection (B) of this section provides that any contractor operating without the required license shall have no right to file or claim any mechanic's lien.

ed as affirmative defense, however, where complaint did not show on its face that contractor's license was necessary). The question then arises, does the failure of a complaint (or crossclaim) to state a claim upon which relief can be granted operate to deprive the court of jurisdiction over the subject matter of the action in which the complaint (or crossclaim) is filed?

In *Martinez v. Research Park, Inc.,* 75 N.M. 672, 410 P.2d 200 (1965), *overruled on other grounds, Lakeview Investments, Inc. v. Alamogordo Lake Village, Inc.,* 86 N.M. 151, 520 P.2d 1096 (1974), judgments in favor of a contractor and a subcontractor foreclosing their respective mechanic's liens were reversed on the ground that the contractors had failed in their pleadings to allege that they held the requisite licenses. This Court said:

> Clearly, foreclosure of a mechanic's lien arising out of a construction contract is an action seeking "collection of compensation for the performance" of such work. An allegation that the contractor was duly licensed is a statutory prerequisite to bringing such an action. It naturally follows that this allegation is essential in order to state a claim for relief, and we have consistently held that failure to state a cause of action is jurisdictional and may be raised for the first time on appeal. (citing *Campbell v. Smith,* 68 N.M. 373, 362 P.2d 523 (1961))

Id. at 676–77, 410 P.2d at 403. In *Campbell v. Smith* another judgment in favor of a contractor was set aside, also for failure of the complaint to allege the requisite contractor's license. The property owner urged that because of this omission the trial court was without jurisdiction; the contractor argued that the point could not be raised on appeal because a ruling of the trial court had not been invoked. This Court held: "Failure of a complaint to state a cause of action is jurisdictional and may be raised for the first time on appeal." 68 N.M. at 375–76, 362 P.2d at 524 (citing *Phillips v. Allingham,* 38 N.M. 361, 363, 33 P.2d 910, 911 (1934) (recognizing "well-established rule * * * that the failure of a complaint to state a cause of action is jurisdictional")).

In light of these statements, the homeowners make an argument that is at least colorable when they assert that the subcontractor's failure to allege that he held a contractor's license deprived the trial court of jurisdiction to grant any relief to the subcontractor based on his defective or legally insufficient claim.

But despite the "consistent" (per *Martinez*) holdings in this Court that failure to state a cause of action is "jurisdictional," the law in this state appears to be equally well-settled that a judgment is not void—i.e., the court does *not* lack jurisdiction—"from the fact that a complaint does not state facts sufficient to constitute a cause of action * * *." *In re Field's Estate,* 40 N.M. at 432, 60 P.2d at 950. *See also id.* (quoting *Acequia del Llano v. Acequia de las Joyas,* 25 N.M. 134, 141–142, 179 P. 235, 237 (1919)):

> This ruling may have been erroneous as a matter of law, and the petition may not have stated facts sufficient to constitute a cause of action. A judgment will not be considered open to collateral impeachment because the petition or complaint in the action in which it was rendered did not constitute a cause of action.

More recently, our court of appeals, in a case affirmed by this Court, ruled that a trial court's dismissal of an action for lack of subject-matter jurisdiction, where the plaintiff's common-law negligence claim was barred by the exclusive-remedy provisions of the Workmen's Compensation Act, was incorrect; the court of appeals held that the complaint's failure to state a cause of action did not deprive the trial court of subject-matter jurisdiction. A portion of the court of appeals' analysis, relying on an Eighth Circuit case, is instructive and bears repeating here:

> [The Eighth Circuit case] distinguishes jurisdictional facts from those facts which are necessary to state a valid cause of action * * *. The Circuit Court

of Appeals, Eighth Circuit, held that whether or not [a certain party] was engaged in manufacturing was not jurisdictional, but went only to whether a valid cause of action existed. The distinction between jurisdictional facts and facts necessary to establish a cause of action was discussed:

> Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitle the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff.

Valenzuela v. Singleton, 100 N.M. 84, 88, 666 P.2d 225, 229 (Ct.App.1982) (quoting *In re First Nat'l Bank of Belle Fourche,* 152 F. 64, 68–69 (8th Cir.1907)), *aff'd,* 100 N.M. 84, 666 P.2d 225 (1983).

That our courts have been on sound ground in declaring that the failure of a complaint to state a cause of action does not interfere with or detract from the court's subject-matter jurisdiction is shown by the weighty authorities which reach the same conclusion. *See, e.g., Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946):

> Jurisdiction, therefore, is not defeated * * * by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

See also Mitchell v. Parham, 357 F.2d 723, 725 (10th Cir.1966) (distinguishing *Bell v. Hood*); *Martinez v. Santa Clara Pueblo,* 402 F.Supp. 5, 9 (D.N.M.1975) (relying on *Bell v. Hood*), *rev'd on other grounds,* 540 F.2d 1039 (10th Cir.1976); *Fleming v. Kane County,* 116 F.R.D. 567, 577 n. 11 (N.D.Ill.1987) ("[I]n defendants' universe the very absence of a cause of action would deprive the court of subject matter jurisdiction. In that sort of Catch–22 analysis, the court could never decide a case on the merits."); *Abraham v. Homer,* 102 Okl. 12, 16, 226 P. 45, 49 (1924) ("Such a rule [that the court's jurisdiction is dependent upon facts constituting a cause of action in the petition] requires the creature to exist before the creator, because here the judicial power already acquired is the creator which creates the adjudication that the facts constitute a cause of action. If the facts pleaded must constitute a cause of action before the court has jurisdiction, then who is to determine that fact?").

And so it appears that the dicta in *Martinez v. Research Park, Campbell v. Smith* and *Phillips v. Allingham* that the failure of a complaint to state a cause of action is jurisdictional, if read to mean that such a failure deprives the trial court of subject-matter jurisdiction, were ill-advised and inconsistent with other statements of the law, both in New Mexico and elsewhere. Such a failure has no jurisdictional effect. It will be observed, however, that in both *Martinez* and *Campbell* the Court in repeating this proposition actually stated *two* propositions: (1) Failure to state a cause of action is jurisdictional, which (2)

may be raised for the first time on appeal. If by "jurisdictional" is meant that the trial court lacks jurisdiction, then the proposition is incorrect and, to the extent they support it, *Martinez, Campbell* and *Phillips* are hereby overruled. If, on the other hand, "jurisdictional" only means that a failure to state a claim may be raised for the first time on appeal, then the proposition is consistent with other statements of the law in New Mexico and should not be disturbed now.

For example, Rule 12(H) of the Rules of Civil Procedure distinguishes among three types of defenses, providing a different rule as to when during a lawsuit each type may be raised. Certain defenses (lack of personal jurisdiction, improper venue, insufficiency of process or service of process) must be asserted at the outset of an action; otherwise these defenses are waived. SCRA 1986, 1-012(H)(1) (Cum.Supp.1989). Other defenses, including the defense of failure to state a claim (along with failure to join an indispensable party and an objection to a legally insufficient defense) may be raised during the pendency of the action including at trial on the merits. Rule 1-012(H)(2). And lack of jurisdiction of the subject matter may be raised *whenever* it appears, following which the court shall dismiss the action. Rule, 1-012(H)(3). A rule that failure to state a claim may be raised for the first time on appeal is simply an extension of Rule 12(H)(2) into the appellate process and is supported by several cases (which, to their credit, have not commented on any "jurisdictional" effect of the failure). *See, e.g., Jernigan v. Clark & Day Exploration Co.*, 65 N.M. 355, 364, 337 P.2d 614, 620 (1959) (citing several cases); *Baca v. Perea*, 25 N.M. 442, 446, 184 P. 482, 484 (1919) ("jurisdictional" and "other matters which may render a case inherently and fatally defective" may be raised for the first time on appeal). When the defense of failure to state a claim upon which relief may be granted is raised on appeal, the defense, if well-taken, may result in various possible dispositions—*e.g.*, reversal and remand with leave to amend the complaint, *see Martinez v. Research Park* and *Campbell v. Smith*, or affirmance under the doctrine of aider by verdict or findings. *See Phillips v. Allingham*, 38 N.M. at 363, 33 P.2d at 911 (dictum); *Martinez v. Zia Co.*, 100 N.M. 8, 10, 664 P.2d 1021, 1023 (Ct.App.1983) (issues tried by implied consent of the parties will be treated as if raised in the pleadings). *See also Daughtrey v. Carpenter*, 82 N.M. 173, 178, 477 P.2d 807, 812 (1970) (citations omitted):

> The requirement of the allegation of a contractor's license is similar to the requirement of one year's residence for a divorce. Both are matters of public policy; neither, otherwise, bears any relation to the cause of action. Where the record shows without dispute, that the claimant was licensed at the time he performed the work, an appellant who has failed to call the matter to the attention of the trial court cannot object to our treating an issue tried with consent of the parties as though it had been raised by the pleadings. Furthermore, the intent of the legislature was to prohibit the bringing of suit by those unlicensed contractors who were acting illegally not to bar the remedy of lawful contractors because of a technical error in their pleadings.

In other words, the action will not be dismissed for lack of subject-matter jurisdiction.

We hold that the subcontractor's failure to state a claim upon which relief could be granted by alleging in his crossclaim that he was duly licensed as a contractor did not deprive the district court of jurisdiction to enter a default judgment on the crossclaim.

IV.

As their next point of error the homeowners assert that the district court could not properly enter a judgment against them personally because they had no contractual relationship with the subcontractor. They rely on *George M. Morris Construction Co. v. Four Seasons Motor Inn, Inc.*, 90 N.M. 654, 567 P.2d 965 (1977),

and *Allison v. Schuler*, 38 N.M. 506, 36 P.2d 519 (1934), which hold that a personal judgment in favor of a contractor against an owner is not proper when the two have no contractual relationship. However, in this case the subcontractor specifically requested judgment against the homeowners for $1,628 plus interest, costs and attorney's fees as compensatory damages, and $10,000 as punitive damages. Where a complaint requests relief of a certain type or amount and a court has jurisdiction to award the relief, and where the defendant defaults in responding to the complaint or fails to comply with a lawful order regarding the complaint, the defendant waives his right to litigate the propriety of the relief requested and consents, in effect, to entry of judgment by default awarding plaintiff the relief requested. *See* SCRA 1986, 1-054(D); *Gallegos v. Franklin*, 89 N.M. 118, 547 P.2d 1160 (Ct.App.1976); *Southern Arizona School for Boys, Inc. v. Chery*, 119 Ariz. 277, 580 P.2d 738 (Ct.App.1978).

Accordingly, the default judgment here was proper.

V.

Finally, the homeowners contend that the trial court abused its discretion in reinstating the default judgment. In their brief-in-chief the homeowners proffer various reasons for the four-month delay between the time the trial court set aside the previously entered default and ordered an "immediate" answer and the ultimate filing of that answer, but on oral argument they conceded that the delay was a case of simple neglect. The homeowners were represented by counsel when the court ordered the filing of an answer "forthwith," and no significant basis has been presented here to establish that the court abused its discretion in reinstating the default when it finally did.

"An abuse of discretion will be found when the trial court's decision is contrary to logic and reason." *Three Rivers Land Co. v. Maddoux*, 98 N.M. 690, 694, 652 P.2d 240, 244 (1982) (citing *Federal Land Bank of Wichita v. Burgett*, 97 N.M. 519, 641 P.2d 1066 (1982)). Although a judgment by default is not favored, *Springer Corp. v. Herrera*, 85 N.M. 201, 202, 510 P.2d 1072, 1073 (1973), reversal by this Court is warranted only if there is a showing of an abuse of discretion, *New Mexico Educators Federal Credit Union v. Woods*, 102 N.M. 16, 17, 690 P.2d 1010, 1011 (1984). The burden is upon the appellant to show that the trial court abused its discretion, *Coastal Plains Oil Co. v. Douglas*, 69 N.M. 68, 71, 364 P.2d 131, 133 (1961), and this burden is a heavy one in view of the requirement that there be a patent showing of abuse of discretion or manifest error in the trial court's exercise of that discretion, *Hanberry v. Fitzgerald*, 72 N.M. 383, 387, 384 P.2d 256, 259 (1963).

In this case the homeowners have not shown that the trial court's decision was contrary to logic and reason, nor have they shown in any other way why or how that decision was an abuse of discretion. The trial court had the authority to impose a condition when it set aside the previously entered default judgment, and it necessarily had the authority to reinstate the default when that condition was not met. *See Kutz v. Independent Pub. Co., Inc.*, 101 N.M. 587, 590, 686 P.2d 277, 300 (Ct. App.1984).

The district court did not abuse its discretion in reinstating the default judgment.

VI.

In his answer brief the subcontractor requests, in addition to costs (which are allowed the prevailing party as a matter of course, SCRA 1986, 12-403(A)), an award of attorney's fees and damages of 10% of the amount of the judgment for taking an appeal which is frivolous, not in good faith or merely for the purpose of delay, pursuant to SCRA 1986, 12-403(B)(4) and NMSA 1978, Section 39-3-27. In light of our discussion in Part III of this opinion, we believe that this appeal was not frivolous, in

bad faith, or taken merely for the purpose of delay. Accordingly, we deny the request for damages but remand for the fixing of a reasonable attorney's fee for services rendered on appeal before this Court. *See* NMSA 1978, § 48-2-14 (Repl.Pamp. 1987); *Measday v. Sweazea,* 78 N.M. 781, 786, 438 P.2d 525, 530 (Ct.App.1968); *Dunson Contractors, Inc. v. Koury,* 76 N.M. 723, 726, 418 P.2d 66, 68 (1966).

The order of the district court is affirmed. The cause is remanded for the purpose of setting a reasonable attorney's fee to be allowed the appellee for the services of his attorney in this Court.

IT IS SO ORDERED.

SOSA, C.J., concurs.

RANSOM, J., specially concurs.

RANSOM, Justice (specially concurring).

Under Part III of the Court's opinion, the question is posed whether failure of a complaint to state a claim upon which relief can be granted operates to deprive the court of jurisdiction over the subject matter. To me, this begs the issue of "power" as a jurisdictional issue separate from "subject matter."

While I concur with the limited overruling of *Martinez, Campbell,* and *Phillips,* to the extent they hold a failure to state a cause of action deprives the court of subject matter jurisdiction, I would not abandon so quickly the principle that a court lacks power to grant relief on a complaint that fails to state a cause of action, and that "power or authority" is a jurisdictional issue that may be raised for the first time on appeal or, perhaps, alternatively under Rule 1-060(B)(4).

It is obvious to me, nonetheless, that the court had subject matter jurisdiction, and that it had the power to entertain issues of failure to state a claim upon which relief can be granted. For example, under Rule 1-012(B), on a motion asserting the defense of failure to state a claim upon which relief can be granted, the court may hear matters outside the pleadings as on a motion for summary judgment.

Power to grant relief, however, is a separate issue. For example, because a defaulting party is not deemed to have admitted specific allegations of unliquidated damages, a court is without power or authority to enter default judgment for unliquidated damages *until evidence is considered. See Gallegos v. Franklin,* 89 N.M. 118, 123-25, 547 P.2d 1160, 1165-67 (Ct.App.) (*well-pleaded allegations* in a complaint establish a defaulting defendant's liability, but the amount of unliquidated damages claimed by plaintiff are not considered to be admitted by default), *cert. denied,* 89 N.M. 206, 549 P.2d 284 (1976).

Under a statutory cause of action, no claim is stated if there is a failure to allege an essential element, and it may be said that the court is without power to grant relief under the statute unless the essentials of the statutory cause of action are satisfied. While a defaulting party may not have admitted essentials of a statutory cause of action not alleged in the complaint, the court certainly has the subject matter jurisdiction to consider evidence and satisfy itself that relief may be granted. The court must decide under the circumstances of each case whether, because of the complaint's failure to state an essential element, the defaulting party did or did not admit liability. I would hold that a defaulting party acts at his or her own peril in saying "So what?" to a statutory cause of action technically deficient but subject to proof as to all essential elements not admitted by the default.

789 P.2d 1260

John LORENTZEN, Plaintiff–Appellee,

v.

Manuel T. SANCHEZ and Felicita Sanchez, his wife, et al., Defendants–Appellants.

No. 18448.

Supreme Court of New Mexico.

April 3, 1990.

Melvin D. Rueckhaus, Clara Ann Bowler, Albuquerque, for defendants-appellants.

James C. Hall, Frank P. Dickson, Jr., Albuquerque, for plaintiff-appellee.

OPINION

WILSON, Justice.

Manuel T. and Felicita Sanchez (the Sanchezes), defendants-appellants, appeal a trial court judgment which modified a real estate contract between the Sanchezes and John Lorentzen (Lorentzen), plaintiff-appellee. The trial court modified the contract to reflect the court's finding that the Sanchezes did not convey full fee simple title to the property and ordered the Sanchezes to refund seventy-five percent of the purchase price to Lorentzen. We reverse.

STATEMENT OF FACTS

On April 9, 1985, the parties entered into a real estate contract in which Lorentzen bought and the Sanchezes sold a half-acre parcel of unimproved real estate for $10,000. The contract required a $2,500 downpayment and three annual payments of $2,500 at ten-percent annual interest, and required the Sanchezes to execute a warranty deed and place it in escrow.

The parties' agreement was on a printed real estate contract form which included the following additional typed and initialed paragraph:

> The *Purchaser agrees to commence and complete as soon as possible a suit to quiet the title to the property herein conveyed at his own cost* and the Escrow Agent herein is hereby empowered to insert in the Warranty Deed after the wording "more particularly described as" the full survey description approved in the Quiet Title Decree. It being further provided, however, that *in the event the*

Quiet Title Suit is prevented from reaching its conclusion within six months hereof that the Purchaser may instruct the Escrow Agent to deliver to the Seller the Special Warranty Deed escrowed herewith, whereupon the Seller shall immediately pay $2,500.00 to Purchaser. Otherwise this contract shall remain in full force and effect. [Emphasis added.]

Lorentzen paid the downpayment and the first annual payment, totalling $5,000. Lorentzen did not elect to rescind the contract within the six month period provided by the contract and sued to quiet title to the property on October 17, 1985, eight days after the six month period expired. Lorentzen joined the Sanchezes as involuntary plaintiffs in that suit. Lorentzen cured an alleged title defect by purchasing the interest of third parties who claimed a fractional interest in the property, and on October 1, 1986, he obtained a judgment quieting title in his name. The next day Lorentzen notified the Sanchezes of his judgment and offered to pay them a token amount for a quitclaim deed to the property, rather than the agreed contract price. The Sanchezes moved to set aside the judgment and on April 2, 1987, the trial court entered an amended judgment stating that Lorentzen's title to the property was subject to the Sanchezes' real estate contract.

On May 14, 1987, Lorentzen filed a complaint against the Sanchezes seeking: (1) an injunction prohibiting the Sanchezes from enforcing the contract; (2) modification of the contractual purchase price and reimbursement of $2,500 for overpayment of the modified contract price; and (3) $20,000 in damages which Lorentzen spent purchasing third parties' interests in the property, due to the Sanchezes' breach of title warranty. The trial court granted the injunction on the condition that Lorentzen continue payments under the original contract into escrow. The trial court found that the Sanchezes only owned a one-fourth interest in the property when the contract was made, and that Lorentzen paid $20,000 to third parties to cure defects in the property's title. The court also found that Lorentzen was not aware of any specific title problems with the Sanchezes' property until after the contract was executed. The parties agreed that the contract was not ambiguous, fraudulent, or the result of mistake. The trial court concluded that the Sanchezes breached their title warranty and thus, Lorentzen should only pay twenty-five percent of the purchase price; $2,500. The Sanchezes appeal the trial court's judgment.

ISSUES

On appeal the Sanchezes claim that substantial evidence does not support the trial court's judgment modifying the contract price upon its finding that the Sanchezes owned and conveyed a one-fourth interest in the property. Lorentzen argues that the Sanchezes breached title warranties by not delivering full fee simple title to the property, thus entitling him to a reduction of the purchase price.

Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Register v. Roberson Constr. Co.,* 106 N.M. 243, 245, 741 P.2d 1364, 1366 (1987). In deciding whether substantial evidence supports the trial court's ruling we must determine whether Lorentzen contracted to assume the responsibility and costs for curing any title defects, in lieu of exercising his option to rescind the contract and obtaining a refund of the purchase price. We find this issue to be dispositive of this case. In answering this question we examine the contract's provisions, which embody the parties' intent. *Boatright v. Howard,* 102 N.M. 262, 694 P.2d 518 (1985). "In construing the terms of the contract, each part of the contract is to be accorded significance according to its place in the contract so as to ascertain and give effect to the intentions of the parties." *Brooks v. Tanner,* 101 N.M. 203, 206, 680 P.2d 343, 346 (1984). "[W]here there is inconsistency in a contract, matter deliberately added by the parties to the contract form must prevail."

17A C.J.S. *Contracts* § 310 (1963). *See also NLRB v. Boyer Bros.*, 448 F.2d 555, 560 (3d Cir.1971), *cert. denied, Boyer Bros. v. NLRB*, 409 U.S. 878, 93 S.Ct. 132, 34 L.Ed.2d 132 (1972).

The real estate contract gave Lorentzen six months to conclude a suit to quiet title to the property. If the property's title was defective Lorentzen could cure any title defects at his own cost and amend the deed to describe the actual property interest conveyed or he could rescind the contract and recover his purchase price payments.

Lorentzen asserts that the Sanchezes breached the warranty deed covenants. Such covenants include the warranty that "'the grantor * * * has good right to sell and convey the [granted premises] * * *'" NMSA 1978, § 47-1-37. This warranty was included in the contract form. However, the parties deliberately added to the contract the typed paragraph noted above, in which Lorentzen agreed to quiet title to the property at his own expense or opt to rescind the contract within six months. Under the law stated above, this language must take precedence over that in the contract form.

"New Mexico * * * has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals." *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 108 N.M. 467, 471, 775 P.2d 233, 237 (1989). A purchaser of real estate may waive title defects by failing to object to them at closing, when the contract provides the purchaser with the option of waiving any title defects or rescinding the contract. *See Jones v. Dickens*, 394 F.2d 233 (10th Cir. 1968).

The record indicates that Lorentzen was a licensed real estate broker who had a real estate company. He personally negotiated this contract with the Sanchezes and bought the Sanchez property and adjoining property as part of a plan to develop a seventeen-acre tract. The contract itself shows that Lorentzen was aware that the Sanchez property was not without title problems. Lorentzen elected to clear title at his own cost, thereby waiving his right of rescission and reimbursement, as well as his right to challenge the title conveyed. *See id.*

CONCLUSION

The Sanchezes had no duty to perfect the property's title, as Lorentzen contracted to assume that burden. Without a duty there can be no breach. As Lorentzen received everything he bargained for, the district court erred in reducing the contract price. Accordingly, we reverse and remand to the trial court to enter judgment consistent with this opinion.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

789 P.2d 1262

Terry J. EOFF, Individually and as Personal Representative of the Estate of Leo Eoff, Deceased, Fay Nell Wolfe, and Tom Stanley Eoff, Plaintiffs-Appellants,

v.

Robert H. FORREST and James L. Dow, Defendants-Appellees,

and

Carlsbad National Bank, Defendant.

No. 17901.

Supreme Court of New Mexico.

April 5, 1990.

J.W. Anderson, Tucumcari, for plaintiffs-appellants.

W.T. Martin, Jr., Carlsbad, for defendant-appellee Forrest.

Civerolo, Hansen & Wolf, Roberto C. Armijo, Albuquerque, for defendant-appellee Dow.

Robert C. Gutierrez, Albuquerque, for defendant Carlsbad Nat. Bank.

OPINION

MONTGOMERY, Justice.

Section 45–1–106 of the Probate Code of this state (taken largely from the Uniform Probate Code) provides in part:

> If fraud has been perpetrated in connection with any proceeding or in any statement filed under the Probate Code or if fraud is used to avoid or circumvent the provisions or purposes of the code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud including restitution from any person * * * benefiting from the fraud, whether innocent or not.

NMSA 1978, § 45–1–106(A) (Repl. Pamp. 1989).

Seeking to invoke this section and relying on other asserted bases of liability, Leo Eoff's nephews and niece (the heirs) sued Robert H. Forrest and James L. Dow (the defendants), along with the Carlsbad National Bank (the bank), for actual and punitive damages claimed to have resulted from an informal probate of the decedent's purported will. The trial court granted summary judgment to the defendants on the heirs' claim of fraud, certifying the judgment as final under SCRA 1986, 1–054(C)(1). The heirs appeal, and we reverse. Although the heirs may have a difficult time at trial in meeting the exacting requirements for a claim of fraud, the defendants failed to make a *prima facie* showing that there is no genuine issue as to the facts underlying the heirs' claim.

I.

Leo Eoff (the decedent) died on August 16, 1985, at Carlsbad, New Mexico. After

his death, the Carlsbad police department found a safe deposit box key at his home and arranged to have the box, which was at the bank, opened. Inside the box was a document apparently signed by the decedent and reading as follows:

> After my death and all incidental expenses are paid; my entire estate (if any) including all relestate [sic], saving certificates, cashon [sic] hand, tools, building equipment, vehicles ect [sic]; I bequeath to The Home For Handicapped Children, of Carlsbad.
>
> As of this date being of sound mind and body, I make this bequest after due consideration and of my own free will.

The document (the purported will) was dated March 18, 1977 in Carlsbad, New Mexico, and was signed, apparently by the decedent. Two signature lines for witnesses appeared below the signature, but they contained no signatures.

The only home for handicapped children in Carlsbad is operated by the Carlsbad Association for Retarded Children, apparently on a farm (the CARC Farm). The president of the CARC Farm, Forrest, took the purported will to an attorney, Dow, to ascertain whether the CARC Farm had any interest in the decedent's estate. Dow did some research and told Forrest that the purported will, if executed in New Mexico, was invalid, but if executed in another state that recognized "holographic" wills, it might be valid under NMSA 1978, Section 45–2–506 (Repl. Pamp. 1989). Forrest told Dow that the police department and the funeral home had been unable to locate any heirs of the decedent; he also learned from Dow that, if the will was invalid and there were no heirs, the estate eventually would escheat to the state. Dow advised that it was a question of interpretation whether the CARC Farm was the devisee referred to in the purported will, but that, if so, the CARC Farm was an "interested party" under NMSA 1978, Section 45–1–201(A)(19) (Repl.Pamp. 1989), and, as president of the Farm, Forrest could apply for letters testamentary and offer the will for probate. Dow further advised Forrest that the only way he could handle the matter would be to make full disclosure to the Probate Court of the facts and of the possibility that, if an heir eventually were located, he or she could set aside any probate of the purported will within three years after the decedent's death. Forrest requested Dow to proceed in that fashion.

Dow filed an application for informal probate with the Probate Court of Eddy County, accompanied by a memorandum brief setting out the facts and legal positions of Forrest as applicant and Dow as his attorney. The application recited that Forrest was an interested person and president of the CARC Farm; that the CARC Farm was the only devisee known or ascertainable with reasonable diligence; that the applicant believed the instrument which was the subject of the application was the decedent's last will and testament; and that

> Applicant does not know where the will, which is tendered herewith, was executed, but states that if the will was executed in a state requiring the will be signed by the testator, then possibly the will tendered herewith is a valid will.

The memorandum brief signed by Dow set out the basic facts as to discovery of the purported will and apparent absence of heirs and continued:

> The applicant and attorneys for applicant have no knowledge of where this Will was executed. If it was executed in the State of New Mexico, it is not sufficient under the New Mexico Uniform Probate Code ... to constitute a valid Will. If the Will was executed in a State that requires Wills drawn by decedent be signed by him without witness, then the Will could be a valid Will.
>
> ....
>
> Applicant ... does not know where the Will was executed but if the Will was executed in a State recognizing the validity of Wills signed by the decedent but not witnessed, then this would be a valid Will.

The memorandum brief further stated, apparently relying on NMSA 1978, Section

45–3–303(C) (Repl.Pamp. 1989), that "this Court may presume this to be a valid Will." The memorandum brief finally advised the court that, if there were any undiscovered heirs of the decedent, they would be protected by provisions in the Probate Code allowing informal probate of a will to be set aside in a formal testacy proceeding commenced within three years after the decedent's death. *See* NMSA 1978, § 45–3–108(A)(3) (Repl.Pamp. 1989). The applicant assured the court that he would make a diligent search to find any heir and that, if any was found, he or she could contest the probate of the purported will within the time allowed by the statute.

The probate court granted the application and appointed Forrest as personal representative in an unsupervised, informal proceeding in September 1985. Dow thereafter did undertake various efforts, into the summer of 1986, to locate any heirs, but none was found. However, in the summer of 1987 the decedent's nephew, Terry Eoff, discovered that Forrest had been appointed as personal representative of his uncle's estate and initiated a formal testacy proceeding. The district court revoked probate of the purported will and adjudicated the appellants as the decedent's heirs. All of the assets of the estate were turned over to Terry Eoff as the new personal representative of the decedent's estate, except for approximately $21,000 that had been expended in the administration of the estate and various items of personalty that Eoff claimed were missing.

The heirs then brought suit against Forrest, Dow and the bank, seeking, in addition to actual and punitive damages for alleged fraud, damages from Forrest for conversion, recovery from Dow of an allegedly excessive fee, and damages from the bank for unauthorized removal of the purported will from the safe deposit box. All three defendants moved for summary judgment, and the district court granted the motions as to Count I (fraud), granted Forrest's motion in part as to Count II (conversion), and denied Dow's motion as to Count III (recovery of excessive fee). The record does not reflect the court's disposition, if any, of the bank's motion. The heirs appeal, asserting as the sole issue that the trial court erred in granting summary judgment as to the fraud count in their complaint.

II.

There is thus no issue on this appeal as to the propriety of the defendants' actions in seeking informal probate of the purported will, apart from the question whether the defendants committed fraud as contemplated by Section 45–1–106(A). More specifically, the heirs did not assert in their complaint and do not assert on appeal that their alleged damages resulted from any wrongful conduct, either actual or constructive, by the defendants in initiating the informal probate proceeding, whether by way of possible breach of fiduciary duty, breach of a standard of care on the part of the attorney for the estate, or other conceivable theories that might lead to relief. The *only* issue presented to the trial court and to this Court on appeal is whether defendants committed fraud in their representations to the probate court.

We are thus called upon to apply Section 45–1–106(A) to the facts as developed in the affidavits submitted to the district court. The heirs do not assert on appeal that the term "fraud" as used in the statute has any meaning different from that involved when the fraud claimed is ordinary, common-law fraud. There is no claim, for example, that the kind of fraud contemplated by the Probate Code is less rigorous, in its requirements of pleading and proof, than common-law fraud, as is true, for instance, in the case of securities fraud. *See, e.g., Treider v. Doherty & Co.,* 86 N.M. 735, 527 P.2d 498 (Ct.App.), *cert. denied,* 86 N.M. 730, 527 P.2d 493 (1974). In *Treider,* the court of appeals noted that common-law fraud "must be proven by clear and convincing evidence because it is an easily made charge that stains the person accused with a mark of dishonesty. In common law

fraud the plaintiff must prove that the defendant intentionally deceived him." *Id.* at 737, 527 P.2d at 500 (citations omitted). The court went on to distinguish such common-law fraud from the special statutory fraud involved there, saying: "The intent with which the defendant makes the statement is irrelevant under the terms of the statute. The statute requires only that the statement made be false and material, or that the omission be of a material fact necessary to make true the statement made." *Id.*

We believe that the "fraud" contemplated by Section 45–1–106(A) is ordinary, common-law fraud as distinct from some other, less demanding species of fraud, such as the securities fraud involved in *Treider. See Witt v. Jones,* 111 Idaho 165, 168, 722 P.2d 474, 477 (1986) (action for fraud against personal representative of estate requires particularly-pled elements of common-law fraud); *cf. In re Estate of Latshaw,* 194 Kan. 747, 402 P.2d 323 (1965). The "Probate Code" fraud involved here comes closer to "fraud on the court," which, if anything, is even more exacting than common-law fraud. *See Moya v. Catholic Archdiocese of New Mexico,* 107 N.M. 245, 247, 755 P.2d 583, 585 (1988):

> Fraud upon the court embraces only that species of fraud which does or attempts to defile the court itself or which is perpetrated by officers of the court so that the judicial system cannot perform in a usual manner. *Jemez Properties, Inc. v. Lucero,* 94 N.M. [181] 184 n. 1, 608 P.2d [157] at 160 n. 1 [(1979)]. Fraud upon the court occurs where there is a deliberately planned and carefully executed scheme to defraud the court * * *.[1]

We hold that the well-established requirements under New Mexico law for an action based on fraud apply to a claim of fraud asserted under Section 45–1–106(A): (a) a misrepresentation of fact, (b) known by the maker to be false, (c) made with the intent to deceive and to induce the other party to act in reliance, and (d) actually relied on by the other party to his or her detriment. *Cargill v. Sherrod,* 96 N.M. 431, 432–433, 631 P.2d 726, 727–28 (1981); *Unser v. Unser,* 86 N.M. 648, 653–654, 526 P.2d 790, 795–796 (1974); *Prudential Ins. Co. of Am. v. Anaya,* 78 N.M. 101, 104, 428 P.2d 640, 643 (1967); *Sauter v. St. Michael's College,* 70 N.M. 380, 374 P.2d 134 (1962). "There must be a concurrence of all of these essential elements and without this there can be no actionable fraud. None * * * can be presumed, but each must be shown by clear and convincing evidence." *Sauter,* 70 N.M. at 385, 374 P.2d at 138.

III.

Thus, the heirs will face a formidable task in attempting to establish at trial the elements of the cause of action they have pled. Even so, it is not the function of the trial court on a motion for summary judgment, and it is not our function here, to decide whether those elements have been established, if one or more factual issues appear from the materials submitted to the court in connection with the motion. The first step in considering such a motion is to decide whether or not the moving parties have established a *prima facie* case that there is no genuine issue of fact as to one or more of these required elements; only in that case would the movants be entitled to judgment as a matter of law under SCRA 1986, 1–056. *Koenig v. Perez,* 104 N.M. 664, 666, 726 P.2d 341, 343 (1986); *Goodman v. Brock,* 83 N.M. 789, 792, 498 P.2d 676, 679 (1972).

The materials available for consideration by the court on the defendants'

1. As *Moya* recognizes, the involvement of an attorney in the perpetration of fraud can amount to fraud on the court. "[W]hile an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court." 7 *Moore's Federal Practice* ¶ 60.33, at 359 (2d ed.1987).

motion consisted of the following: the purported will, the defendants' application for informal probate, Dow's memorandum brief in connection with the application, and various affidavits, including an affidavit by the probate judge who granted the informal probate. The probate judge's affidavit stated that she relied on the lawyers in the community and signed whatever documents they presented to her. Her affidavit was sufficient, at least for purposes of the motion, to establish the fourth element of the heirs' cause of action: reliance by the "other party" to his or her detriment.[2]

As to the other elements of the heirs' claim for fraud, we think that the materials submitted to the district court, while not establishing any of those elements, were sufficient to give rise to several issues of fact. Neither Forrest's nor Dow's affidavit directly addressed the questions whether the defendants had made a misrepresentation of fact, whether (if so) they knew their statements to be false, or whether the statements were made with the intent to deceive the probate judge. Forrest simply averred that he had turned over the assets in the estate to Terry Eoff upon the latter's appointment as successor personal representative; it did not relate to the circumstances surrounding the application for informal probate.

Dow's affidavit, on the other hand, did address those circumstances but, when considered in connection with the purported will and the materials filed with the probate court, left certain questions unanswered—questions which it was necessary for him to eliminate in order to carry his initial burden on summary judgment. First, although Dow swore that "[a]t the time of filing the probate, I filed the Memroandum [sic] Brief with the Court fully disclosing all the facts as we knew them at that time and thereby disclosed to the Court * * * the legal procedure that we intended to take," the affidavit at no point affirmed the truth of the statements that had been made to the probate court or denied that, if any statement was not true, it was known by the applicants to be false. Dow's affidavit related at considerable length the circumstances under which the application had been filed and the lengths to which he had gone to determine whether the decedent had left any heirs. From this affidavit one can assume that Forrest and Dow faced a quandary: The decedent had died leaving an instrument that appeared to be a will devising his entire estate to the CARC Farm;[3] there were no heirs as far as anyone knew; if no heir existed or could be found, the estate presumably would go unadministered and ownership eventually would pass to the state.

But the recitations in Dow's affidavit, while perhaps warranting an inference that he and Forrest were acting in complete good faith in proceeding as they did, did not suffice to dispel the conflicting inferences that arose from the purported will itself and the documents submitted to the probate court to secure its informal probate. Immediately above the date on the purported will was an address on West Church Street in Carlsbad—yet the defendants represented that they did not know where the purported will was executed and implied that it might have been executed in a state other than New Mexico. They further stated that, if the purported will were executed in a state recognizing the validity of wills signed by the decedent but not witnessed, the purported will would be valid—but every state appears to invalidate a

2. In the context of fraud under Section 45-1-106(A), as in other instances of "fraud on the court," we construe the "other party" whose reliance is essential for a valid cause of action to be the court to which the representation is made. *See Moya,* 107 N.M. at 247-48, 755 P.2d at 585-86 (Supreme Court defrauded in relying on false testimony to reverse district court judgment); *Lockwood v. Bowles,* 46 F.R.D. 625, 632 (D.D.C. 1969) (fraud between parties not treated as fraud on court without attempt to defile or improperly influence court itself).

3. The defendants submitted an affidavit of one of the decedent's friends, who stated that the decedent had told him that he had made a will and had given his entire remaining property to the CARC Farm "or the farm north of Carlsbad, New Mexico."

typewritten (i.e., not a holographic or handwritten) will the execution of which has not been witnessed by attesting witnesses.[4] Dow's Memorandum Brief, relying on NMSA 1978, Section 45-3-303(C), stated that the probate court "may presume this to be a valid Will"—but Section 45-3-303(C) permits such a presumption only when the will appears to have been properly executed or when a person having knowledge of the circumstances of execution gives a sworn statement showing that it was properly executed. The requirements for "due execution" in Sections 45-2-502 and 45-2-506 contemplate that the will must be executed in the presence of at least two attesting witnesses or must comply with the law of the place where the will is executed. In this case the purported will did not appear to have been properly executed, and Forrest (as the affiant in the application for informal probate) did not have knowledge of the circumstances of its execution.

We certainly do not hold that the raising of these questions would satisfy the heirs' burden at trial to prove fraud by clear and convincing evidence. The sufficiency of the heirs' proof at trial must be decided, first, by the trial judge (in ruling, for example, on a motion for a directed verdict) and, second, by the jury if the issue of fraud is submitted to it. We hold only that the questions raised by the papers filed with the probate court constituted issues of fact and that the affidavits in support of the motion for summary judgment did not negate them. The movants, in other words, did not make a *prima facie* showing that there was no genuine issue of fact as to one or more of the requisite elements in the heirs' claim for fraud. That being the case, there was no occasion for the district court to consider, and we do not consider, whether anything submitted on behalf of the heirs rebutted a *prima facie* showing which the movants did not make.

The purpose of Section 45-3-303

> is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly * * *. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the strength of an affidavit by a person who can say what occurred at the time of execution.

Unif. Probate Code § 3-303 comment, 8 U.L.A. 250 (1983). The official comments to the Uniform Probate Code also indicate that the requirement of an oath

> concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings * * *. If *deliberately false* representation is made, remedies for fraud will be available to injured persons * * *.

Id., § 3-301, 8 U.L.A. at 247 (emphasis added).

The record in this case does not establish that the defendants made "deliberately false representations" or that they intended to abuse the informal probate process. However, that process was not designed to determine the validity of a testamentary instrument lacking the facial indicia of validity contemplated by Sections 45-3-301 and 45-3-303. That task is reserved to the district court under Sections 45-1-302 and 45-3-401. In this case there was also a question as to the identity of the devisee under the purported will; whether the "Home For Handicapped Children, in Carlsbad" meant the CARC Farm was a question of interpretation that only the district court could properly resolve. *See Moore v. Bean*, 82 N.M. 189, 477 P.2d 823 (1970) (considering extrinsic evidence and interpreting testator's intent, court found charitable beneficiary to be intended devisee despite mistake in will regarding charity's name and location). While we see no basis for the heirs' assertion that the defendants falsely represented that the CARC Farm was the devisee under the purported will, we disapprove submitting this kind of issue to the probate court. The system of probate in New Mexico depends on attorneys

4. *See Shepard's Lawyer's Reference Manual* § A-33 (M. Bennett ed. 1983).

and requires them to exercise their best professional judgment in selecting informal probate, in which the attorney is the main safeguard against all manner of abuse, or formal probate, which is designed to resolve questions regarding the validity and interpretation of a testamentary instrument.

We conclude that the district court erred in finding that there was no genuine issue as to one or more of the material facts necessary to give rise to a claim for fraud against the defendants under Section 45–1–106(A). The summary judgment in defendants' favor is reversed, and the cause is remanded for further proceedings consistent with this opinion.

SOSA, C.J., and WILSON, J., concur.

RANSOM and BACA, JJ., specially concur.

RANSOM, Justice (specially concurring).

While I concur in the result reached in this opinion, I do so on rationale that conflicts with that of the author. Referring to the substantive evidentiary burden of clear and convincing evidence, the opinion holds that the "sufficiency of the heirs' proof" can be tested only at trial on a motion for directed verdict or by the jury. We recently addressed sufficiency of proof by clear and convincing evidence in the context of a directed verdict.

> The possibility of recovery may appear remote to the trial judge in the normal case involving a "preponderance of the evidence" standard. It may appear even more remote when proof is required by "clear and convincing evidence." However, if the plaintiff has introduced a minimum quantum of evidence from which the jury could reasonably find in his favor under the applicable standard of proof, then the plaintiff is entitled to a jury determination.
>
> When the standard is clear and convincing evidence, the question for the trial judge is whether there is sufficient evidence introduced from which a reasonable juror could reach an "abiding conviction" as to the truth of the plaintiff's claim. *See Duke City Lumber Co. v. Terrel*, 88 N.M. 299, 540 P.2d 229 (1975); *In re Foster*, 102 N.M. 707, 699 P.2d 638 (Ct.App.), *cert. denied*, 102 N.M. 734, 700 P.2d 197 (1985); *see also In re Fletcher*, 94 N.M. 572, 613 P.2d 714 (Ct.App.), *cert. denied*, 94 N.M. 674, 615 P.2d 991 (1980).
>
> In the instant case, we believe that the evidence presented by [plaintiff] met this threshold standard and, therefore, entry of a directed verdict against him was error. The evidence is entirely circumstantial, but we have long recognized that clear and convincing evidence may be circumstantial in nature. *See Ledbetter v. Webb*, 103 N.M. 597, 711 P.2d 874 (1985); *Sauter v. St. Michael's College*, 70 N.M. 380, 374 P.2d 134 (1962).

Chavez v. Manville Products Corp., 108 N.M. 643, 648, 777 P.2d 371, 376 (1989).

I would explicitly extend the holding of *Chavez* to summary judgment proceedings. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Supreme Court held:

> [W]e are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.

Id. at 252, 106 S.Ct. at 2512.

> In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the * * * "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant.

Id. at 255, 106 S.Ct. at 2514.

The opinion rendered today does not apply the *Chavez* holding to summary judg-

ment proceedings. It specifically states: "We certainly do not hold that the raising of these questions [i.e., factual inferences] would satisfy the heirs' burden at trial to prove fraud by clear and convincing evidence." Also: "The record in this case does not establish that the defendants made 'deliberately false representations' or that they intended to abuse the informal probate process."

To the contrary, while the possibility of recovery may appear remote and, as expressed in the opinion, "the heirs may have a difficult time at trial meeting the exacting requirements for a claim of fraud," I believe the plaintiff has responded to the motion for summary judgment with a minimum quantum of evidence from which the jury could reasonably find in his favor under the applicable standard of proof.

Therefore, applying the substantive evidentiary standard of proof to this proceeding, I would reverse the summary judgment and remand for trial.

BACA, J., concurs.

[redacted]

[redacted]

[redacted]

790 P.2d 502

Margarito TRUJILLO and Swope Farm and Livestock Co., Plaintiffs–Appellants,

v.

CS CATTLE CO. and Eagle Nest Reservoir Corporation, Defendants–Appellees,

v.

ANGEL FIRE CORPORATION, Defendant–Intervenor–Appellee.

No. 18129.

Supreme Court of New Mexico.

April 12, 1990.

Rehearing Denied May 11, 1990.

Steven E. Schmidt, John W. Danfelser, Albuquerque, for plaintiffs-appellants.

Charles T. DuMars, Albuquerque, Kastler & Kamm, Paul A. Kastler, John William Clever, Raton, for defendants-appellees CS Cattle Co. and Eagle Nest Reservoir Corp.

Kanter & Everage, Elvin Kanter, Albuquerque, for defendant-intervenor-appellee Angel Fire Corp.

OPINION

BACA, Justice.

Appellants, Margarito Trujillo and Swope Farm and Livestock Company, brought suit against CS Cattle Company (CS), its wholly owned subsidiary Eagle Nest Reservoir Corporation, and intervenor Angel Fire Corporation seeking *inter alia* a declaratory judgment, injunctive relief, and damages for breach of contract regarding appurtenant water rights. Appellants sought to have CS's regulations regarding its reservoir declared invalid as violative of certain covenants in Trujillo's and Swopes' deed granting water rights and sought injunctive relief preventing the enforcement of the regulations. They also sought damages for breach of contract and tort. The district court, following a bench trial on the merits, determined that the regulations promulgated by CS were reasonable and that the covenant by which Trujillo claimed water was ambiguous on the issue before the court. It interpreted the covenant in favor of appellees, and granted the judgment in their favor.

We find that the contract was not ambiguous and reverse the judgment.

FACTS

CS was granted a permit to construct a reservoir with a priority date of 1907. The water right permit was confirmed by an adjudication decree in 1929. Appellants received appurtenant water rights through two warranty deeds granted by CS Cattle Company conveying certain acreage to their predecessors in interest in 1933 and 1951. The 1933 deed conveying 462.2 acres of land stated that 135 of the acres have "water right[s] under Permit Number seventy-one (71)." The instrument continued that the conveyance of land was made:

> Together with the right, as an appurtenance to said lands, to demand and receive of the waters of the Cimarron River and its tributaries, impounded and to be impounded by what is known as the Eagles [sic] Nest Dam and Reservoir owned by [the Charles Springer Cattle Company (now CS)], an amount of water delivered to said land sufficient for beneficial use in the proper irrigation thereof, for the growing of crops thereon without waste of said water, limited to the maximum amount of one and one-half (1½) acre feet per acre per annum on not to exceed one hundred and thirty-five (135) acres of land actually irrigated during each year.

The 1951 deed contained the following agreement concerning the water rights:

> 1. It is understood and agreed that the water right appurtenant to said land above described is a right for the irrigation of 972 acres, said water right being a part of the water right represented by Permit No. 71. [The Charles Springer Cattle Company (now CS)] hereby agrees that, without cost to [appellants' predecessor] it will deliver all of the water appurtenant to the said 972 acres of irrigated land at the diversion dam now serving said land and located on the Cimarron River, and that no maintenance charges or other charges whatsoever shall be made to [appellants' predecessor] for the upkeep of the Eagle's [sic] Nest Dam and Reservoir from the said reservoir to the said diversion dam on the Cimarron River * * *
>
> 2. To guard against a shortage of irrigation water for the irrigated lands hereby conveyed, [the Charles Springer Company (now CS)] agrees that of the water stored in the Eagle's [sic] Nest Dam and Reservoir, *it will not sell or deliver water for any use whatsoever to any person or party not having a vested water right for the same at the date of this deed, at any time when the water stored in the said Eagle's [sic] Nest Dam and Reservoir is less than 20,000 acre feet, except with the written consent of all parties having vested water rights under said Permit No. 71, or their heirs or assigns.*

(Emphasis added.)

The agreement continued that the water rights vested under Permit No. 71 included those assigned to appellants through the 1933 deed. It had become apparent that at times the water supply would be less than required to meet all the rights to the water. CS agreed to grant those parties, including

appellants' predecessor in interest, that had contracted for water as of 1951, a priority date equal to that of the permit, 1907. These first tier users were granted the rights contained in the above deed. The first tier users had rights to approximately 10,040 acre feet of water per annum; parties with priorities antedating the permit also had rights to approximately 10,000 acre feet per annum.

Pursuant to the covenant, the first tier users met annually through 1981 to determine the appropriate pro rata allocation of water stored in the reservoir. In 1983, however, CS unilaterally promulgated regulations through which it sought to sell water when the reservoir contained less than 20,000 acre feet without the consent of the first tier users. CS further asserted the right to limit appellants' water rights to water received in the preceding year rather than water stored in the reservoir.

The amended regulations adopted by CS in 1988 state in pertinent part:

> 3. *Adoption to Contracts by Reference; Court Reference*
>
> (a) All of the contracts and deeds for water issued by, and executed between, the CS and the reservoir water users shall be subject to these Regulations as though set forth in full detail in the contracts and deeds to the degree they apply in each contract or deed.
>
> (b) The incorporation by reference of these Regulations shall also be true of all contracts and deeds for License 71 waters or water rights issued heretofore by the CS. All persons who have rights under License 71 shall be bound by these Regulations and all contracts, deeds and other documents evidencing or manifesting such person's rights under License 71 shall be deemed modified to conform to the provisions, terms and interpretations of these Regulations.
>
> * * * * * *
>
> 9. *New Contracts*
>
> Under License 71, CS may contract from time to time and on terms it may determine, water from the storage pool for beneficial use, in a bulk quantity or as second tier rights, and may also so contract for storage privileges for municipal or domestic use in the reservoir.
>
> * * * * * *
>
> 12. *Standby Pool*
>
> (a) CS has declared, by use and by contract, that there is a standby pool of 20,000 acre feet of water in the Reservoir, to be maintained, contracted, delivered out of storage, distributed or stored in the Reservoir. Such water has been, and will in the future be, beneficially used under New Mexico law for public recreation, game and fish, and other recognized beneficial uses.
>
> (b) CS may, from time to time, sell, deliver and distribute, in bulk quantity contracts for beneficial use, any portion of the standby pool * * *.
>
> * * * * * *
>
> 17. *Carryover Water or Annualized Carryover Storage Water*
>
> * * * The privilege of first tier water rights to the limited storage under the water storage year/use year and carryover provisions of these Regulations, is derived in part from the clause contained in certain contracts and deeds which proscribe a sale or delivery of water when the reservoir has less than 20,000 acre feet of water. The water storage year/use year and carryover storage privileges herein provided supplants such clause in its entirety, intent and meaning.

Appellants contest the regulations, which they claim abrogate the rights granted them through their deeds. They claim that appellees' contention that the deed is ambiguous regarding the 20,000 acre foot reservoir and thus allows appellee unilaterally to impose the regulations is meritless, and that, if the provisions in the deed create a nonbeneficial use of water, CS is not the proper party to assert that claim.

Appellants have presented the following issues for our consideration in support of its argument that the district court should be reversed: (1) the deeds unambiguously granted them certain rights, and those rights should be determined by this court as a matter of law; (2) because the language of the deeds is unambiguous, parol

evidence should not have been admitted to demonstrate an ambiguity; (3) the doctrine of merger precludes admission of the executory purchase contracts into evidence; (4) estoppel by deed bars CS from asserting rights contrary to its deeds; (5) the deeds, if ambiguous, should be interpreted against CS as drafter; (6) certain findings of fact are not supported by substantial evidence; and (7) enforcement of the agreements contained in the deeds does not result in waste.

CS has construed the issues somewhat differently, and contends: (1) the covenant properly was found to be ambiguous, and substantial evidence supports the trial court's construction; (2) appellants own a contract right to receive water from the reservoir, and do not own, as an appropriative right, any part of Permit 71; (3) appellants' contract for irrigation water does not entitle them to a 20,000 acre foot pool; and (4) the regulations in fact improve the operation of the reservoir and make more water available to appellants than there was previously.

We do not find it necessary to address all of the issues raised in order to resolve properly the case before us. Many of CS's contentions are premised in the ambiguity of the deed, a premise we find in error. Accordingly, we consider whether the deed is ambiguous, whether extrinsic evidence properly was admitted, whether estoppel by deed bars CS from asserting rights contrary to the deed, and whether the effect of the regulations is relevant to our decision.

As a threshold matter, CS claims that appellants have not met the requirements of SCRA 1986, 12–213(A)(3), pertaining to the format for an appellate brief-in-chief. It argues that appellants have not set forth a specific attack on the findings together with the substance of the evidence contended to be in error and thus is bound by those findings. We find, however, that appellants properly have set forth their argument. Appellants have based their claim in their deed, interpretation of which is a question of law. *See Peck v. Title USA Ins. Corp.*, 108 N.M. 30, 766 P.2d 290 (1988). This contention is stated adequately in appellants' briefs, with appropriate citation to the record and to the challenged findings. Because appellants rest on interpretation of the deed, the evidence supporting the findings that CS claims was not cited by appellants is irrelevant to our decision based on interpretation of the document. *See State ex rel. Garcia v. Martinez*, 80 N.M. 659, 459 P.2d 458 (1969).

I. *The Deed is not Ambiguous, and Parol Evidence is Inadmissible to Vary Its Clear Meaning.*

Initially, the parties argue whether appellants' right to water is appropriative or merely based in contract. CS vigorously maintains that it owns the permit, the dam, the reservoir, and the water, and that appellants have not gained a right to the water through an appropriation, which it maintains is the only way appellants could have gained an appropriative right.[1] Appellants contest this argument, indicating that an appropriative right may be gained through a transfer of land with water appurtenant.[2] We find, however, that resolution of this case does not require us to determine this issue. Even if appellants

1. CS relies on NMSA 1978, Sections 72–1–1 and 72–5–1 (Repl.Pamp.1985) for this proposition, as well as *State ex rel. Erickson v. McLean*, 62 N.M. 264, 308 P.2d 983 (1957); *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929); and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 58 S.Ct. 803, 82 L.Ed. 1202 (1938). Section 72–1–1 establishes that all waters flowing in New Mexico belong to the public and are subject to appropriation; Section 72–5–1 requires that an individual seeking the right to appropriate must file with the State Engineer and follow appropriate application procedures. *Erickson* and *Yeo* similarly state that the corpus of waters in New Mexico belongs to the state, and water can be appropriated for beneficial use through the appropriation system.

2. Appellants cite us to NMSA 1978, Section 72–5–22 (Repl.Pamp.1985) ("[T]he transfer of title of land in any manner whatsoever shall carry with it all rights to the use of water appurtenant thereto for irrigation purposes, unless previously alienated in the manner provided by law."), and *First State Bank of Alamogordo v. McNew*, 33 N.M. 414, 269 P. 56 (1928), to support its position, and refers us to the express language of its deed transferring land together with appurtenant water.

have only an annualized contract right for the sale of water, CS is bound by its contract. Even a "mere contract right" cannot be blithely and unilaterally ignored.

Where the language of an agreement clearly and unambiguously expresses the intent of the parties, this court must give effect to the parties' agreed-upon intent. *See Padilla v. Sais*, 76 N.M. 247, 414 P.2d 223 (1966). The determination of ambiguity is a question of law. *Levenson v. Mobley*, 106 N.M. 399, 744 P.2d 174 (1987). A contract will be found ambiguous only if it is reasonably susceptible to different constructions. *Id.* Merely because the parties differ on the proper construction does not establish an ambiguity. *Vickers v. North Am. Land Devs., Inc.*, 94 N.M. 65, 607 P.2d 603 (1980). Furthermore, parol evidence is not admissible to alter or vary unambiguous language in a contract or deed or "for the purpose of rendering an otherwise clear contract provision ambiguous." *Clark v. Sideris*, 99 N.M. 209, 213, 656 P.2d 872, 876 (1982) (unless an ambiguity exists, court will not go beyond the document's four corners to ascertain intent).

Despite the multitudinous questions that CS contends the 1951 deed does not address or answer in its effort to demonstrate to us that the deed is ambiguous, we find that it is not ambiguous as to the right of appellants to have reserved in the reservoir 20,000 acre feet of water. The 1951 deed states:

> To guard against a shortage of irrigation water for the irrigated lands hereby conveyed, [the Charles Springer Cattle Company (now CS)] agrees that of the water stored in the Eagle's [sic] Nest Dam and Reservoir, it will not sell or deliver water for any use whatsoever to any person or party not having a vested water right for the same at the date of this deed, at any time when the water stored in the said Eagle's [sic] Nest Dam and Reservoir is less than 20,000 acre feet * * *

We find that this language, which was agreed to by CS, unambiguously prevents CS from selling water to parties who do not have vested water rights when there is less than 20,000 acre feet of water in the reservoir, without the permission of the vested right holders.[3]

CS argues that the provision is ambiguous: for example, it does not address "whose water it is that is stored, whether *any* water *must* be stored, what happens to that 20,000 acre feet from year to year, and significantly, whether that includes water flowing into the reservoir—'inflow'." However, the express language of the provision clearly states that CS will not sell water when less than the requisite amount exists. It is irrelevant to whom the water belongs, whether water must be stored, what happens to the water, or whether "inflow" is included; CS simply cannot sell water when the amount is less than 20,000 acre feet.[4]

CS maintains that after extrinsic evidence is considered, the intent of the parties becomes clear: the agreement intended, in any one year, to give first tier users water before subsequent users.

3. A reading of the regulations promulgated by CS indicates that CS, too, at one time interpreted its agreement as we do today.

4. One fundamental error in CS's argument is its characterization of appellants' claim as interpreting the deed to require storage. The deed does not require any water to be stored, and it does not grant appellants ownership or an exclusive right to the water—it simply precludes CS from selling water to nonvested, nonfirst tier users when the water level falls below 20,000 acre feet.

CS raises other questions it contends demonstrate an ambiguity. It argues that the clause does not answer whether appellants are allowed to take more than their annualized duty. The answer to this is "no"; by the terms of their deed, appellants can take only their duty. Because the deed does not require storage, appellants are not "given" storage, but this does not limit their right to hold CS to the terms of the agreement. Similarly, CS raises a question regarding whose water it actually is. The water belongs to the State of New Mexico; individuals have a right to put the water to beneficial uses, and CS has the right to store it and sell it, limited by its contractual arrangements. CS contends that the clause does not address which party is responsible for evaporation. Again, the express terms of the deed preclude selling water when there is less than 20,000 acre feet; evaporation is not an issue.

■ However, because we find that the agreement is unambiguous, parol evidence admitted at trial, over appellants' objection, that served to vary or contradict the terms of the agreement was improperly admitted. *See, e.g., Brooks v. Tanner,* 101 N.M. 203, 680 P.2d 343 (1984); *Lanehart v. Rabb,* 63 N.M. 359, 320 P.2d 374 (1957) (parol evidence inadmissible to show grantor's intent that would vary terms of unambiguous deed), *overruled on other grounds, Ortega, Snead, Dixon & Hanna v. Gennitti,* 93 N.M. 135, 597 P.2d 745 (1979); *cf. Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co.,* 69 N.M. 281, 285–86, 365 P.2d 925, 928 (1961) (although evidence of prior or contemporaneous parol agreements cannot be admitted to vary terms of written contract concerning interest in land, evidence of subsequent oral modification admissible). Thus, extrinsic evidence showing that the regulations actually created a more efficient use of the reservoir, that the agreement between CS and appellants constituted waste, and that the agreement meant something other than a literal construction would indicate, was all improperly before the court and should not have been considered. *See Boatwright v. Howard,* 102 N.M. 262, 694 P.2d 518 (1985) (intent of parties should be ascertained from the instrument itself); *Boylin v. United Western Minerals Co.,* 72 N.M. 242, 246, 382 P.2d 717, 720 (1963) ("The terms of the agreement as written being clear, the intent must be ascertained from the language used."); *Davies v. Boyd,* 73 N.M. 85, 87–88, 385 P.2d 950, 951 (1963) ("The purpose, meaning and intent of the parties to a contract is to be deduced from the language employed by them; and where such language is not ambiguous, it is conclusive.")

Accordingly, we find that because the language of the deed unambiguously conveys the intent of the parties, extrinsic evidence cannot be relied upon to vary the clear language used by the parties.

II. *Estoppel by Deed Bars CS from Asserting Rights Contrary to the Deed.*

■ CS contends, and the trial court found, that if the clause is interpreted to require that 20,000 acre feet must be stored, it violates our law because the water is not being put to beneficial use, citing New Mexico Const. art. XVI. CS does not contest, however, the validity of the deed under which it granted to appellants the rights at issue.

Appellants dispute CS's standing to argue that the water is not being put to beneficial use, contending that CS is barred by the doctrine of estoppel by deed from denying the agreement not to sell water when less than 20,000 acre feet exist in the reservoir. Appellants maintain that the deed created a right in them, protecting them from a shortage of water, and CS cannot dispute the plain language of the deed.

> Estoppel by deed is a bar which precludes a party to a deed and his privies from asserting as against the other and his privies any right or title in derogation of the deed, or from denying the truth of any material fact asserted in it. In order that a deed may give rise to an estoppel, it must contain representations or covenants. * * * [A]n estoppel by deed may be invoked only in a suit on the deed or concerning a right arising out of the deed.... The doctrine of estoppel by deed is applied in order to avoid circuity of action, and to compel the parties to fulfill their contracts.

31 C.J.S. *Estoppel,* § 10 (1964) (footnotes omitted); *see also* 28 Am.Jur.2d *Estoppel and Waiver* § 4 (1966); *Norman v. State,* 182 Mont. 439, 597 P.2d 715 (1979); *Rocky Cliff Coal Mining Co. v. Kitchen,* 29 N.M. 395, 222 P. 658 (1924). Estoppel by deed binds the parties to a deed, as well as their heirs and assigns, to its representations. *Aguilera v. Corkill,* 201 Kan. 33, 439 P.2d 93 (1968).

CS conveyed by deed certain acreage to appellants' predecessor in interest, including appurtenant water rights, and "to guard against a shortage of irrigation water," CS agreed not to sell water when the water level fell below 20,000 acre feet. Having granted this right, CS is estopped from denying its validity through its regulations.

CS asserts, as an affirmative defense, that such a determination grants appellants the right to a standby pool of water that is not put to beneficial use and is therefore contrary to basic water law tenets. Assuming, *arguendo,* that the agreement does grant such a right in its effect, we find that CS is not the proper party to challenge appellants' right. Estoppel by deed operates to bar it from denying the representations in its deed. Junior users who in fact are prejudiced by any lack of beneficial use of the water, or the State Engineer, would not be estopped from challenging the agreement on the grounds of waste, but CS is, and it cannot be heard to complain about being required to perform pursuant to its covenant. *See Surface Creek Ditch & Reservoir Co. v. Grand Mesa Resort Co.,* 114 Colo. 543, 557, 168 P.2d 906, 913 (1946) (en banc) ("As between the litigating parties defendant is in no position to insist that plaintiff's use of the waters impounded in [the reservoir at issue] is not a beneficial one, for by the provisions of its contract it recognized it as such. It is now estopped to make this contention, and it, therefore, is not necessary to, and we do not, determine whether the use made of impounded waters * * * is such a beneficial use as would entitle [plaintiff] to appropriate waters therefor.")

As a final matter, we feel it necessary to address with CS's contention that the regulations are necessary for the efficient functioning of the reservoir and, in fact, improve its operation, making more water available to appellants and other users. CS argues that the regulations are extremely generous to users, such as appellants; appellants do not pay operational costs, they bear no carriage costs, and the system implemented by the regulations assures prudent planning from year to year for users. At trial, CS presented considerable expert testimony regarding the efficiency of the regulations and the increased availability of water resulting from their use, all to the effect that appellants suffered no injury from the regulations' implementation. As CS argues, because of the self-evident improvements for the users, appellants' "inability to understand that they are better off under the Regulations * * * is baffling * * * * The irony of this case is that the very Regulations under attack by [appellants] have made them better off than they have been historically."

Initially, it should be understood that nothing in our opinion precludes CS from implementing regulations or improving the ability of the reservoir to function efficiently. CS is only prevented from implementing regulations that interfere with the rights it has established to users by prior agreement. Second, we do not find that appellants' desire to enforce their contractual rights is baffling; CS obviously guaranteed appellants a valuable right to protect against water shortage—a right not vitiated by the improvements that CS contends have been made. Finally, we find much of CS's argument irrelevant. Whether the system functions more efficiently under the regulations does not justify CS's repudiation of contractual obligations after appellants have performed their part of the agreement, simply because it has determined at this late date that the agreement is no longer propitious.

Accordingly, we hold that the agreement between CS and appellants' predecessor in interest unambiguously precludes CS from selling water to nonvested users when the water level falls below 20,000 acre feet. Regulations promulgated by CS that seek to unilaterally supplant or supersede the terms of the agreement are thus void and without effect. We REVERSE and VACATE the judgment of the district court, and REMAND to the district court to enter judgment in favor of appellants declaring invalid the regulations promulgated by CS and to consider appellants' remaining claims.

IT IS SO ORDERED.

SOSA, C.J., and RANSOM, J., concur.

790 P.2d 509

Eddy JARAMILLO, Plaintiff–Appellant,

v.

CONSOLIDATED FREIGHTWAYS, Defendant–Appellee.

No. 11344.

Court of Appeals of New Mexico.

Jan. 25, 1990.

Certiorari Denied March 27, 1990.

Benito Sanchez, Benito Sanchez, P.A., Albuquerque, for plaintiff-appellant.

Charles E. Stuckey, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendant-appellee.

OPINION

DONNELLY, Judge.

Plaintiff appeals from the trial court's denial of his motion to increase a prior award of workers' compensation benefits and for an award of vocational rehabilitation benefits. We discuss (1) whether the trial court erred in determining that there had been no increase in plaintiff's disability; and (2) whether the court erred in denying plaintiff's request for the award of vocational rehabilitation benefits. We affirm in part and reverse in part.

This is the third appeal since the filing of plaintiff's original workers' compensation action. On remand following the first appeal, the trial court entered judgment in 1986 determining that plaintiff suffered a work-related accident on January 22, 1983 but that no immediate disability resulted from the accident; that in March 1983, plaintiff aggravated his prior injury; and that "[p]laintiff became 60% disabled on January 1, 1984, and this disability was caused by the ... March 1983 incident."

The 1986 judgment entered by the court provided that plaintiff was "100% unable to return to his former employment, i.e., truck driver, and 60% disabled from performing other work and duties commensurate with his age, level of education, background and work experience." The court ordered that plaintiff be awarded "60% permanent partial disability for injuries sustained [to] his low back," together with payment of reasonable medical expenses and attorney fees.

Both plaintiff and defendant appealed from the judgment on the mandate. On February 26, 1987, this court affirmed the

trial court's judgment determining the amount of plaintiff's disability.

In June 1985, plaintiff underwent a laminectomy and fusion of his lower back. Subsequent to the 1985 trial, plaintiff began complaining of pain in his left hip. A medical examination revealed that plaintiff was suffering from septic necrosis, a deterioration of his hip joint caused by medication prescribed in the treatment of his back condition. The examination indicated that the degeneration was most prevalent in plaintiff's left hip. Thereafter, plaintiff underwent a total left hip replacement in February 1986.

In February 1988, plaintiff filed a motion to increase his workers' compensation benefits, alleging that his disability had increased since the entry of the prior judgment for workers' compensation benefits.

I. CLAIM OF INCREASE IN DISABILITY

Plaintiff asserts that the trial court erred in denying his motion to increase the amount of his disability. Plaintiff argues that subsequent to his previous workers' compensation trial wherein the trial court determined that he had suffered a 60% permanent partial disability, his physical condition has deteriorated so that he is currently permanently totally disabled.

Plaintiff's claim for modification and increase in his workers' compensation disability award is governed by the law in effect on the date of his accidental injury resulting in his disability. Thus, the 1983 law is controlling since plaintiff's original accident occurred in 1983. *See Varos v. Union Oil Co. of California,* 101 N.M. 713, 688 P.2d 31 (Ct.App.1984).

Under NMSA 1978, Section 52–1–56 (Orig.Pamp.), a worker may petition the court to modify or increase the amount of compensation payable to him based upon a showing that his disability "has become more aggravated or has increased without the fault of the workman." *See also DiMatteo v. County of Dona Ana,* 109 N.M. 374, 785 P.2d 285 (Ct.App.1989); *Holliday v. Talk of the Town, Inc.,* 98 N.M. 354, 648 P.2d 812 (Ct.App.1982). A worker has a right to reopen his claim when there is a showing that his disability has increased and that the increase in disability is causally related to his initial compensable injury. *Rumpf v. Rainbo Baking Co.,* 96 N.M. 1, 626 P.2d 1303 (Ct.App.1981); *Glover v. Sherman Power Tongs,* 94 N.M. 587, 613 P.2d 729 (Ct.App.1980). An increase in physical impairment, however, will not automatically result in an increase in the worker's disability. *Tafoya v. Leonard Tire Co.,* 94 N.M. 716, 616 P.2d 429 (Ct. App.1980). *See also Goolsby v. Pucci Distrib. Co.,* 80 N.M. 59, 451 P.2d 308 (Ct.App. 1969); *Gallegos v. Kennedy,* 79 N.M. 590, 446 P.2d 642 (1968).

Because plaintiff previously obtained an award of permanent partial disability, it was his burden to show facts indicating that his physical condition had changed and that there had been an increase in his disability since the original award in 1985. *E.g., Amos v. Gilbert W. Corp.,* 103 N.M. 631, 711 P.2d 908 (Ct.App. 1985). Since the trial court found that the medical treatment rendered to plaintiff for his original back problems caused plaintiff's deteriorating hip conditions, the critical question thus becomes whether the aggravation of plaintiff's original disability has resulted in any diminishment of his ability to perform to some percentage extent the usual tasks in the work he was performing at the time of his injury, and whether plaintiff is unable to some percentage extent to perform work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience. *See* NMSA 1978, §§ 52–1–25, –26, –56 (Orig.Pamp.); *see also Perez v. International Minerals & Chem. Corp.,* 95 N.M. 628, 624 P.2d 1025 (Ct.App.1981).

In the present case plaintiff presented evidence that he remained 100% unable to perform his former work as a long-distance truck driver, that he could not perform certain functions as a laborer, that he was significantly limited in his ability to lift, bend, and walk any extended distances, and that his range of motion was restricted. It was uncontradicted that degeneration in

plaintiff's right hip was progressive and may ultimately require an operation to replace his right hip.

Defendant argues that, although plaintiff's physical condition has changed, other evidence in the record supports the trial court's findings determining that his disability has not changed. Defendant contends that the evidence concerning whether plaintiff has suffered any increase in the percentage of disability is conflicting; that, among other evidence, Dr. Richard White, an orthopedic surgeon, testified that plaintiff's hip replacement achieved an excellent result and that there has been no change in the restrictions placed on plaintiff at the original trial; that Dr. Garry L. Singer also testified that there has been no change in plaintiff's ability to return to work and that although he is unable to work as a long-distance truck driver, he is nevertheless able to perform light, sedentary work.

On appeal where a challenge is raised concerning the sufficiency of the evidence to support the findings adopted by the trial court, our scope of review is limited to determining whether there is substantial evidence to support the trial court's findings. *Lyon v. Catron County Comm'rs,* 81 N.M. 120, 464 P.2d 410 (Ct.App.1969). In conducting this review, all disputed issues of fact are resolved in favor of the successful party, together with all reasonable inferences arising therefrom. *Lopez v. Smith's Management Corp.,* 106 N.M. 416, 744 P.2d 544 (Ct.App.1986). In evaluating the sufficiency of the evidence on appeal, the question is not whether there is evidence to support an alternative result, but whether the trial court's result is supported by substantial evidence. *Bagwell v. Shady Grove Truck Stop,* 104 N.M. 14, 715 P.2d 462 (Ct.App.1986). This court will not reweigh the evidence even though evidence is presented which may have supported a different result. *Id.*

Applying the above rules to the record before us, we cannot say that the record does not support the findings of the trial court determining that although there has been a change in some of the physical functions which the plaintiff has been able to perform since the prior trial in this case, there has been no change in the plaintiff's percent of disability. Therefore, we hold that substantial evidence supports the trial court's findings of no increase in disability.

In analyzing plaintiff's contention that he is totally permanently disabled, however, we note what appears to be an inadvertent discrepancy in the findings of fact and conclusions of law entered by the trial court, which is carried forward in the judgment of the trial court. The judgment entered by the trial court on May 13, 1987, awarded benefits based on its finding that plaintiff was 60% *permanently* partially disabled due to injuries sustained to his low back. Following the hearing on plaintiff's motion to increase his disability benefits, the trial court adopted both a finding of fact and conclusion of law determining that although plaintiff had "a change in some of the physical functions" which he is able to perform since his former trial in this case, "there has been no change in the [p]laintiff's percent of disability," and that "[p]laintiff is presently, and has been since the time of this trial, 60% *temporarily* partially disabled, except for the period of convalescence following hip replacement, February 6, 1986 to May 20, 1986, in which [p]laintiff was 100% disabled." (Emphasis added.) On appeal, both plaintiff and defendant agree that the reference to "temporarily" rather than "permanently" was inadvertent.

We affirm the trial court's denial of increase in disability and remand for correction of the trial court's findings of fact, conclusions of law and judgment concerning the permanency of plaintiff's disability.

II. VOCATIONAL REHABILITATION BENEFITS

Next, plaintiff argues that the trial court erred in denying his request for vocational rehabilitation services and that such award is mandatory when the evidence establishes that he is permanently disabled and unable to return to his former employment.

Plaintiff's claim for vocational rehabilitation benefits is governed by the law in effect at the time he suffered his original

work-related accident in 1983. *See Varos v. Union Oil Co. of California;* NMSA 1978, Section 52–1–50 (Cum.Supp.1983), provides in pertinent part:

> 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.* 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 ... for such services.... The refusal of the employee to avail himself for rehabilitation ... shall not result in any forfeiture or diminution of any award made pursuant to the Workmen's Compensation Act.... [Emphasis added.]

Under Section 52–1–50, the burden of proof to establish a need for an award of vocational rehabilitation benefits is upon the worker; a worker is not automatically entitled to such benefits. *See Lopez v. Smith's Management Corp.; Sanchez v. Homestake Mining Co.,* 102 N.M. 473, 697 P.2d 156 (Ct.App.1985); *Garcia v. Albuquerque Pub. Schools,* 99 N.M. 741, 663 P.2d 1198 (Ct.App.1983).

Proof of need for vocational rehabilitation services requires evidence that (1) as a result of a compensable injury, the worker is unable to return to his or her former employment, or is permanently unable to some percentage extent to perform work for which he or she has previous training or experience; and (2) that the worker is a proper candidate for and in need of vocational rehabilitation. *See Sanchez v. Homestake Mining Co.; Nichols v. Teledyne Economic Dev. Co.,* 103 N.M. 393, 707 P.2d 1203 (Ct.App.1985); *see also Garcia v. Albuquerque Pub. Schools.* To qualify for vocational rehabilitation benefits a worker must show that there is a likelihood that such rehabilitation will enable him to return to suitable employment. *Id.* Where the evidence is undisputed that an injured worker meets the two-pronged test required under Section 52–1–50, his right to vocational rehabilitation benefits is mandatory. *See Lopez v. Smith's Management Corp.; Sanchez v. Homestake Mining Co.*

The trial court found that plaintiff currently is totally disabled from returning to his former employment as a truck driver, and defendant concedes the correctness of that finding. Therefore, our focus is on the second element of whether plaintiff is a proper candidate for and in need of vocational rehabilitation.

Vocational rehabilitation benefits are intended to assist a worker who is unable to return to his former employment to be restored, in whole or in part, to suitable gainful employment. *Garcia v. Schneider, Inc.,* 105 N.M. 234, 731 P.2d 377 (Ct.App. 1986). As observed in *Garcia,* where a worker has reached maximum medical improvement, a determination of the extent of his disability may not be properly capable of assessment, other than in obvious cases, until the injured worker who is unable to return to his or her former job has been afforded the benefit of vocational rehabilitation services.

In the present case the evidence was undisputed that at the time of the hearing on plaintiff's motion for increase of his disability, he had a permanent back disability which has limited his ability to lift and his range of movement; that he had undergone a replacement of his left hip, resulting in additional limitations on his ability to lift and range of movement; that he continues to suffer from necrosis of his right hip, which may require a second hip replacement operation for that hip in the future; that he has a shortened left leg; and that at the time of the hearing he was fifty-seven years of age, had a seventh grade education, and since leaving school he worked primarily as a laborer and as a truck driver. The court adopted findings determining that plaintiff was 100% unable to return to his former work as a truck driver, and that he was partially permanently disabled.

Defendant did not offer any evidence to refute plaintiff's showing that he was in

need of vocational rehabilitation services. Theresa Guerin, a physical therapist, recommended that plaintiff be referred to a rehabilitation specialist for an evaluation of his job skills in order to evaluate him properly for retraining. William G. Krieger, a vocational rehabilitation expert, testified that plaintiff was in need of significant and comprehensive vocational rehabilitation services. Dr. Krieger further testified that plaintiff's chances of obtaining further employment, even with the benefit of a rehabilitation program, were guarded. Although Dr. Krieger did indicate a low probability of success in employment after vocational rehabilitation, we do not read that testimony as necessarily negating Dr. Krieger's opinion as to the need of significant and comprehensive professional rehabilitation services. As we stated in *Garcia,* "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 vocational rehabilitation." *Id.* at 237–38, 731 P.2d at 380–81.

In view of the court's finding that plaintiff could not return to his former job as a truck driver and unrefuted evidence that plaintiff was in need of vocational rehabilitation assistance, it was error to deny such award. *See Lopez v. Smith's Management Corp.; Sanchez v. Homestake Mining Co.; Trujillo v. Beaty Elec. Co.* 91 N.M. 533, 577 P.2d 431 (Ct.App. 1978). The fact that an injured worker retains some capacity to perform some type of work does not bar the worker from an award of vocational rehabilitation. *See McInnis v. Town of Bar Harbor,* 387 A.2d 739 (Me.1978).

When a worker is determined to be a proper candidate for vocational rehabilitation and in need of such benefits the court should direct that the worker be evaluated in order to determine the appropriate type of vocational rehabilitation which will assist the worker in being restored to suitable employment. Under Section 52–1–50, the term "restore ... to suitable employment" means to return the worker to employment similar in remuneration to that earned prior to the worker's disability and which is compatible with the worker's age, education, training, general physical and mental capacity, and previous work experience. *See also Nichols v. Teledyne Economic Dev. Co.; Smith v. Hastings Irrigation Pipe Co.,* 222 Neb. 663, 386 N.W.2d 9 (1986). Under Section 52–1–50, a worker who is determined to be eligible to receive vocational rehabilitation benefits may also be awarded, where appropriate, such "board, lodging, travel and other expenses and [assistance] for the maintenance of his family during the period of rehabilitation," not to exceed the statutory amount. *See also Aranda v. D.A. & S. Oil Well Servicing, Inc.,* 98 N.M. 217, 647 P.2d 419 (Ct.App.1982).

In the absence of legislative guidelines for implementation of vocational rehabilitation, the judge should devise and monitor a suitable vocational rehabilitation plan. *See Ex Parte Beaver Valley Corp.,* 477 So.2d 408 (Ala.1985). In determining the form of vocational rehabilitation which is most likely to restore the injured worker to suitable employment, the plan must be reasonably calculated to restore the worker to suitable employment providing income comparable to that earned prior to his disability. *Id.* As observed in *Ex Parte Beaver Valley Corp.,* "[i]n making its determination, the trial court should also consider the type of work done by the employee at the time of the injury, his vocational aptitude, his physical and mental abilities, and such other factors as the court may deem relevant." *Id.* at 412.

We affirm the trial court's findings denying an increase in disability. The court erred in denying plaintiff's motion for vocational rehabilitation services. The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion. Plaintiff is awarded $1,200 for the services of his attorney incident to this appeal.

IT IS SO ORDERED.

BIVINS, C.J., and APODACA, J., concur.

790 P.2d 515

STATE of New Mexico,
Plaintiff–Appellee,

v.

Rosemary SANCHEZ,
Defendant–Appellant.

No. 11720.

Court of Appeals of New Mexico.

Feb. 13, 1990.

Certiorari Denied March 19, 1990.

Hal Stratton, Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Hugh W. Dangler, Ass't. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

DONNELLY, Judge.

Defendant appeals the district court's revocation of her probation. Three issues are raised on appeal: (1) whether the corpus delicti rule applies in probation revocation proceedings; (2) whether the violations of probation committed by defendant were waived by the state; and (3) whether there was sufficient evidence to support revocation of defendant's probation. The case was assigned to this court's summary calendar and our calendar notices proposed summary affirmance of the district court's revocation of probation. Defendant filed timely memoranda in opposition to all calendar notices. Not being persuaded by defendant's arguments, we affirm.

In February 1987, defendant was convicted of trafficking a controlled substance, heroin, contrary to NMSA 1978, Section 30–31–20 (Repl.Pamp.1989). In a separate case she pled guilty to possession of heroin, contrary to NMSA 1978, 30–31–23 (Repl. Pamp.1989), and escape from jail, contrary to NMSA 1978, Section 30–22–8 (Repl. Pamp.1984). She was sentenced to serve concurrent terms in the penitentiary on each of the offenses. However, all of the sentences were suspended, except 364 days to be served in the Lea County Detention Facility. Defendant was also placed on five years probation. In 1988, a probation revocation hearing was held based upon defendant's alleged violation of her conditions of probation. Following the hearing, the court continued probation at that time, and defendant's probation was transferred to Texas.

A second petition to revoke defendant's probation was filed by the district attorney in January 1989, alleging that defendant had violated condition number 12 of her probation, that she was not to use or possess any narcotic drugs or marijuana. A

hearing on the petition was held in June 1989. At this hearing, defendant's probation officer testified that defendant had admitted to him that she had used $25 worth of drugs on the previous day. Based on this evidence, the trial court revoked defendant's probation because she had violated condition number 12 of her probation.

I. EVIDENCE OF CORPUS DELICTI

Defendant contends the court erred in revoking her probation and in relying upon evidence of her admission. The general rule in New Mexico is that the corpus delicti of an offense, or substance of an offense charged, cannot be sustained solely on extrajudicial confessions or admissions of the accused. *State v. Paris,* 76 N.M. 291, 414 P.2d 512 (1966). However, if independent evidence is introduced that tends to establish the trustworthiness of the extrajudicial confession, a conviction will be sustained. *Id.* In New Mexico, the corpus delicti rule has only been applied in criminal proceedings. *See, e.g., Doe v. State,* 94 N.M. 548, 613 P.2d 418 (1980); *State v. Buchanan,* 76 N.M. 141, 412 P.2d 565 (1966); *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); *State v. Bejar,* 101 N.M. 190, 679 P.2d 1288 (Ct. App.1984); *State v. Maestas,* 92 N.M. 135, 584 P.2d 182 (Ct.App.1978). Defendant's appeal raises an issue of first impression in this jurisdiction concerning the application of the corpus delicti rule in probation revocation proceedings.

A hearing on revocation of probation or parole is not a criminal prosecution or a trial on a criminal charge; instead, it is a hearing to determine whether, during the probationary or parole period, defendant has conformed to or breached the course of conduct outlined in the probationary or parole order. *State v. Sanchez,* 94 N.M. 521, 612 P.2d 1332 (Ct.App.1980). Thus, the full rights owed a criminal defendant in a criminal prosecution do not apply in probation revocation proceedings, and only minimum due process requirements must be met. *Id. See also Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

While the issue presented is one of first impression in New Mexico, other jurisdictions have addressed the use of admissions or confessions in probation revocation hearings. In *Johnson v. State,* 378 So.2d 108 (Fla.Dist.Ct.App.1980), a case factually similar to the present case, the defendant admitted to his supervisor that he used heroin subsequent to the imposition of his probation. The defendant denied making the statement at the revocation hearing, but the trial court chose to believe the supervisor's in-court testimony about defendant's admission of heroin use, and revoked the defendant's probation on that basis. On appeal, the reviewing court upheld revocation of the defendant's probation, holding that the defendant's admission was not hearsay. *Id.*

In another Florida case, the District Court of Appeals held that as a matter of law, a defendant's own admissions of probation violations are sufficient to support revocation of probation. *See State ex. rel. Russell v. McGlothin,* 427 So.2d 280 (Fla. Dist.Ct.App.1983). The Florida court acknowledged that a confession, standing alone, is generally insufficient to support a criminal conviction. However, the court also noted that evidence sufficient to support a criminal conviction is unnecessary to sustain a probation revocation order. *Id.* at 282.

Similarly, in *Commonwealth v. Kavanaugh,* 334 Pa.Super. 151, 482 A.2d 1128 (1984), the court held that the corpus delicti rule is inapplicable in probation revocation proceedings. The court's reasoning was that the corpus delicti rule is only applicable in criminal prosecutions, and revocation of probation is not a stage of a criminal prosecution. *Id.*

Defendant argues that *In re R.D.,* 178 Ill.App.3d 681, 128 Ill.Dec. 33, 533 N.E.2d 1121 (1989), supports the adoption of the corpus delicti rule in probation revocation proceedings so as to preclude evidence of defendant's admissions. We disagree. While the court in *In re R.D.* did discuss the amount of evidence sufficient to revoke a defendant's probation, it did not reach the issue of whether or not the admissions of a

defendant alone could warrant the revocation of probation because there was other independent evidence supporting revocation. *Id.*

We hold the reasoning adopted by the Pennsylvania and Florida courts to be persuasive in the present case and determine that the corpus delicti rule is inapplicable in probation revocation proceedings. We conclude that a trial court may revoke a defendant's probation based on defendant's extrajudicial admission that he or she violated the terms of probation. It is unclear on the facts before us whether defendant in the present case denied at the revocation hearing that she made the admission to her probation officer. However, even if she had done so at the hearing, the trial court, acting as the finder of fact, could properly weigh the evidence and the credibility of the witnesses. *See Johnson v. State.*

II. WAIVER OF PROBATION VIOLATIONS BY STATE

Our calendar notices proposed to find that defendant had failed to show prosecutorial delay, indicating waiver of defendant's probation violations, according to the standard articulated in *State v. Chavez,* 102 N.M. 279, 694 P.2d 927 (Ct.App.1985). Defendant has failed to point out any error in law or fact in her third memorandum in opposition; therefore, we find no basis for defendant's claim of waiver of her probation violations by the state. *See State v. Sisneros,* 98 N.M. 201, 647 P.2d 403 (1982).

III. SUFFICIENCY OF EVIDENCE TO REVOKE PROBATION

Lastly, defendant contends that because her admission concerning her drug use was the sole evidence upon which the trial court revoked her probation, there was insufficient evidence to support revocation. In light of our holding that a defendant's out-of-court or extrajudicial admissions of probation violations may properly support revocation of probation, we reject defendant's contention and determine that there was sufficient evidence to support the trial court's revocation of defendant's probation.

Defendant's revocation of probation is affirmed.

IT IS SO ORDERED.

APODACA and CHAVEZ, JJ., concur.

790 P.2d 517

STATE of New Mexico,
Plaintiff-Appellee,

v.

Antonio VASQUEZ,
Defendant-Appellant.

No. 10922.

Court of Appeals of New Mexico.

Feb. 22, 1990.

Certiorari Denied April 5, 1990.

Hal Stratton, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Sheila Lewis, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BIVINS, Chief Judge.

Convicted for trafficking in a controlled substance and conspiracy to traffic in a controlled substance, defendant appeals. In his brief-in-chief, defendant initially attempted to raise twelve issues. He abandoned one in his reply brief. Since the application of law to the facts concerning most of the issues is clear, only part of this opinion warrants publication. The remainder of the opinion, which is incorporated by reference, will be a memorandum opinion and may not be cited as precedent.

In that part of the opinion to be published, we discuss defendant's claims of trial court error in (1) failing to suppress defendant's statement; and (2) failing to hold an in camera hearing regarding disclosure of the confidential informant. In that portion of the opinion that is not to be published, we discuss two issues not before the court, and four issues answered summarily. We affirm.

The Gallup police received information from a confidential informant (C.I.) that drug dealers from southern Colorado had contacted the C.I. in New Mexico about expanding their operations into this state. The police told the C.I. to set up a deal with the dealers; this was accomplished about one week later. The dealers were to deliver drugs to Gallup, and the C.I. would introduce the police to them.

The C.I. arranged for the deal to take place at a motel in Gallup. Defendant and a friend of his, Donesimo, arrived at the motel in Donesimo's vehicle. The C.I. met defendant at a restaurant across the street from the motel, and a short time later they went into the motel room together while Donesimo waited outside in his vehicle. Police were stationed outside the motel, and the C.I. and defendant were together inside the motel room when other police, posing as buyers, arrived. The C.I. intro-

duced defendant to the undercover police. After the undercover police showed defendant some money, defendant went outside to the vehicle where Donesimo was waiting, removed the drugs, showed them to Donesimo, and went back to the motel room. The C.I. was still in the motel room when defendant came back with the drugs and was also present when defendant either transferred, or discussed transferring, the drugs to the police. The C.I. left the room shortly thereafter, ostensibly for the purpose of getting more money, but actually to signal for the outside police to move in.

As the police outside began to move in, Donesimo began to shoot at them. The police returned fire and killed him. Defendant was then arrested. As defendant left the motel, he unavoidably observed Donesimo lying back with blood on his face. Defendant gave a statement to the authorities later that night. At that time, neither defendant nor the officers present knew that Donesimo had been mortally wounded.

1. Suppression of Defendant's Statement

Defendant claims the statement he gave to the police after his arrest was involuntary, and therefore its use is prohibited. After defendant's arrest but before questioning commenced, the police advised defendant of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). No question has been raised concerning *Miranda* warnings. Rather, the issue concerns whether defendant's statement was voluntary; specifically, whether it was "extracted by fear, coercion, hope of reward or any other improper inducement." *State v. Tindle,* 104 N.M. 195, 198, 718 P.2d 705, 708 (Ct.App.1986).

Defendant refers to testimony at the suppression hearing that indicated that at the time of the statement, he was a Mexican national, illiterate in both English and Spanish, unfamiliar with the legal system in this country, and, most importantly, in a "justified state of overwhelming fear," having passed by his friend, who had just been wounded in a shootout with the police. While conceding there was no police misconduct or unfairness, defendant nevertheless urges that, under the totality of the circumstances test, his statement should have been suppressed. *See Aguilar v. State,* 106 N.M. 798, 751 P.2d 178 (1988) (adopting totality of the circumstances test for determining voluntariness of confession as set forth in court of appeals opinion in that case).

Because defendant claims the trial court focused only on the lack of police misconduct and did not consider the totality of the circumstances, particularly defendant's state of mind, he urges remand for a correct determination of voluntariness. We reject defendant's contention and hold that under federal constitutional standards, involuntariness requires police coercion, so there is no need to further inquire into the totality of the circumstances when there has been no such coercion.

Reading defendant's issue as a claim under the fourteenth amendment to the United States Constitution, the state argues that, absent coercive police activity, there can be no involuntary statement or confession. The state relies on *Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), which held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id.* at 167, 107 S.Ct. at 522. In *Connelly,* the defendant approached a police officer on the street and told him that he had murdered someone and wanted to talk about it. After the police had given the defendant appropriate *Miranda* warnings, he described the murder and took the police to the scene of the crime. The defendant suffered from chronic schizophrenia and believed the "voice of God" coerced him to confess. The Supreme Court said that the importance or significance of the defendant's perception of coercion flowing from the "voice of God" is inconsequential; it is a matter to which the federal Constitution does not speak. The Court in *Connelly* also observed, "Absent police conduct causally related to the confession, there is

simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.* at 164, 107 S.Ct. at 520.

We agree with the state that *Connelly* answers defendant's federal constitutional claim. Since there was no police activity that coerced defendant to give his statement, the due process clause of the fourteenth amendment is not implicated.

Whether a different result would be required under our state constitution or state rules of evidence, *see Colorado v. Connelly,* we do not decide. Although defendant asserted state constitutional violations in his motion to suppress, it is apparent he bases his claim on appeal solely on the federal Constitution. He made no reference to the state constitution or state rules of evidence in support of this claim in his brief-in-chief and failed to respond in his reply brief to the state's argument that *Connelly* controls. Furthermore, all cases defendant used in support of his argument were decided under the federal Constitution.

For the reasons stated, we hold the trial court properly denied defendant's motion to suppress.

2. Confidential Informant

Defendant claims the trial court erred by failing to hold an in camera hearing on the need to disclose the identity of the C.I. We affirm.

Defendant filed a motion for disclosure pursuant to SCRA 1986, 5–501. At a hearing held on January 19, 1988, however, defense counsel proceeded as if the motion had been made under SCRA 1986, 11–510(C)(2), which gives the state a privilege to refuse to disclose the identity of a confidential informer. To obtain disclosure under that rule, the evidence must show that "an informer will be able to give testimony that is relevant and helpful to the defense of an accused, or is necessary to a fair determination of the issue of guilt or innocence." As the district court ruled, this showing was not made.

Defendant argued that, in accordance with *State v. Beck,* 97 N.M. 312, 639 P.2d 599 (Ct.App.1982), an allegation that an informer was the only non-police witness was sufficient of itself to show that the testimony of the C.I. was necessary to a fair determination of the issue of guilt or innocence. We disagree.

Defendant confessed to the crime. We have already held that the confession was voluntary and admissible. At the district court hearing, defendant did not disavow the confession in any respect. When asked for specifics as to how the C.I. could provide testimony helpful to defendant, defense counsel referred only to an entrapment defense. The confession makes clear, however, that the C.I. did not entrap defendant. According to the confession, defendant had received the drugs from a different individual. (Defendant's brief on appeal suggests that the C.I. present at the time of the transaction was the same person who delivered the drugs to defendant; but that contention is based on a clear misreading of the confession.) Defense counsel did not explain how the C.I. could assist in establishing that the individual who delivered the drugs to defendant was an agent of the state who had entrapped defendant.

Thus, although an in camera hearing may have been advisable, we hold that the district court did not abuse its discretion in finding that defendant did not make a showing adequate to require an in camera hearing.

Conclusion

We affirm defendant's convictions for trafficking in a controlled substance and conspiracy to traffic in a controlled substance.

IT IS SO ORDERED.

DONNELLY and HARTZ, JJ., concur.

790 P.2d 521

STATE of New Mexico,
Plaintiff–Appellee,

v.

Gildardo BENCOMO,
Defendant–Appellant.

No. 11409.

Court of Appeals of New Mexico.

March 13, 1990.

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

Hal Stratton, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HARTZ, Judge.

Defendant appeals the judgment entered on his plea of no contest to the charge of child abuse resulting in death. NMSA 1978, § 30–6–1(C)(2) (Repl.Pamp. 1984). We apply the doctrine of fundamental error and reverse because the district court failed to offer defendant the opportunity to withdraw his plea after the court refused to accept the prosecutor's sentencing recommendation pursuant to a plea agreement between the state and defendant.

The plea agreement provided that the state would recommend a period of actual incarceration not to exceed six months and an in-house mental health treatment program to last up to eighteen months. Nevertheless, the district court's judgment, sentence, and commitment, filed on February 15, 1989, imposed a sentence of imprisonment for a term of nine years, the maximum allowed. On March 3 defendant filed a motion for reconsideration, which was denied by order dated March 16. On March 17 defendant filed a motion to withdraw his plea, claiming that (1) the district attorney had violated the plea agreement by informing the district court that defendant had committed an unrelated heinous act and that police officers involved in the case felt that defendant deserved a one-year incarceration, and (2) defendant did not receive effective assistance of counsel because his attorney did not provide adequate advice. Later that day the district court filed its order denying defendant's motion to withdraw his plea and defendant filed a timely notice of appeal.

Defendant's original docketing statement listed only one issue presented: whether the district court abused its discretion in denying defendant's motion to withdraw his plea. We assigned the case to the general calendar and requested counsel to brief the question of this court's jurisdiction to hear an appeal from an order denying a post-conviction motion. *See* SCRA 1986, 5–802(G)(2) (review of district court's denial of petition for writ of habeas corpus is by filing petition for writ of certiorari

with supreme court). We need not address that question, however, because we grant the relief defendant seeks without having to consider the merits of the contentions in his post-conviction motion. We rely on a ground raised by defendant for the first time on appeal.

That ground is the failure of the district court to offer defendant the opportunity to withdraw his plea pursuant to SCRA 1986, 5–304(D) when the district court determined that it would not accept the state's recommendation for incarceration of only nine months. Rule 5–304(D) states:

> D. Rejection of plea. If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford either party the opportunity to withdraw the agreement and advise the defendant that if he persists in his guilty plea, plea of no contest or guilty but mentally ill the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Eller v. State, 92 N.M. 52, 582 P.2d 824 (1978) held that even though a plea agreement states only that the prosecutor will *recommend* a certain sentence, Rule 5–304(D) requires the district court to permit withdrawal of the plea if the court does not follow that recommendation. The district court in this case did not follow the command of *Eller.* Defendant is therefore entitled to remand so that he may withdraw his plea if the district court does not resentence him in accordance with the plea agreement.

We undoubtedly have jurisdiction to consider the *Eller* issue on appeal. Defendant filed a timely notice of appeal from the judgment, and we can resolve the *Eller* issue based on the district court record at the time the notice of appeal was filed.

Of greater concern than our jurisdiction to review the *Eller* question is whether we can properly consider that question when it was raised by defendant for the first time on appeal. In general, an appellate court will not consider a question unless it has been preserved for review in district court. *See* SCRA 1986, 12–216. One exception to the general rule, however, permits consideration for the first time on appeal of questions involving "fundamental error." *See* R. 12–216(B)(2). No reported New Mexico decision has considered when there may be fundamental error with respect to a plea of guilty or no contest. The doctrine of fundamental error ordinarily concerns the conduct of a trial. Yet the articulation of the doctrine in *State v. Lucero,* 70 N.M. 268, 272, 372 P.2d 837, 840 (1962) suggests its application in other contexts:

> The doctrine of fundamental error has its place in this jurisdiction. But the errors complained of must be such as go to the foundation of the case, and which deprive the defendant of rights essential to his defense. The discretion residing in this court to apply the doctrine is not to be exercised in aid of strictly legal, technical or unsubstantial claims. Where substantial justice has been done, the parties must have taken and preserved exceptions in the lower court before this court will notice them on appeal. [Citations omitted.]

When a defendant has pleaded guilty or no contest, the "foundation of the case" is the validity of the plea. "Substantial justice" has not been done when grave doubt arises as to whether the defendant would have entered and maintained his plea if his rights had been observed. Thus, applying the principles of *Lucero* to the context of a plea of guilty or no contest, we find the error below to be fundamental because it satisfies the following two requirements: (1) the error must be clear, and (2) the error must clearly have affected the outcome.

We have already discussed the first requirement. The second requirement is satisfied because of the high probability that defendant would have withdrawn his plea if the district court had complied with *Eller.* We note that the sentence imposed was the maximum sentence permissible for the only charge filed against defendant (the plea agreement did not require the state to dismiss or refrain from filing any

other charges), and defendant filed a motion to withdraw his plea promptly after the district court denied his motion to reconsider sentence. There is no hint that defendant intentionally waived his rights under *Eller* for tactical reasons. We point out that we would ordinarily question whether the second requirement was satisfied if defendant waited a considerable period of time before raising the *Eller* issue, because in that event one could infer that (1) at the time of sentencing, defendant felt that, notwithstanding the penalty's being harsher than expected, the plea was still advantageous, and (2) defendant's belated desire to withdraw the plea was inspired by a belief that the state would be substantially handicapped by having to go to trial at a delayed date. Our holding that the failure to comply with *Eller* constituted fundamental error is supported by decisions in other jurisdictions. In those decisions, even though the defendant had not objected at the time of sentencing, the appellate court overturned a plea of guilty or no contest on the ground that the defendant had not been afforded an opportunity to withdraw his plea after the sentencing court rejected a promised or recommended sentence. *See State v. Bergerson,* 144 Vt. 200, 475 A.2d 1071 (1984) (plain error); *People v. Johnson,* 10 Cal.3d 868, 112 Cal.Rptr. 556, 519 P.2d 604 (1974) (In Bank); *State v. Schaeffer,* 5 Conn.App. 378, 498 A.2d 134 (1985) (plain error); *People v. Smith,* 76 A.D.2d 891, 429 N.Y.S.2d 29 (1980).

Finally, the state urges us to certify this case to the New Mexico Supreme Court for a reconsideration of *Eller.* We recognize that *Eller* may have been a controversial decision. It was a 3–2 decision of the New Mexico Supreme Court, reversing a 2–1 decision of this court. Nevertheless, we ordinarily do not certify an issue to our supreme court for reconsideration of an earlier case unless subsequent legislation, decisions of the New Mexico Supreme Court, or decisions of the United States Supreme Court place in question the underpinnings of the decision being challenged. That is not the situation here. On the contrary, the New Mexico Supreme Court has not seen fit to modify the language of Rule 5–304(D), which would be the most expedient way for that court to modify *Eller.* Therefore, we do not accept the state's invitation to certify this case to our supreme court. We note, of course, that the supreme court could revisit *Eller* by granting certiorari in this case.

For the above reasons, we remand to the district court with instructions either (1) to resentence defendant in conformity with the plea agreement or (2) to permit defendant to withdraw his plea.

IT IS SO ORDERED.

ALARID and APODACA, JJ., concur.

790 P.2d 523

STATE of New Mexico,
Plaintiff–Appellee,

v.

Ronald W. MORRIS,
Defendant–Appellant.

No. 11263.

Court of Appeals of New Mexico.

March 15, 1990.

Hal Stratton, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

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

OPINION

CHAVEZ, Judge.

Defendant appeals the portion of his judgment and sentence ordering restitution for extortion, commercial burglary, and larceny over $2500. Defendant was sentenced to seven and one-half years incarceration and ordered to pay $3200 in restitution to the victim. He raises three issues: (1) whether he was denied the opportunity to challenge the amount of, and his ability to pay restitution in violation of NMSA 1978, Section 31–17–1 (Repl.Pamp.1987); (2) whether the trial court erred in ordering restitution because the victim was not a person; and (3) whether the trial court erred in ordering fifty percent of his wages go toward restitution while he is incarcerated. We reverse in part and affirm in part.

As to issue three, the state has agreed that the trial court erred in ordering restitution from defendant's wages while incarcerated. *See* § 31–17–1 (restitution contemplated as part of probation or parole). We reverse this portion of the judgment.

Regarding issue two, the victim in this case was the Artesia High School Credit Union. Defendant argues pursuant to *State v. Boyer,* 103 N.M. 655, 712 P.2d 1 (Ct.App.1985), that the trial court lacked statutory authority to order restitution because the victim is not a person. Defendant recognizes this court has previously rejected this contention. *State v. Griffin,* 100 N.M. 75, 665 P.2d 1166 (Ct.App.1983). We decline to reconsider *Griffin* and affirm the award of restitution on this basis.

As to issue one, defendant argues he was denied due process of law by the trial court's failure to follow the procedures outlined in Section 31–17–1. *See State v. Lack,* 98 N.M. 500, 650 P.2d 22 (Ct.App.1982). In *Lack,* this court determined that Section 31–17–1 gave defendant the right to notice and an opportunity to prepare a plan of restitution or challenge the accuracy of the amount of restitution or his ability to pay. Although the defendant had not prepared a plan of restitution in *Lack,* this failure to comply with the statute was not error because the presentence report from a previous sentencing hearing gave defendant notice of the specific amounts of restitution as detailed in the report. Also, the defendant in *Lack* had been aware of the exact amount of restitution based on the previous sentencing hearing and had the opportunity to contest the amount. We also note defendant's basic sentence in *Lack* was suspended so that the district court was required to include restitution as a condition of probation. *See* § 31–17–1(B); *State v. Gross,* 98 N.M. 309, 648 P.2d 348 (Ct.App.1982).

In the present case, defendant waived the presentence report and the trial court clearly contemplated the parties would stipulate to the amount of restitution. The state contends defendant knew he would be required to pay the amount stolen as restitution and was on notice of this amount from the affidavit attached to the complaint, which asserted the amount taken was $3200. At the sentencing hearing, however, the state was unwilling to offer a specific amount and the trial court stated it wanted the amount determined as quickly as possible, requesting the parties to stipulate to it. The contemplated stipulation was not completed, and apparently was not even attempted before entry of the judgment and sentence.

The record discloses that the order of judgment, sentence and commitment was not approved by the attorneys representing the parties. Defense counsel contends that he was "never shown the judgment with the proposed restitution amount, or otherwise told how much restitution the ADA was claiming was due." We are not persuaded defendant was required at the sentencing hearing to object to the amount of restitution, to request a hearing to fix the amount as suggested by the state, or that defendant failed to submit a plan of restitution as contemplated by Section 31–17–1(B), when all involved anticipated a stipulation.

Under the facts of this case, defendant was denied due process because he did not receive adequate notice or opportunity to challenge the amount of restitution. *See State v. Lack.* We need not determine whether defendant was denied due process in the failure to provide him an opportunity to challenge his ability to pay the restitution since such a determination would be premature based on the length of defendant's incarceration.

The state also contends defendant should be denied relief because he has an adequate remedy under Section 31–17–1(C) and (F), which permits the trial court to modify the restitution plan at any time and allows defendant to request a hearing on the plan of restitution. Defendant, however, points out that he has a limited time to file his notice of appeal and that a motion under Subsection (F) would not stay the time to file a notice of appeal. SCRA 1986, 12–201(A) & (D). Moreover, we note the language of the statute refers to the plan of restitution and that there is no plan of restitution in the present case. Defendant was not required to seek a rehearing from the district court prior to filing his appeal.

We reverse and remand to the district court for the deletion of that portion of the sentence requiring defendant to pay restitution from his wages while incarcerated. We reverse and remand for further proceedings giving defendant notice of, and the opportunity to challenge the amount of restitution. We affirm the award of restitution regarding the victim's status as a person.

IT IS SO ORDERED.

ALARID and APODACA, JJ., concur.

790 P.2d 1010

GARDNER-ZEMKE COMPANY, Plaintiff-Appellant,

v.

STATE of New Mexico, Fox & Associates, Inc., Morrison-Knudson Company, Inc. and W.C. Kruger & Associates, Defendants-Appellees.

No. 18517.

Supreme Court of New Mexico.

April 10, 1990.

Rehearing Denied May 23, 1990.

Linda Zemke, Sullivan, Villella, Skarsgard & Noya, Charles J. Noya, Albuquerque, for plaintiff-appellant.

Hal Stratton, Atty. Gen., Bruce Charles and Nann Houliston, Asst. Attys. Gen., Santa Fe, for defendant-appellee State of N.M.

Harl D. Byrd, Santa Fe, for defendant-appellee Morrison.

Montgomery & Andrews, P.A., John B. Pound, Ann B. Hemenway, Santa Fe, for defendant-appellee Kruger.

Watrous & Reardon, Thomas S. Watrous, Albuquerque, for defendant-appellee Fox & Associates.

OPINION

BACA, Justice.

This case is before us on an appeal of the grant of defendants-appellees' motion for summary judgment in an action for breach of contract and negligence. We find that no material issues of fact exist, that summary judgment was appropriately granted, and we affirm the judgment below.

FACTS

This case arises out of a construction project to build the Las Cruces Medium Security Facility. Multiple parties are involved: Gardner–Zemke Company (Gardner–Zemke), plaintiff below, which was the prime electrical contractor for the project, sued the State of New Mexico, Morrison–Knudson, the construction manager for the project, W.C. Kruger (Kruger), the architect, and Fox & Associates, Inc. (Fox), the firm that prepared the soil reports.

To secure contractors for the various aspects of the project, the state solicited bids. Included in the bid document package was a soil report, prepared by Fox, describing subsoil conditions at the site. The report consisted of several sections, including a narrative section summarizing the subsoil conditions and a technical section describing the data summarized in the narrative section. The technical section contained graphs detailing blow counts—the amount of feet a 140–pound hammer drove a two-inch sampler after a number of blows—and a legend explaining their significance. Kruger and Morrison–Knudson were contractually bound to prepare bidding documents, and they decided to include the Fox report with the pre-bid documents.

Gardner–Zemke, relying in part on the Fox soil report that it received in the bid package, was the successful bidder for the electrical work. The parties dispute the meaning of the report, but Gardner–Zemke maintains that the report meant to it that the soil consisted primarily of sand. This was relevant to their bid because the electrical work required trenching through the surface. Gardner–Zemke submitted affidavits below indicating that other electrical contractors would interpret the report as it

did, relying primarily on the narrative portion and interpreting the term "calcareous sand" to mean sand consisting of limestone, rather than hard subsurface soil. The affidavits also indicate that electrical contractors do not know what "blow count" means, and appellant submits that it was acting reasonably when it relied on the narrative portion of the report rather than the technical sections detailing the blow counts.

Portions of the subsurface soil consisted, however, not of sand but of hard limestone rock and caliche. This was more expensive to trench through than Gardner–Zemke had anticipated, and appellant brought this suit under the contract's changed conditions clause to recover its excess costs.

The contract contained a clause pertaining to concealed conditions allowing the contract to be equitably adjusted if subsurface conditions differed materially from what the contractor could reasonably expect.

Several issues are raised on appeal. Appellant contends that the trial court failed to interpret the report as would a reasonable contractor, asserting that the proper standard for the trial court to use in reviewing the Fox report is from the perspective of a reasonable electrical contractor interpreting the report. It maintains that the trial court improperly ignored the affidavit evidence presented, which indicated that other electrical contractors would interpret the report as did Gardner–Zemke, and that this disputed interpretation of the report made summary judgment inappropriate. Appellant further contends that the trial court erred by relying on an unpublished opinion of the court of appeals, *Mesilla Valley Construction Co. v. Morrison–Knudson Co.*, No. 9404 (N.M.Ct.App., filed March 3, 1988), a case involving different parties but similar issues and that involved an interpretation of the Fox soil report. Appellant also argues that Morrison–Knudson, Fox, and Kruger all owed a duty to Gardner–Zemke to ensure that the report was accurate, and that exculpatory language in the contract was ineffective to defeat the claim based on the changed conditions clause. The essence of appellant's argument is that a reasonable electrical contractor, such as itself, would not read the technical information in the report to indicate the presence of limestone rock and would not consider that the technical information was relevant to its bid. It would read the narrative portion to indicate sand, and therefore the meaning to be assigned to the report was an issue of fact, making summary judgment inappropriate.

The various appellees dispute Gardner–Zemke's assertions. They all argue that the soil report was unambiguous; that the court applied the proper standard in reviewing the report; that no material issues of fact exist regarding the report—the court properly interpreted the report as a matter of law; and that the court made an independent interpretation of the Fox report and did not rely exclusively on *Mesilla Valley*. Fox, Kruger, and Morrison–Knudson also contend that each owed no duty to Gardner–Zemke that was breached. Kruger and Morrison–Knudson contend that the contract's exculpatory provisions effectively preclude Gardner–Zemke's claims, and Fox contends that certain issues raised by the appellant are not included in the docketing statement and may not be raised on appeal.

We consider the following issues to determine whether summary judgment was appropriate: (1) Whether the court applied the proper standard of review in examining the Fox report; and (2) whether the court properly determined that the report was unambiguous as a matter of law. Our disposition of these issues resolves the dispute, and we do not find it necessary to consider the other issues raised.

Preliminarily, we dispose of Fox's contention that certain issues raised on appeal were not included in the docketing statement and therefore may not be raised on appeal. In *Gallegos v. Citizens Insurance Agency*, 108 N.M. 722, 731, 779 P.2d 99, 108 (1989), we determined that for this court the docketing statement, although mandatory to perfect appeals, is not jurisdictional, and we may in our discretion

consider error properly preserved below but omitted from the docketing statement.

Summary judgment is appropriate if no genuine issue as to any material fact exists, so that the movant is entitled to judgment as a matter of law. *State v. Intigon Indem. Corp.*, 105 N.M. 611, 612, 735 P.2d 528, 529 (1987); SCRA 1986, 1–056(C). In considering a motion for summary judgment, the trial court must view the pleadings, affidavits, and depositions in the light most favorable to the opposing party. *Intigon,* 105 N.M. at 612, 735 P.2d at 529. The movant bears the initial burden of demonstrating he is entitled to summary judgment; once the movant makes out a prima facie showing, the burden shifts to the opposing party to show at least a reasonable doubt that a genuine issue exists. *Koenig v. Perez,* 104 N.M. 664, 666, 726 P.2d 341, 343 (1986). A summary judgment motion is not an opportunity to resolve factual issues, but should be employed to determine whether a factual dispute exists. *Pharmaseal Laboratories, Inc. v. Goffe,* 90 N.M. 753, 568 P.2d 589 (1977). If genuine controversy as to the facts exists, a motion for summary judgment should be denied and the factual issues should proceed to trial. *Great W. Constr. Co. v. N.C. Ribble Co.,* 77 N.M. 725, 729, 427 P.2d 246, 249 (1967). On review the court must consider the whole record for evidence that puts a material fact at issue. If the facts are not disputed, and only the legal effect of the facts remains to be determined, summary judgment is appropriate. *Id.*

The trial court, in granting the defendants' motion for summary judgment, determined that, as a matter of law, the soil report unambiguously indicated the presence of rock.

Gardner–Zemke contends that the trial court erred when it failed to interpret the soil report from the perspective of a reasonable electrical contractor, and that a reasonable electrical contractor would not have understood the significance of the blow-count analysis in the report. Accordingly, it argues that summary judgment was inappropriate—that the pre-bid documents incorporated in the bid package were ambiguous to it because the soil report misled the contractor as to subsoil conditions, and therefore a material issue of fact was before the court to decide. Alternatively, Gardner–Zemke contends that we should find the report ambiguous as a matter of law and construe the report in its favor, relying on the principle of contra proferentum. It maintains that appellees presented no evidence that a reasonable contractor would interpret the soil report as unambiguously indicating rock, and that the only evidence presented was appellant's affidavits. Thus, it contends, appellees did not rebut Gardner–Zemke's prima facie showing of ambiguity. Appellant also contends that the trial court inappropriately relied on *Mesilla Valley* to collaterally estop the issue of whether the soil report was ambiguous as a matter of law, basing this argument on the absence of identity of parties, *see State v. Rogers,* 90 N.M. 604, 566 P.2d 1142 (1977), and the contention that *Mesilla Valley* considered different legal and factual issues..

Gardner–Zemke correctly argues that the doctrines of collateral estoppel and res judicata cannot be used against it with regard to the issues litigated in *Mesilla Valley.* However, our reading of the record indicates that the trial court did not invoke either doctrine, and it did not rely on *Mesilla Valley* to definitively resolve the issue of the soil report's alleged ambiguity. Under the record before us, we find no impropriety in the trial court's examination of that decision. Moreover, the court's letter opinion clearly indicates that it independently examined the soil report. Accordingly, we find that the court did not commit reversible error by improperly relying on *Mesilla Valley.*

We agree with Gardner–Zemke that the proper standard for interpreting the soil report is from the perspective of what a reasonably experienced and intelligent contractor would have understood it to mean, and not from the perspective of an expert. *Ets–Hokin Corp. v. United States,* 420 F.2d 716, 722, 190 Ct.Cl. 668 (Ct.Cl.1970); *Kaiser Indus. Corp. v. Unit-*

ed States, 340 F.2d 322, 169 Ct.Cl. 310 (Ct.Cl.1965).[1] However, our analysis of the record and the trial court's opinion indicates that the court did apply an appropriate standard.

Gardner–Zemke maintains that, nevertheless, the court did not consider the report from the perspective of a reasonable contractor because it ignored the uncontroverted affidavits submitted from other electrical contractors to the effect that they, too, interpreted the report as did Gardner–Zemke. Accordingly, Gardner–Zemke concludes that a reasonable contractor would not have understood the report, and that summary judgment was inappropriate. As will be shown, this contention is meritless, and the affidavits do not demonstrate a material issue of fact.

The pre-bid documents, including the soil report, were integrated into the contract, and should be analyzed according to accepted canons of contract law, and, if the documents are misleading, the contracting body has breached an implied warranty of correctness. *See Vinnell Corp. v. State,* 85 N.M. 311, 512 P.2d 71 (1973).[2]

Interpretation of a contract to determine whether a condition encountered is a changed condition allowing an equitable adjustment of the contract is a question of law. *T.F. Scholes, Inc. v. United States,* 357 F.2d 963, 174 Ct.Cl. 1215 (Ct.Cl.1966). The question of whether an ambiguity exists is one of law. *Levenson v. Mobley,* 106 N.M. 399, 744 P.2d 174 (1987). Once the contract is determined to be ambiguous, the meaning to be assigned the ambiguous terms is a question of fact. *Segura v. Molycorp, Inc.,* 97 N.M. 13, 636 P.2d 284 (1981). The government, as drafter of the document, bears the burden to use language conveying its intent. If it does not, and the language is reasonably susceptible to more than one meaning consistent with its language and as an objective indication of the parties' intent, the specification is ambiguous and will be interpreted against the drafter. *Smith v. Tinley,* 100 N.M. 663, 674 P.2d 1123 (1984). This rule applies, however, only if the court is otherwise unable to ascertain the parties' intent. *El Paso Natural Gas Co. v. Western Bldg. Assocs.,* 675 F.2d 1135 (10th Cir.1982). A disagreement over the meaning of specifications does not necessarily indicate an am-

1. Fox argues that New Mexico law does not create this standard of review in construction contracts whereby the *contract* is interpreted from the reasonable contractor perspective. This is a misstatement of the issue. The contract is not examined from that perspective, but is interpreted by accepted canons of contract construction. However, the soil report is examined from the perspective of what a reasonable contractor would understand it to mean, to determine whether there is an ambiguity and what the contractor's reasonable expectations were when entering a bid. The contractor is not held to a standard of what an expert would have understood the soil report to mean.

2. Appellee Fox contests this premise, arguing that *Vinnell* stands only for the proposition that a cause of action against the government for misleading information contained in bidding documents must sound in contract, not tort. Fox contends that there is no requirement that subsoil reports must be considered part of the contract as a matter of law, and insists that, as a general proposition, a contract must be analyzed on a case-by-case basis, citing *Yankee Atomic Electric Co. v. New Mexico and Arizona Land Co.,* 632 F.2d 855 (10th Cir.1980). Fox has not provided any authority for its contention that a pre-bid document should not be considered part of the agreement between the parties, and it has not explained why, when we consider this contract according to its terms and conditions, we should not find the pre-bid report to form part of the contract.

Fox is correct in asserting that *Vinnell* considered only a narrow question of law, but we find that appellant's contention is a logical extension of that case—if a cause of action for misrepresentations contained in pre-bid documents must lie in contract, the documents must be considered part of the contract. Considering this contract according to its terms and conditions, we reach the same conclusion. The soil report was included in the pre-bid documents, inducing reliance by the bidders. When Gardner–Zemke submitted its bid, it considered the soil report to define, in part, the scope of its work and the report could only have been included to delineate the scope of the project, forming part of the bargain between the parties. Indeed, the changed conditions clause in the contract, upon which appellant relies, could have no meaning if the conditions as represented by the pre-bid documents were not considered to form part of the agreement. Accordingly, we hold that the soil report should be considered part of the agreement between the parties.

biguity—the contractor's interpretation must be reasonable and the contract must be fairly susceptible to different constructions. *See Levenson,* 106 N.M. at 401, 744 P.2d at 176; *see also Major v. Bishop,* 462 F.2d 1277 (10th Cir.1972). To be reasonable, an interpretation must be consistent with the contract language: the language of the entire contract must be considered, and selected portions cannot support a claim of ambiguity. *Lindbeck v. Bendziunas,* 84 N.M. 21, 498 P.2d 1364 (Ct.App. 1972).

Gardner–Zemke argues that a contractor, reasonably experienced and intelligent, such as itself, would not have understood the soil report to indicate the presence of rock. In support of this contention, it submitted affidavits from other electrical contractors that indicated that they too read the report and understood it to mean that subsurface conditions consisted of sand, not rock.[3] Appellant admits that it did not understand the term blow count; it contends that a reasonable electrical contractor is unfamiliar with the term and could not be expected to understand it, and that it did not feel that the chart and the technical explanation contained in the report were relevant to its bid. It maintains that it acted reasonably when it relied on the narrative explanation for the electrical bid. Gardner–Zemke also admits that the subsoil conditions were very important to its bid; in a project such as this, the trenching and subsurface work that accompanies the electrical work is significant and can amount to a major portion of the project.

To prevail on a changed condition claim, the contractor must show that he was reasonably unaware that the condition existed, either because of the representations made about the site or because the condition was hidden. J.C. McBride & I.H. Wachtel, *Government Contracts* § 29.20 (Rev'd 1989) (hereinafter McBride & Wachtel). A party to 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, 545, 650 P.2d 825, 829 (1982). In interpreting a contract, it "must be considered and construed as a whole, with meaning and significance given to each part in its proper context with all other parts, so as to ascertain the intention of the parties." *Schultz & Lindsay Constr. Co. v. State,* 83 N.M. 534, 535, 494 P.2d 612, 613 (1972). Gardner–Zemke cannot prevail on its claim that as an electrical contractor it could not reasonably have been expected to have read and understood the blow count tables in the soil report; every party to a contract has a duty to read the document in its entirety and is charged with knowledge of the document. This is especially true when, as here, the document pertained to a significant element of the project. By not having read the document in its entirety, Gardner–Zemke cannot now claim that it was *reasonably* unaware of the conditions detailed in the unread portion.[4]

3. The three affidavits state essentially similar views. All of the deponents were estimators for electrical contractors, and all, after reaffirming the significance of the trenching in an electrical job and the importance of knowing the soil condition, submitted that they relied solely on verbal descriptions of the conditions in preparing their bids. One stated he would place great reliance on core samples, but did not understand blow counts. They stated that the terms "blow count" and "calcareous sand" had no meaning to them, although one indicated he thought calcareous sand meant caliche sand.

4. In *Flippen Materials Co. v. United States,* 312 F.2d 408, 160 Ct.Cl. 357 (Ct.Cl.1963), a case presenting an issue very similar to the one we address today, the contractor in a contract to manufacture crushed rock for the United States government claimed that the rock in the quarry differed from what it was represented to be in the bidding documents and sought an equitable adjustment pursuant to the changed conditions clause. Prior to the execution of the contract, the government had drilled holes in the quarry area to ascertain the subsurface conditions; it then provided the contractor with drawings representing the profiles of the boring for the area. The drawings showed that there were cavities in the limestone, but did not indicate that, within the cavities, clay had been found. The presence of clay made the excavation of the limestone much more difficult and costly. The contractor claimed that the drawings upon which it relied did not indicate the clay and that therefore it was entitled to an adjustment in the contract. The court denied the claim, because the contractor knew of field logs that were available to it and that unambiguously indicated the presence of clay. The contractor was found to have a

If Gardner–Zemke reasonably did not understand the meaning of blow counts, as it claims, it had a duty to ascertain what the term meant and its significance. *See Leal v. United States*, 276 F.2d 378, 384 n. 1, 149 Ct.Cl. 451 (Ct.Cl.1960); McBride & Wachtel, *supra*, § 29.70 ("Whenever there is any doubt respecting the government's representation in the solicitation of subsurface conditions, the bidder has the affirmative duty of seeking clarification.").

Even if the narrative portion of the report can be interpreted to indicate that the subsoil consisted of sand, Gardner–Zemke, if it had read the report in its entirety, would have been alerted to this and was under a duty to inquire. Section 4.2.1 of the contract states: "The Contractor shall carefully study and compare Contract Documents and shall at once report to the Architect and the Construction Manager any error, inconsistency or omission that may be discovered." Thus, because Gardner–Zemke, as a reasonable contractor, if it had read the provision in question, would have noted the obvious discrepancy in its interpretation of the narrative section of the soil report and the technical section of the report, and because it was under a contractual duty to inform the government of the discrepancy, it cannot prevail on its claim. *See also Beacon Constr. Co. v. United States*, 314 F.2d 501, 161 Ct.Cl. 1 (Ct.Cl.1963) (relying on a similar clause in a federal construction contract to require the contractor to notify and seek clarification from the government of a discrepancy of which it knew).[5]

Accordingly, we hold that the soil report was not ambiguous and that summary judgment was appropriate. Even if the narrative portion of the report would indicate sand to a reasonable contractor preparing a bid, the contract should be read as

duty to fully acquaint itself with the relevant information, including information available but not within the four corners of the contract. In the case presented to us today, appellant had to venture no further than the end of the soil report for all of the information, and he cannot be heard to complain that all of the relevant information was not available to it.

The contractor in *Flippen* also contended that it was entitled to rely on definitive representations contained within the contract itself, and, having found what it determined to be a definitive statement of the conditions, was under no duty to investigate further. The court disagreed, stating:

> The cases do hold that the Government is liable for damage attributable to misstatements of fact (in a contract or specifications) which are representations made to the contractor. The cases also hold that, in such circumstances, the defendant is not relieved from liability by general contractual provisions requiring the bidder to investigate the site or satisfy himself of conditions, or stating that the United States does not guarantee the statements of fact in the specifications, etc. But the cases do *not* hold that a bidder can rely on some portion of the information supplied by the Government without looking at other Government materials (to which he is directed by the contract documents themselves) which qualify, expand, or explain the particular segment of information on which the contractor intends to rely.

Id. at 413, 160 Ct.Cl. 357 (footnotes omitted).

This court, too, has previously decided the issue of whether a contractor has the right to rely upon a representation regarding conditions to be encountered in a construction contract. In *State ex rel. Santa Fe Sand & Gravel Co. v. Pecos Constr. Co.*, 86 N.M. 58, 61, 519 P.2d 294, 297 (1974), we determined that a contractor was not entitled to rely upon a representation of conditions to be encountered when the condition was equally within its knowledge or it had the opportunity to independently ascertain the conditions for itself. We cannot see how, when a contractor is held to a level of knowledge equal to the owner when he has the opportunity to independently investigate, he can be held to a lesser standard when he need only ask the significance of information contained within the document.

5. This is not to require every contractor to be responsible for determining every possible ambiguity in a contract of this type. The ambiguity must be obvious, so that a reasonable contractor would be aware of it. It is not necessary for a contractor to inquire about all possible discrepancies, only those that are obviously ambiguous, and a reasonable contractor is not charged with careful study of every possible detail in a complex specification or clause when preparing a bid. In a case such as the one presented today, however, where the contractor considered the trenching to be a significant part of the bid and where the report was not overly lengthy or complex, and where it is apparent that if it had read the entire document and taken the minimal effort to understand it, the discrepancy between its interpretation of the narrative and the obvious interpretation of the data would have created a patent ambiguity.

a whole, construing each part harmoniously, and a reasonable contractor would have noted the obvious discrepancy between its interpretation of the narrative portion and the technical portion, giving rise to its duty to inquire.

Because we dispose of this appeal on these grounds, we deny Gardner–Zamke's request that we interpret the report against the drafter. Furthermore, we find it unnecessary to address whether the various defendants owed a duty to Gardner–Zemke and the effect of the various exculpatory clauses contained in the contract.

In accordance with this opinion, we hold that the summary judgment of the district court was appropriate, and we AFFIRM.

IT IS SO ORDERED.

SOSA, C.J., and DONNELLY, Judge, Court of Appeals, concur.

790 P.2d 1017

COUNTY OF LOS ALAMOS, Petitioner,

v.

Joe D. TAPIA, Respondent.

No. 18304.

Supreme Court of New Mexico.

April 12, 1990.

Byron L. Treaster, Los Alamos, for petitioner.

Griffith, Boone & Cruse, P. Reid Griffith, Jr., Los Alamos, for respondent.

OPINION

MONTGOMERY, Justice.

In the trial of a criminal case, after jeopardy attaches,[1] one of three outcomes is possible: The trial may be completed and the defendant acquitted; the trial may be completed and the defendant convicted; or the trial may not be completed at all, in which case it will have been aborted by some ruling of the trial court. In the first situation, it has been settled for almost a century that the Double Jeopardy Clause of the United States Constitution[2] precludes further prosecution of the defendant. *United States v. Ball,* 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1896). *Ball* also firmly established that, in the second situation, reprosecution of the defendant is not barred if his or her conviction is set aside on appeal. *Id.* at 671–72, 16 S.Ct. at 1195–96.[3] The third situation has presented great difficulty for the courts; sometimes, depending on the reasons for the trial court's aborting the trial, double jeopardy will preclude a retrial; sometimes it will not.[4]

This case is one of those falling into the third category. The defendant's trial was aborted during the testimony of the county's first witness when the trial court ruled that his arrest had been illegal and that all evidence in support of the charge had to be suppressed. The court dismissed the charge and the state appealed to the court of appeals. The court of appeals dismissed the appeal, holding that the Double Jeopardy Clause barred further prosecution.[5] We granted certiorari and now reverse the court of appeals, remanding to the district court for trial.

I.

In the early morning hours of January 27, 1987, a police officer in Los Alamos

1. Jeopardy attaches in a jury trial when the jury is empaneled and sworn; it attaches in a bench trial when the court begins to hear evidence. *Serfass v. United States,* 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975); *State v. James,* 93 N.M. 605, 606, 603 P.2d 715, 716 (1979).

2. U.S. Const. amend. V ("... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *"). The corresponding provision in the New Mexico Constitution is N.M. Const. art. II, § 15. The Double Jeopardy Clause applies to the states through the fourteenth amendment. *Benton v. Maryland,* 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969). We have held that the New Mexico provision should be interpreted in the same way as the federal clause. *State v. Rogers,* 90 N.M. 604, 566 P.2d 1142 (1977).

3. However, if the defendant's appeal is successful because the prosecution's evidence was insufficient to convict, double jeopardy prevents a retrial. *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

4. *See United States v. Scott,* 437 U.S. 82, 92–95, 98 S.Ct. 2187, 2194–96, 57 L.Ed.2d 65 (1978).

5. When further prosecution is barred by double jeopardy, an appeal by the state, which if successful would lead to reprosecution, will be dismissed. *See e.g., Smalis v. Pennsylvania,* 476 U.S. 140, 145, 106 S.Ct. 1745, 1749, 90 L.Ed.2d 116 (1986); *United States v. Jorn,* 400 U.S. 470, 476, 91 S.Ct. 547, 552, 27 L.Ed.2d 543 (1971). *See also United States v. Scott,* 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (judgment of acquittal may not be appealed); *State v. Mares,* 92 N.M. 687, 594 P.2d 347 (Ct.App.1979) (court of appeals cannot review acquittal); NMSA 1978, § 39–3–3(C) (no appeal shall be taken by state where Double Jeopardy Clause prohibits further prosecution). *Cf. Serfass v. United States,* 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975) (government appeal from pre-trial order not barred since jeopardy had not attached); *United States v. Wilson,* 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975) (government appeal from postverdict ruling not barred; double jeopardy not implicated where no danger of subjecting defendant to second trial).

observed defendant, at a point near the Los Alamos–Santa Fe County line, running a stop sign and driving with an inoperative tail light. The officer pursued defendant with emergency lights flashing, and defendant drove across the county line a short distance into Santa Fe County. There he stopped; and the officer, after observing his behavior, administered a field sobriety test and placed him under arrest. Defendant was cited for driving while intoxicated and later tried in Los Alamos Municipal Court, where he was convicted. He then appealed to the district court in a trial *de novo.*

At trial, the county first called the arresting officer. His testimony was interrupted by a defense motion to suppress all evidence resulting from the arrest on the ground that the arrest was illegal under the Fresh Pursuit Act, NMSA 1978, Sections 31–2–1 to –8 (Repl.Pamp.1984). Defense counsel questioned the officer on voir dire, establishing the fact that the arrest occurred in Santa Fe County. The evidence in support of the DWI charge consisted of the officer's observations, the field sobriety test, and a breath test. Defense counsel submitted a trial brief seeking suppression of the evidence and dismissal of the charge of driving while intoxicated. The trial judge heard oral argument, following which he granted the motion to suppress and to dismiss and later entered a written decision containing these rulings:

> 6. Defendant's arrest by Officer Davis and all fruits of that arrest, inlcuding [sic] statements made by the defendant, testimony concerning observations of the defendant made by the officer, testimony concerning field sobriety tests administered to Defendant by the officer and testimony or documentary evidence concerning the results of any chemical or breath tests are inadmissible as fruits of the illegal arrest, and should be suppressed.
>
> 7. The charge of driving while intoxicated and the charge of running a stop sign should be dismissed because the arrest of Defendant was illegal and all evidence in support thereof has been suppressed.

The county appealed to the court of appeals. While the appeal was pending, the court of appeals decided another case involving similar facts, ruling that the Fresh Pursuit Act did not authorize an officer deputized in one county to pursue a suspect into another county and arrest him there for DWI. On certiorari, we reversed this ruling and held that an arrest under these circumstances is valid under the Fresh Pursuit Act. *Incorporated County of Los Alamos v. Johnson,* 108 N.M. 633, 776 P.2d 1252 (1989). In that case the defendant had been convicted by the trial court, so the result of this Court's review was simply to reinstate the conviction. 108 N.M. at 635, 776 P.2d at 1254. In the present case, however, the defendant's trial had not been concluded; accordingly, the county on appeal sought to have the district court's dismissal of the charge reversed and to have the case remanded for trial.

Tapia moved to dismiss the appeal on double jeopardy grounds. The court of appeals granted the motion holding, in a two-to-one decision, that the constitutional prohibition against double jeopardy barred further proceedings. The court reasoned, relying on *Smalis v. Pennsylvania,* 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986), and *Sanabria v. United States,* 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978), that the district court's dismissal constituted an "acquittal." In his opinion for the court, Judge Hartz said:

> The district court's ruling was as much a determination of the facts in this case as is a directed verdict in a civil case resulting from the failure of a plaintiff to offer any admissible evidence on an element of the cause of action * * *. The prosecution had no admissible evidence to convict defendant; so it failed to satisfy its burden of proof. An acquittal is nothing more than a determination that the prosecutor has failed to meet the burden of proof.

Dissenting, Chief Judge Bivins took the view, in reliance on *United States v. Scott,* 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), and *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 97 S.Ct. 1349, 51

L.Ed.2d 642 (1977), that the trial court's dismissal was not an acquittal because it was not an adjudication of defendant's factual guilt or innocence; it was instead a ruling on a question of law and one that, moreover, the defendant himself had procured through his motion to abort the trial.

We granted certiorari to resolve these conflicting views and to provide our own input into the confusing welter of cases that suffuse this area of double-jeopardy jurisprudence.[6]

II

We think that Judge Bivins had the better of the analysis. Despite the court of appeals' statement, the district court's ruling was *not* a determination of the facts in the case and, while it may have had the same effect insofar as the defendant was concerned, it was quite unlike a directed verdict in which the plaintiff or the state fails to offer sufficient evidence to satisfy its burden of proof. The trial court's ruling was in no sense a decision on the quantum of proof offered by the county, on its probative value, on the credibility of the evidence, or on any other question relating to the sufficiency of the county's case; it was purely and simply a ruling on the legality of defendant's arrest and the consequent admissibility *vel non* of the prosecution's evidence. The charge of DWI was dismissed, not because of an insufficiency of evidence to prove that defendant was guilty beyond a reasonable doubt, but because "the arrest of Defendant was illegal and all evidence in support thereof ha[d] been suppressed." Thus, the court of appeals was simply wrong when it said, later in its opinion, that "the basis of the dismissal was factual innocence;" the basis of the dismissal was that all evidence in support of the charge had been suppressed (albeit, as we now know, incorrectly). For this reason, the decision in *Smalis v. Pennsylvania*—that a defendant who demurs to the evidence as "insufficient to establish his factual guilt" has been acquitted, 476 U.S. at 144, 106 S.Ct. at 1744—is inapposite to this case.

In this area of the law, as in many others, characterizations and labels abound. What was the trial court's "dismissal," really? Was it really an "acquittal"—in which case the interdictions of *Smalis* and *Sanabria* absolutely prohibit retrial (and hence mandate dismissal of the appeal)—or was it, really, the "functional equivalent"[7] of a mistrial requested by the defense, in which "the Double Jeopardy Clause is not offended by a second prosecution." *United States v. Scott,* 437 U.S. at 93, 98 S.Ct. at 2195 (citing *United States v. Jorn,* 400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971)). Or was it, really, not the equivalent of a mistrial but a "termination" of the trial in defendant's favor before any determination of factual guilt or innocence, like the dismissal for preindictment delay in *Scott,* 437 U.S. at 94–95, 98 S.Ct. at 2195–96?

In *Scott,* the midtrial dismissal for preindictment delay was held not to bar further prosecution, and the distinction referred to above between an acquittal for insufficient evidence and a termination of the trial on a basis unrelated to factual guilt or innocence was firmly recognized.

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.

Scott, 437 U.S. at 98–99, 98 S.Ct. at 2198. The Court relied on the definition of "ac-

6. *See Burks v. United States,* 437 U.S. at 9, 98 S.Ct. at 2146: "The Court's holdings in this area * * * can hardly be characterized as models of consistency and clarity." *See also United States v. DiFrancesco,* 449 U.S. 117, 127, 101 S.Ct. 426, 432, 66 L.Ed.2d 328 (1980): "That its [i.e., the Double Jeopardy Clause] application has not proved to be facile or routine is demonstrated by acknowledged changes in direction or in emphasis."

7. *Cf. Serfass,* 420 U.S. at 392, 95 S.Ct. at 1064 (dismissal of indictment before trial not functional equivalent of acquittal on the merits).

quittal" provided in *United States v. Martin Linen Supply Co.,* 430 U.S. at 571, 97 S.Ct. at 1354:

> [A] defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged."

Scott, 437 U.S. at 97, 98 S.Ct. at 2197 (brackets in original).

Out of the distinction in *Scott* and *Smalis* between acquittals for "evidentiary insufficiency" and dispositions for some other reason has crept another label: reversals for "trial error." On the same day that the Supreme Court decided *Scott* it handed down *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), in which it said:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.,* incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.

437 U.S. at 15, 98 S.Ct. at 2149. To these examples of a defective judicial process the Court might have added preindictment delay (*Scott*), an improperly drafted information (*Lee v. United States,* 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977),[8] and an involuntary plea of guilty (*United States v. Tateo,* 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964)). Especially noteworthy in the present case was the classification in *Burks* of the "incorrect receipt or rejection of evidence" as "trial error." The current viability of this classification is indicated in the relatively recent case of *Lockhart v. Nelson,* 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), in which the Court held that, where a reviewing court sets aside a defendant's conviction because evidence essential to the conviction was erroneously admitted, the Double Jeopardy Clause does not preclude a retrial:

> Burks was careful to point out that a reversal based solely on evidentiary insufficiency has fundamentally different implications, for double jeopardy purposes, than a reversal based on such ordinary "trial errors" as the "incorrect receipt or rejection of evidence." * * * While the former is in effect a finding "that the government has failed to prove its case" against the defendant, the latter "implies nothing with respect to the guilt or innocence of the defendant," but is simply "a determination that [he] has been convicted through a judicial *process* which is defective in some fundamental respect."

488 U.S. at 33, 109 S.Ct. at 290, 102 L.Ed.2d at 273 (quoting *Burks,* 437 U.S. at 14–16, 98 S.Ct. at 2148–50) (brackets and emphasis in original). *See also Palmer v. Grammer,* 863 F.2d 588 (8th Cir.1988) (discussing *Burks* and *Lockhart*).

Thus, *Lockhart* carries forward the distinction recognized in *Smalis, Scott* and *Burks* between an acquittal for evidentiary insufficiency (i.e., failure of the prosecution to offer sufficient evidence to satisfy the trier of fact beyond a reasonable doubt) and a midtrial termination in favor of the accused based on a fundamental defect in the judicial process such as incorrect (in some critical respect) receipt or rejection of evidence. In the present case—the court of appeals' conclusions to the contrary notwithstanding—the trial court's ruling was not one based on evidentiary insufficiency but rather was based on the complete exclusion of all evidence offered by the prosecution because of an erroneous interpretation of the statute under which defendant was arrested. We believe that this is the kind of "trial error" for which the county can appeal and after which, if the appeal is successful, the defendant can be retried.

8. *See also, Illinois v. Somerville,* 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973) ("fatally deficient" indictment).

See People v. Greer, 91 Mich.App. 18, 282 N.W.2d 819 (1979) (retrial not barred after reversal of midtrial dismissal based on improper search, because dismissal was unrelated to factual guilt or innocence and therefore defendant had been neither acquitted nor convicted). *Contra, United States v. Baptiste,* 832 F.2d 1173 (9th Cir. 1987).[9]

To some extent, and even though the United States Supreme Court has not so ruled, the statements in *Burks* and *Lockhart* might appear to represent a relaxation of the vigorous pronouncements in *Sanabria* that:

> [W]hen a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous.

437 U.S. at 64, 98 S.Ct. at 2179; *see also id.* at 69, 98 S.Ct. at 2181; and in *Arizona v. Washington,* 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), that:

> The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal [is] based upon an egregiously erroneous foundation."

434 U.S. at 503, 98 S.Ct. at 829 (quoting *Fong Foo v. United States,* 369 U.S. 141, 143, 82 S.Ct. 671, 672, 7 L.Ed.2d 629 (1962)).

But it will be observed that in *Sanabria* and *Fong Foo* there was an actual *judgment of acquittal.* This, perhaps, goes to show that, in this area at least, labels do have some constitutional significance.[10] The policy against allowing the state to appeal from a judgment of acquittal, and against allowing retrial of the accused after such a judgment, is so strong that it simply will brook no relaxation, whether or not there has been a "trial error" or other defect in the process leading to the judgment. Once an accused is actually, and in express terms, acquitted by a court, the finality of that judgment will not yield to any attempts to dilute it.

III.

Still, labels and rubrics, while they may facilitate analysis and help square the result in a particular case with controlling precedents, ultimately fail to provide a satisfactory explanation for a given result. A better explanation, perhaps, may be found in the policies served by the Double Jeopardy Clause and in the policies underlying the rules that deny it application in all circumstances.

The purposes of the Clause are set out in this oft-quoted passage in *Green v. United States,* 355 U.S. 184, 187–88, 78 S.Ct. 221, 223–24, 2 L.Ed.2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo–American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

To the three goals articulated in this passage—enabling an accused to escape embarrassment, expense and ordeal, to be free from anxiety and insecurity, and to reduce the possibility of an unjust conviction—may be added a fourth: to protect the defendant's " 'valued right to have his

9. We might agree in the abstract with the dissent that "[a] ruling on the factual elements of a case oftentimes cannot be easily disentangled from ... trial procedures." However, in this case we find that the procedural necessity to abort the trial arose with the court's ruling on the preliminary suppression issue and prior to any putative determination of the sufficiency of the evidence on the merits. Any comments by the court on the sufficiency of the evidence therefore were surplusage; there were no findings to make, no discretion to be exercised. The fact that the court entered such findings cannot be determinative any more than the court's denomination of its action as a dismissal rather than an acquittal. For this reason, we believe *Baptiste* to have been wrongly decided.

10. However, according to the Supreme Court, the word "acquittal" has no "talismanic quality" for purposes of the Double Jeopardy Clause. *Serfass,* 420 U.S. at 392, 95 S.Ct. at 1064.

trial completed by a particular tribunal.' " *United States v. Jorn,* 400 U.S. at 484, 91 S.Ct. at 557 (quoting *Wade v. Hunter,* 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949)). This interest of the accused may be subsumed in one or more of the three noted in *Green,* but it has often been singled out by the Supreme Court (or one or more of its Justices dissenting on a particular occasion) as deserving of protection under the Double Jeopardy Clause.

Still another formulation is "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn,* 400 U.S. at 486, 91 S.Ct. at 558. Much of the policy—not all, to be sure—behind the Double Jeopardy Clause is thus simply to protect the defendant's interest in repose. *See Lockhart v. Nelson,* 488 U.S. at 47–48, 109 S.Ct. at 294, 102 L.Ed.2d at 278 (Marshall, J., dissenting).

It is clear from the cases applying the Clause that the protection it affords to criminal defendants is not absolute. *See, e.g., United States v. DiFrancesco,* 449 U.S. at 132, 101 S.Ct. at 434. If it were, many of those cases, extending well back into the nineteenth century—*e.g., United States v. Perez,* 9 Wheat. 579, 6 L.Ed. 165 (1824) (mistrial declared for "manifest necessity" not a bar to second trial); *United States v. Ball,* (successful appeal of conviction precludes plea of double jeopardy on retrial)—would have been decided differently. The purposes enunciated in *Green* are frustrated to some extent whenever a defendant is retried; the defendant probably always undergoes additional embarrassment, expense and ordeal, continues to live in anxiety and insecurity, and remains subject to the possibility that even though innocent he may be found guilty. These interests, as the Court has recognized on numerous occasions, often are subordinated to the countervailing interest of society in the orderly administration of justice. *See, e.g., Lockhart,* 488 U.S. at 47–48, 109 S.Ct. at 294, 102 L.Ed.2d at 278 (defendant's interest in repose balanced with society's interest in administration of justice); *Scott,* 437 U.S. at 92, 98 S.Ct. at 2194 (propriety of mistrial requires balancing defendant's right to have trial completed by a particular tribunal against public interest in insuring that justice is meted out to offenders); *Illinois v. Somerville,* 410 U.S. at 470, 93 S.Ct. at 1073 (quoting *Wade v. Hunter,* 336 U.S. at 689, 69 S.Ct. at 837) .... (defendant's "valued right" to have trial completed by particular tribunal must in some instances be subordinated to public's interest in fair trials designed to end in just judgments); *Downum v. United States,* 372 U.S. 734, 736, 83 S.Ct. 1033, 1034, 10 L.Ed.2d 100 (1963) (defendant's right to have his trial completed by particular tribunal may be subordinated to the public interest when there is "imperious necessity" to do so).[11]

The public's interest in the "orderly administration of justice" has been variously described. *See, e.g., United States v. Tateo,* 377 U.S. at 466, 84 S.Ct. at 1589 ("punishing one whose guilt is clear after he has obtained [a fair] trial"); *United States v. Scott,* 437 U.S. at 92, 98 S.Ct. at 2194 ("insuring that justice is meted out to offenders"); *Burks v. United States,* 437 U.S. at 15, 98 S.Ct. at 2149 ("insuring that the guilty are punished"); *Arizona v. Washington,* 434 U.S. at 509, 98 S.Ct. at 832 ("giving the prosecution one complete opportunity to convict those who have violated its laws").

Although, as has been noted, the rights secured by the Double Jeopardy Clause are not absolute, they come very close to being so treated in the situation described earlier—where the trial court has entered a judgment of acquittal. In that case the defendant's interest in being free of governmental oppression, *Scott,* 437 U.S. at 99, 98 S.Ct. at 2198, is at its zenith, whereas the government, having had one "full and

11. *See also State v. Saavedra,* 108 N.M. 38, 41, 766 P.2d 298, 301 (1988) (when retrial after declaration of mistrial would not create unfairness to the accused, his interest against retrial may be subordinated to the public interest in substantive justice) (citing *Arizona v. Washington,* 434 U.S. at 505, 98 S.Ct. at 830).

fair opportunity" to vindicate society's interest, *Arizona v. Washington,* 434 U.S. at 505, 98 S.Ct. at 830, is denied another. Almost the same level of protection is granted to the defendant's interests in cases where he or she is convicted but the conviction is reversed by an appellate court for evidentiary insufficiency. Here again, the government has had its full and fair opportunity to convict but has failed to muster the necessary evidence, *Burks,* 437 U.S. at 11, 98 S.Ct. at 2147, and so again the defendant's rights are ascendant in the balance.

At the opposite end of the spectrum is the case in which the defendant is convicted and his conviction is set aside on appeal on a ground other than insufficiency of the evidence to prove the offense. In that case, although the defendant may on retrial suffer the same anxiety and ordeal as he did the first time around, no one doubts that society's interest in administering its laws completely overrides the defendant's interest in freedom from these hardships. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States v. Tateo,* 377 U.S. at 466, 84 S.Ct. at 1589.

Toward the middle of the spectrum are the cases which have caused difficulty over the past thirty years. These are the cases where the trial is aborted for some reason and the state seeks to place the defendant on trial again. Lying close to the cases where the defendant is acquitted or his conviction is set aside for evidentiary insufficiency is the case in which a mistrial is declared but the trial court is found to have abused its discretion in so declaring—i.e., the mistrial is found to have been for reasons other than "manifest necessity." In this case the defendant's interest in escaping the evils of a new trial and in having his fate determined by the first tribunal outweighs society's interest in trying to convict and punish him. *See, e.g., United States v. Jorn; Downum v. United States.* In making this determination it is relevant, of course, that the defendant either did or did not seek or consent to the mistrial or that, on the other hand, the state requested or the court *sua sponte* declared the mistrial. Where the government, through the prosecution or the court, is the moving party, the defendant's interest carries greater weight because he or she has not voluntarily surrendered it, and the government is held to a strict standard of necessity in aborting the trial and requiring the defendant to start over.[12]

At the same time, where a reviewing court is satisfied that indeed the trial court not only had good reasons for declaring a mistrial, but practically was *compelled* by the circumstances to do so—as where reversal on appeal of any conviction would be a virtual certainty, *Illinois v. Somerville,* or where there was a serious likelihood of juror bias engendered by improper comments to the jury, *Arizona v. Washington* —the trial court's decision to declare a mistrial will be accorded respect and the defendant will be required to undergo reprosecution. In such a case, especially since the likelihood of governmental oppression or manipulation is much reduced or nonexistent, the public's interest in fair trials designed to end in just judgments will prevail over the defendant's valued right to have his trial concluded before the first jury empaneled. *Arizona v. Washington,* 434 U.S. at 508, 516, 98 S.Ct. at 831, 835. *A fortiori,* where the defendant *has* sought a mistrial and thereby—at least arguably—manifested a willingness to proceed to trial again despite the disadvantages, the strength of his interest is diluted and the government's interest presses more forcefully, particularly since there is little likelihood of governmental oppression or manipulation in that case. *See Lee v. United States.*

Finally, we come to a case like the one at bar—an instance of "trial error" in

12. For a recent case in this Court applying this standard *see Callaway v. State,* 109 N.M. 416, 785 P.2d 1035 (1990).

which the trial has been aborted by a trial court ruling favorable to the defendant in the sense that he or she has prevailed, at least for the time being, but no judgment of acquittal has been entered. Without canvassing the myriad possibilities that can arise in this category, we can perhaps generalize by saying that, at least where the government has not been responsible for the error and has not sought termination of the trial, the defendant's interest in ridding himself or herself of the evils attendant upon another trial may be subordinated to society's interest in the correct application of its laws. *See, e.g., United States v. Scott.* In the present case Tapia waited until jeopardy had attached before requesting that the evidence obtained as a result of his (then arguably illegal) arrest be suppressed.[13] Having waited until then, and having moved to terminate the trial through a dismissal of the charge rather than to pursue his valued right to have his trial completed by the first tribunal, he does not have a strong claim to protection of this interest. Looking at the case from the county's standpoint, it did not bring about the termination of the trial; the dismissal was entered, obviously, over its objection. There was no opportunity for oppression or manipulation on the part of the prosecution. And, most importantly, the county and the entire state have a keen interest in the correct interpretation and application of all laws governing arrests, such as the Fresh Pursuit Act. The county's desire to retry Tapia is not a case of " 'honing its trial strategies and perfecting its evidence through successive attempts at conviction,' " *Lockhart v. Nelson,* 488 U.S. at 44, 109 S.Ct. at 292, 102 L.Ed.2d at 276 (Marshall, J., dissenting) (quoting *Tibbs v. Florida,* 457 U.S. 31, 41, 102 S.Ct. 2211, 2218, 72 L.Ed.2d 652 (1982)), or of asking for a chance to " 'supply evidence ... which it failed to muster in the first proceeding.' " *Id.* 488 U.S. at 47, 109 S.Ct. at 294, 102 L.Ed.2d at 278 (quoting *Burks v. United States,* 437 U.S. at 11, 98 S.Ct. at 2147).

In the circumstances of this case at least, we agree with the Court of Appeals for the Fifth Circuit, passing upon a question expressly reserved in *Serfass,* 420 U.S. at 394, 95 S.Ct. at 1065, that "a defendant who for reasons of trial tactics delays until mid-trial a challenge to the indictment that could have been made before the trial—and before jeopardy has attached—is not entitled to claim the protection of the double jeopardy clause when his objections to the indictment are sustained." *United States v. Kehoe,* 516 F.2d 78, 86 (5th Cir.1975) (footnote omitted). We also agree with the United States Supreme Court: "That any judicial system should encourage litigants to raise objections at the earliest rather than latest possible time seems self-evident." *United States v. Tateo,* 377 U.S. at 468 n. 4, 84 S.Ct. 1590 n. 4. Prohibiting retrial of the defendant in these circumstances could discourage trial courts from granting valid motions to suppress, knowing that an improper denial of such a motion could be corrected on appeal but that an improper granting of the motion would prohibit further prosecution. *Cf. id.* at 466, 84 S.Ct. at 1589: "[I]t is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution."

We conclude that double jeopardy does not prevent further prosecution of Tapia on remand and that his motion to dismiss the county's appeal should have been denied by the court of appeals.

13. He had, of course, known of the ground for his motion to suppress well before his trial. He had in fact even argued the illegality of the arrest and consequent inadmissibility of the evidence at his trial in municipal court. Our rules of criminal procedure provide that a motion to suppress evidence is to be made within twenty days after entry of a plea, SCRA 1986, 5-212(C), but they do not *require* that such a motion be made prior to trial. *See id.,* Committee Commentary; *State v. Doe,* 93 N.M. 143, 148, 597 P.2d 1183, 1188 (Ct.App.1979) (defendant's duty to move for suppression of evidence before trial is discretionary).

IV.

Although the court of appeals did not pass upon the merits of the county's appeal, it would serve no purpose to remand the case to that court for a ruling. The district court's order dismissing the charges against Tapia was erroneous; the arrest was valid, and the evidence obtained pursuant thereto should not have been suppressed. *Incorporated County of Los Alamos v. Johnson.*

In ruling in this fashion, we are cognizant of the factual differences between this case and *Johnson.* In *Johnson,* the police officer followed the defendant for several miles and observed him making an improper left turn, driving erratically, and touching or straddling the highway's yellow center line and white side line. This erratic behavior gave rise to a reasonable suspicion that the defendant in that case was driving while intoxicated. In the present case the district court found no basis for such a suspicion, finding instead that the officer had observed only defendant's running a stop sign and operating his motor vehicle with an inoperative tail light—petty misdemeanors under the applicable municipal ordinances.

It is not disputed that, if the officer had authority under the Fresh Pursuit Act to pursue Tapia into Santa Fe County and stop him there for violation of the municipal ordinances, the officer's subsequent administration of a field sobriety test, based on his observations at that time, and his arrest of defendant for DWI were valid. The principal opinion in *Johnson* holds that, since the officer had reasonable grounds to believe the suspect there was driving while intoxicated and since the officer had no way of knowing whether, upon conviction, the suspect would be guilty of a "misdemeanor" (for a second or subsequent conviction of DWI) or a "petty misdemeanor" (for a first conviction), the pursuit was authorized under the Fresh Pursuit Act and the arrest was valid. In a specially concurring opinion, however, Justice Baca (joined by Justice Ransom) eschewed, for purposes of construing the Fresh Pursuit Act, the distinction between a misdemeanor and a petty misdemeanor and took the view that the Fresh Pursuit Act authorizes pursuit of a suspect into another county, whether the pursuing officer has reasonable cause to believe the suspect guilty of a misdemeanor or only of a petty misdemeanor. Justices Baca and Ransom, in other words, construed the term "misdemeanor" in NMSA 1978, Section 31-2-8(B), as including a "petty misdemeanor."

We believe that this construction of the statute is correct and that, accordingly, the arrest in the instant case was valid. The policy consideration identified by Justice Scarborough in *Johnson* (removing DWI drivers from New Mexico roads in order to protect the public) may be absent under this broadened interpretation, but it nonetheless finds support in other policies: The municipal officer is not required to remember the perhaps arbitrary classification of the degree of misdemeanor offense in making the decision whether to pursue or not to pursue, and the suspect is not encouraged to streak for the county line (or other territorial boundary) in an effort to escape prosecution for one or more offenses, even if those offenses are properly classified as "petty."

The decision of the court of appeals is reversed, and the cause is remanded to the district court with instructions to vacate the order of dismissal and to reinstate the cause for trial on the merits.

IT IS SO ORDERED.

SOSA, Jr., C.J., and RANSOM and BACA, JJ., concur.

WILSON, J., dissents.

WILSON, Justice, dissenting.

I respectfully dissent from the majority opinion in the following respects.

I agree with the majority that NMSA 1978, Section 31-2-8 (Repl.Pamp.1984) of the Uniform Act on Fresh Pursuit authorizes the extraterritorial arrest of petty misdemeanants who are apprehended after hot pursuit. A reading of the statute requires such an interpretation, and public policy demands that petty misdemeanants

not be allowed a safe haven across county lines.

I cannot agree with the majority, however, that the defendant in this case may be retried on the same charges which he successfully defeated at his trial on the merits. This conclusion is even more compelling under the majority's opinion which recognizes that the previous law would not have allowed the police officer to pursue and arrest this defendant, a petty misdemeanant, across county lines. Without the benefit of our present opinion, the district court accurately interpreted and applied the law as it existed at the time of trial; the district court's judgment should now be upheld.

The majority interprets the district court's "dismissal" of all charges against the defendant as "trial error" rather than acquittal. However, "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d 642 (1977) (citing *United States v. Sisson*, 399 U.S. 267, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970)). Rather, the appellate courts must determine whether the ruling of the judge below, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* 430 U.S. at 571, 97 S.Ct. at 1355. The district court in this case called its ruling a dismissal; it was a "legal determination on the basis of facts adduced at the trial relating to the general issue of the case." *United States v. Sisson*, 399 U.S. 267, 290 n. 19, 90 S.Ct. 2117, 2130 n. 19, 26 L.Ed.2d 608 (1970). As such, it is the functional equivalent of an acquittal on the merits. *See also Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Once a judgment of acquittal has been entered, whether it is based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, it may not be appealed and terminates the prosecution. *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 2193, 57 L.Ed.2d 65 (1978). "Thus when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." *Sanabria v. United States*, 437 U.S. 54, 64, 98 S.Ct. 2170, 2179, 57 L.Ed.2d 43 (1978).

A ruling on the factual elements of a case oftentimes cannot be easily disentangled from the trial procedures involved. This is reflected in the plethora of United States Supreme Court cases recently emerging regarding double jeopardy. Each new case modifies the legal analysis espoused in the preceding cause and alters the standard of review on the issue.

This ever-changing area of law must be applied to the particulars of this case. Noting the current persuasion of the United States Supreme Court, and giving thoughtful consideration to the policies underlying the double jeopardy doctrine as enunciated in the majority opinion above, I am compelled to find that double jeopardy bars retrial in this case. The district court received evidence during a trial on the merits, made findings of fact and conclusions of law based on the evidence presented, and determined that there was not reasonable suspicion to stop the defendant for DWI. The district court made a legal ruling, supported by the facts, that the plaintiff could not provide sufficient evidence to bear its burden of proof. Once the defendant moved to suppress all of the plaintiff's evidence as inadmissible fruit of an illegal arrest, there was no other evidence available to prove the defendant's guilt. Consequently, the district court dismissed all charges against the defendant.

While the majority concludes that the defendant's motion to dismiss all charges was *essentially* a motion for a mistrial or a motion to stay the proceedings to allow the plaintiff an appeal, I believe the defendant will be surprised to learn that he had made such a request. It is my opinion that the defendant specifically requested a final adjudication of the charges against him and that the district court in this case clearly acquitted him of these charges, in substance as well as in form.

The case before us is on all fours with a Ninth Circuit case in which the court of appeals found double jeopardy barred the defendant's retrial. In *United States v. Baptiste,* 832 F.2d 1173 (9th Cir.1987) the defendant was charged with driving under the influence of alcohol. Trial was held before the magistrate court, and after the government presented its case and rested, the defendant moved for a judgment of acquittal. The magistrate court determined that the police officer lacked probable cause to order the defendant out of his car. Consequently, the court refused to consider any evidence submitted by the government and dismissed the charges. The government appealed, and the district court thereupon dismissed the case on double jeopardy grounds. Shortly thereafter, the district court sua sponte vacated its dismissal and remanded the case for a retrial, finding that the magistrate court erred in determining there was no probable cause. The district court decided that the erroneous probable cause determination by the magistrate court resulted in the suppression of evidence and a simple dismissal rather than a judgment of acquittal.

As in the case before us, the government in the *Baptiste* case argued on appeal that the magistrate did not evaluate the evidence, but rather dismissed the case on a perceived violation of state law. However, the Ninth Circuit disagreed. They stated:

> The proper analysis is that because the magistrate refused to consider any of the government's evidence, there was no evidence available to prove Baptiste's guilt. This can only mean that the "evidence was legally insufficient to convict." Hence, the magistrate's action is properly characterized as a judgment of acquittal. *See* [*U.S. v.*] *Ember,* 726 F.2d [522] at 524 [(9th Cir.1984)]. That the magistrate may have erred in his ruling is irrelevant. *See Sanabria,* 437 U.S. at 68–69, 98 S.Ct. at 2181 (erroneous evidentiary ruling leading to erroneous judgment of acquittal for insufficient evidence bars further prosecution).

United States v. Baptiste, 832 F.2d 1173, 1175 (9th Cir.1987). I find this legal analysis in the *Baptiste* case convincing, especially in light of the remarkable factual similarities to the case at bar.

On the issue of whether retrial is permissible because the district court's dismissal came as the result of the defendant's motion to suppress evidence, as opposed to an unqualified demand for acquittal and dismissal, I find the distinction irrelevant. After a lengthy discussion of the effect of a defendant's request on a double jeopardy proceeding, whether it be the defendant's motion for a new trial or a motion for acquittal, the United States Supreme Court stated: "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy." *Burks v. United States,* 437 U.S. 1, 17, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978). In so ruling, the Supreme Court weighed the policy reasons behind allowing retrial where the accused successfully seeks review of a conviction and expressly overruled prior decisions suggesting that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency. I agree that it is immaterial that the trial termination in this case followed the defendant's motion to dismiss since the dismissal was the functional equivalent of an acquittal.

The majority opinion also makes much of the fact that the defendant waited until jeopardy had attached to raise his motion to suppress, stating:

> Having waited until then, and having moved to terminate the trial through a dismissal of the charge rather than to pursue his valued right to have his trial completed by the first tribunal, he does not have a strong claim to protection of this interest. Looking at the case from the county's standpoint, it did not bring about the termination of the trial; the dismissal was entered, obviously, over its objection.

What the majority is saying, although carefully camouflaged, is that the defendant waived his constitutional right of jeopardy by objecting belatedly to the evidence. I disagree; constitutional rights should not

be jeopardized by tactical decisions or cosmetic procedures.

First, it should be noted that our local rules, specifically SCRA 1986, Rule 5–601, do not mandate a specific time in which to file a motion to suppress evidence. The "defendant's duty to move for suppression of evidence before trial is discretionary." *State v. Doe,* 93 N.M. 143, 148, 597 P.2d 1183, 1188 (Ct.App.1979) (interpreting prior Rule 18, N.M.R.Crim.P.).

> Although orderly procedure requires the motion to be made earlier [interpreting Fed.R.Crim.P. 41(e)], the court in its discretion may entertain a motion at the trial stage. That discretion should be liberally exercised in the furtherance of justice. *Gallegos v. United States,* 237 F.2d 694 (10th Cir.1956). In other words, the failure of defendant to file a motion to suppress prior to trial did not foreclose defendant's right to object to the admission of evidence during the trial. *Glisson v. United States,* 406 F.2d 423 (5th Cir.1969).

Id. at 148, 597 P.2d at 1188.

Second, unlike *State v. Aragon,* 89 N.M. 91, 547 P.2d 574 (Ct.App.), *cert. denied,* 89 N.M. 206, 549 P.2d 284 (1976), *overruled on other grounds, State v. Rickerson,* 95 N.M. 666, 625 P.2d 1183, *cert. denied,* 454 U.S. 845, 102 S.Ct. 161, 70 L.Ed.2d 132 (1981), the failure of the defendant here to file his motion to suppress prior to trial did not result in prejudice to the plaintiff. The plaintiff in this case had advance notice that the defendant would be raising this motion to suppress evidence; the defendant had raised the motion previously at the municipal court level. While the plaintiff now complains that the defendant's motion to suppress was untimely, the plaintiff did not raise this critical issue itself in a pretrial hearing; nor did it object to the district court's ruling to dismiss or offer to proceed with trial by presenting other evidence against the defendant after the district court granted the defendant's motion to suppress. Furthermore, the plaintiff failed to protect its anticipatory appellate rights by failing to specifically request the district court to declare a mistrial for manifest necessity or stay the proceedings in order to take an interlocutory appeal. The majority apparently agrees with Judge Bivins's dissent in the court of appeals's opinion below that "the proper procedure would have been to allow the county to proceed, and if it had no further proof, then dismiss. If defendant had insisted on completion of his trial, as he should have, this issue would not have arisen."

As the Supreme Court stated in *Sanabria v. United States,* "[l]egal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight." 437 U.S. 54, 65, 98 S.Ct. 2170, 2179, 57 L.Ed.2d 43 (1978). I believe the plaintiff in this case received a fair opportunity to bring the full weight of the state against the defendant in district court; I therefore do not think it now rightfully can claim that no jeopardy attached simply because the defendant successfully challenged the evidence against him.

For the reasons stated above, I respectfully dissent.

790 P.2d 1029

STATE of New Mexico,
Plaintiff–Appellant,

v.

Arthur R. FACTEAU,
Defendant–Appellee.

No. 18703.

Supreme Court of New Mexico.

April 18, 1990.

Hal Stratton, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Arthur R. Facteau, Santa Fe, pro se.

OPINION

BACA, Justice.

This matter is before the court on an appeal by the state from an order granting defendant eleven months of presentence confinement credit against his sentence for escape from the penitentiary. Defendant was serving time on a burglary charge when he escaped. When he was captured, he was immediately incarcerated to continue to serve time on his burglary charge. He was later sentenced to an additional nine years for the escape to run *consecutively to* his original charge. He is therefore not entitled to presentence confinement credit. We reverse.

FACTS

Defendant Facteau was serving a burglary sentence at the Central New Mexico Correctional Facility when he escaped on January 7, 1985. He was apprehended and returned to jail on January 10, 1985. Defendant pled guilty to escape from the penitentiary on August 5, 1985, and was sentenced on December 10, 1985, for nine years to run consecutively to the sentence he was then serving for burglary, a sentence which he had not completed serving. Defendant then filed a pro se motion for presentence confinement credit for the period of eleven months between his apprehension and his sentencing. The district judge granted this credit.

Presentence confinement was erroneously granted in this case. When defendant escaped from jail, he had not completed serving his sentence for burglary. When he was apprehended and returned to jail it was to continue serving time on that prior sentence. The eleven months of incarceration were not a direct result of defendant's escape. He was returned to jail due to the unfulfilled sentence for burglary. NMSA 1978, Section 31–20–12 (Repl. Pamp.1987) allows for *presentence* confinement credit only if the sentence was a direct result of the felony committed. This was not the case for defendant Facteau. The eleven months of confinement were not "presentence" because defendant had been previously sentenced and was serving time for burglary. NMSA 1978, Section 31–18–21 (Repl. Pamp.1987) mandates that a sentence for a felony committed while serving a sentence in a penal institution run *consecutive to* the prior sentence. It is impossible to grant "presentence" confinement credit *concurrent with* time served on the prior sentence and comply with Section 31–18–21 which requires that the sentences run consecutively.

Defendant claims that because a codefendant in this case received credit for time served prior to the sentence, defendant must also be awarded credit. This is not a correct assumption. The codefendant was not incarcerated at the time of the escape, but out on parole. He was then arrested and served time as a direct result of the escape charges. Defendant was confined for a pre-existing and unrelated conviction and would have been in custody irrespective of the escape charge, serving time on

the prior conviction during the contested period of time. Defendant was treated differently because his legal status was different than his codefendant.

The trial court erroneously awarded presentence confinement credit to defendant, apparently based on *State v. Ramzy,* 98 N.M. 436, 649 P.2d 504 (Ct.App.1982). In *Ramzy,* the defendant, while free on an appeal bond after being sentenced for aggravated burglary and aggravated assault (Case One), was arrested and incarcerated on a second charge (Case Two). The appeal bond in Case One was revoked because of the charges in Case Two. The court of appeals held in *Ramzy* that there was enough of a connection with Case Two to the ensuing incarceration that the defendant should be granted credit for presentence confinement on Case Two, despite the appearance that he was serving time on Case One because his Case One bond was revoked. Defendant's incarceration was directly attributable to both Case One and Case Two charges. In allowing presentence credit, the court in *Ramzy* held that the decisive factor was whether the confinement was *actually related* to the particular charges; the confinement need not be the exclusive result of the charges in order for a defendant to be credited for presentence time served. The court in *Ramzy* found a "sufficient connection" between the second case and the incarceration for presentence credit to be awarded. There is no such connection in this case.

In *State v. Brewton,* 83 N.M. 50, 487 P.2d 1355 (Ct.App.1971), the court of appeals held that credit was possible only if the confinement was a direct result of the offense, and not for a prior, unfulfilled sentence. In *State v. Orona,* 98 N.M. 668, 651 P.2d 1312 (Ct.App.1982), the court of appeals held that, despite the precedent set in *Ramzy,* an inmate temporarily transferred from the penitentiary to the county jail to answer a perjury charge was not entitled to presentence confinement credit on the perjury charge.

Orona distinguishes *Ramzy* and sets out a three-part test for determining if presentence credit is appropriate: 1) Was defendant confined in either case? 2) Did the second charge trigger the incarceration (such as the bond revocation in *Ramzy*)? and 3) Was bond set for the escape? 98 N.M. at 670, 651 P.2d at 1314. In this case the defendant, as in *Orona,* was already confined. The second charge did not trigger incarceration because the authorities returned him to jail on the burglary charge, and no bond was set on the escape. There is not a sufficient connection between the circumstances underlying defendant's incarceration on the burglary charge and those giving rise to his sentence for the escape to claim that the latter was the reason for the presentence incarceration, as in *Ramzy.* The facts in this case are much closer to the *Orona* scenario, and therefore presentence credit is inappropriate. It is also impossible to grant "presentence" credit *concurrent* with credit for time served on the prior sentence and follow the mandate in Section 31–18–21, which demands *consecutive* sentences for a felony committed while serving a sentence in the penitentiary. We therefore REVERSE.

IT IS SO ORDERED.

SOSA, C.J., and MONTGOMERY, J., concur.

790 P.2d 1032

SUPREME COURT OF NEW MEXICO

Denials of Certiorari

Title	Docket Number	Date of Denial
Ferguson v. State	19096	4/20/90
Herrera v. Furr's Inc.	19076	4/10/90
Ibarra v. State	19047	4/5/90
Juarez v. State	19048	4/5/90
Martinez v. State	19060	4/10/90
Martinez v. State	19088	4/19/90
Ortega v. State	19064	4/10/90
Ortiz v. State	19095	4/20/90
Paul v. State	19058	4/10/90
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790 P.2d 1033

STATE of New Mexico,
Plaintiff-Appellee,

v.

John Wilson BRAZEAL,
Defendant-Appellant.

No. 11505.

Court of Appeals of New Mexico.

Feb. 1, 1990.

Certiorari Denied March 19, 1990.

Jacquelyn Robins, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HARTZ, Judge.

The public defender was appointed to represent defendant one week before his retrial on a charge of receipt, transportation or possession of a firearm by a felon, NMSA 1978, Section 30–7–16 (Cum.Supp. 1989). The day before trial, defense counsel, claiming insufficient time for preparation, requested a continuance. The district court denied the motion. Defendant appeals his conviction on the grounds that: (1) the district court erred in denying the continuance, and (2) he received ineffective assistance of counsel at trial. We affirm.

1. BACKGROUND

Because the validity of defendant's claims turns on the specific circumstances of the case, we review those circumstances in detail. We begin with a summary of the evidence at defendant's second trial; then we describe the procedural history.

A. *Evidence at Trial*

Steve Lambert testified that he, Ted Moore, and Jimmy Spears were at Spears' house on February 1, 1988, when defendant arrived. Defendant began talking to the others in the kitchen, then said he needed to talk to Spears. Defendant seemed upset. When words were exchanged between defendant and Spears, Lambert left the kitchen and entered the dining room. He saw defendant and Spears with their hands on each other, fighting. He heard a pistol go off and saw a gun. Defendant's hand was on the grip, Spears' was on the barrel. He and Moore intervened; defendant, or both Spears and defendant, handed the gun to Moore, who unloaded it. The gun was a large caliber weapon, a .44 or .45. On cross-examination by the public defender, Lambert admitted that both men were holding the gun and that he did not know whose gun it was. He saw a hole in the wall, but did not know if it was caused by a bullet.

Spears testified that he and defendant had an argument and a scuffle at his home while Moore and Lambert were there. The fight started in the kitchen. He and defendant wrestled. He believed some kind of weapon was involved; he did not know what it was, but it came from defendant's coat. He did not at any time see defendant with a gun in his hand. He had seen defendant with a .44 or .41 caliber magnum months before. Defendant owned a leather holster. Spears did not have a pistol with him at the time. During the scuffle, he heard a loud noise. He did not know what it was. He came to in the hospital.

He did not recall talking to Officer Steve Groves that night, but he remembered telling Detective Ron Shoemake the next day that defendant had a gun and a shoulder holster. He said, however, that he told Shoemake that only because it was what his girl friend and Lambert had told him. He also admitted telling Shoemake that during the argument he had asked defendant to go outside with him to settle the dispute and in response defendant had pulled a gun. The prosecutor offered Spears' preliminary hearing testimony, in which Spears said that (1) he had asked defendant, "Did you bring your gun today, John?" and (2) defendant had the gun, a .41 magnum revolver, in a shoulder holster. On cross-examination Spears testified that he did not know whether defendant pulled a gun. He stated that when he spoke to Shoemake the morning after his release from the hospital, he was still drowsy from medication. He added that because of a head injury sustained after the incident, his memory of the incident was almost gone.

Officer Groves testified that in the emergency room after the accident, Spears told him that defendant had pistol-whipped him. Defense counsel unsuccessfully attempted to exclude Groves' testimony that he had taken photos showing a bullet hole in a kitchen cabinet at the scene of the fight. On cross-examination Groves admitted that he never found a bullet and that he could not establish the date that the hole was made, only that it was less than six months old. Groves also admitted that although a large caliber gun makes a loud noise and the nearest house was only thirty feet away, he never interviewed any neighbors.

Moore testified that after defendant arrived at Spears' home, there was a heated argument between Spears and defendant, including a wrestling match over a pistol. He did not know which man had the gun first. Defendant's hand was toward the butt of the gun and Spears' hand was around defendant's hand. He denied telling Detective Shoemake that defendant pulled the gun. He testified that he took the gun from both men, although at the preliminary hearing he had testified that he got it from defendant. He unloaded the gun, a large caliber revolver, and put it in his car. He never saw a shoulder holster and had not seen defendant in possession of the gun before. He did not recall a prior statement that he had given the gun back to defendant.

Detective Shoemake testified that Moore had told him that defendant had reached inside his own jacket and pulled out a .41 magnum. Also Moore told him that he gave the gun back to defendant. After Spears was released from the hospital, Spears told Shoemake that defendant had produced the gun. Shoemake also testified that examination of Spears' house revealed plants overturned, blood on the wall, and a bullet hole in a kitchen cabinet. On cross-examination defense counsel established that Moore gave his statement to Shoemake shortly after having dental work performed, apparently suggesting that the statement was unreliable.

Officer Brian Smith testified that he arrested defendant and found a shoulder holster, and .41 and .44 magnum ammunition in a locked metal box in the bed of defendant's pickup. On cross-examination Smith admitted that he did not know to whom the holster or ammunition belonged.

Defendant stipulated to his prior felony conviction and presented no evidence. The trial was completed in one day.

B. *Procedural Background*

Defendant's first trial, conducted on September 12, 1988, ended in a mistrial. The same witnesses testified as in the second trial. Private counsel represented defendant at the first trial, but he was permitted to withdraw from the case on October 17, 1988. On January 18, 1989, the district court set defendant's second trial for the week of February 27 on a trailing docket. On February 23 defendant filed an affidavit of indigency to obtain a public defender to represent him at the second trial; that same day the district court appointed a public defender to represent him. On February 27 the public defender filed a motion in limine to exclude evidence that cartridges were found in defendant's car and

to exclude testimony of events subsequent to Moore's taking the gun.

The day before trial, March 1, defense counsel filed a statement that he had not had enough time to investigate certain matters and therefore could not provide effective assistance of counsel. On the day of trial, defense counsel moved for a continuance for most of the reasons recited in his filed statement. He stated that he had listened to the tapes from defendant's preliminary hearing and first trial, and had made notes from the tapes, but had not had enough time to transcribe the tapes. The specific items he claimed a need to investigate were: (1) the medical records of Spears, to see if his head injury may have created delusions or perverted his memory; (2) the decibel level of the gun that was allegedly possessed and fired by defendant; (3) whether neighbors had heard a shot and, if so, why they had not reported it; (4) whether there was a bullet at the scene of the alleged offense; (5) whether Spears suffered powder burns or ear damage from the gunshot.

The trial judge denied the motion. The judge stated that it was not the general practice of defense counsel to transcribe tapes of prior proceedings, except for pertinent short portions. He observed that the case was simple, the testimony in the previous trial was clear, the previous trial had provided quite a bit of information, and the court was unaware of any pertinent medical evidence. The judge expressed his belief that defense counsel would do an outstanding job.

2. DISCUSSION

■ To begin, we note that defendant's claim of error in denial of a continuance is but one aspect of his claim of denial of effective assistance of counsel. Although he contends that denial of the continuance deprived him of "effective assistance of counsel, due process, and a fair trial," we fail to see what he adds to the claim of ineffective assistance by also including the claims of denial of due process and denial of a fair trial. The gist of his complaint about the denial of a continuance is that his attorney was thereby handicapped in preparation for trial. Analysis in terms of due process or the right to a fair trial does not give us a different perspective on that complaint from what is provided by ineffective-assistance analysis. *See United States v. Cronic,* 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984) ("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."). Both the New Mexico and the United States Supreme Courts have treated the claim of an improper denial of a continuance as a claim of ineffective assistance of counsel. *State v. Taylor,* 107 N.M. 66, 752 P.2d 781 (1988); *United States v. Cronic.* Thus, we discuss together defendant's two claims: (1) improper denial of a continuance and (2) denial of effective assistance of counsel.

■ Also, we note that a claim of ineffective assistance of counsel could arise under either the sixth amendment to the United States Constitution (applied to the states via the Due Process Clause of the fourteenth amendment, *see Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)) or Article II, Section 14 of the New Mexico Constitution. Yet because the New Mexico Supreme Court relied on *Strickland, Cronic,* and *Morris v. Slappy,* 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), when it considered the question of ineffective assistance of counsel in *Taylor,* we conclude that the test for ineffective assistance of counsel is identical under the federal and state Constitutions. In this opinion we will make no distinction between federal and state law.

Turning to the merits, we first consider whether denial of the continuance was a per se violation of defendant's constitutional rights—in other words, whether we can *presume,* in the absence of any consideration of the actual conduct of the trial, that defendant suffered from ineffective assistance of counsel because of the denial of a continuance. After denying such a presumption, we consider defendant's specific claims of shortcomings of his attorney. Even assuming that those shortcomings

constituted ineffective assistance of counsel, we find that defendant has not shown the prejudice required for reversal.

A. *Presumption of Ineffective Assistance*

In general, the trial judge has broad discretion in ruling on a motion for continuance. "Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *Morris v. Slappy,* 461 U.S. at 11, 103 S.Ct. at 1616. *Accord State v. Taylor,* 107 N.M. at 73, 752 P.2d at 788. As a result, "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris v. Slappy,* 461 U.S. at 11–12, 103 S.Ct. at 1616 (quoting *Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964)).

Moreover, appellate courts will not presume denial of effective assistance of counsel because of the trial judge's refusal to grant a continuance unless, under the circumstances, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *United States v. Cronic,* 466 U.S. at 659–60, 104 S.Ct. at 2047. Such was the case in *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), where the defendants indicted for a highly publicized capital offense received no counsel until the day of trial. The Supreme Court "did not examine the actual performance of counsel at trial, but instead concluded that under these circumstances the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." *United States v. Cronic,* 466 U.S. at 660–61, 104 S.Ct. at 2048 (footnote omitted).

Powell, however, does not suggest that a presumption of prejudice should be common. It presented egregious circumstances. A presumption of ineffectiveness arising from refusal to grant a continuance is justified in a very limited class of cases. To illustrate, *Cronic* cited with approval *Avery v. Alabama,* 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940), in which the Supreme Court affirmed a conviction in a capital case in which defense counsel was appointed less than three days before the trial on a charge of committing a murder that had occurred six years earlier. *Cronic* also cited with approval *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), in which the Court refused to find ineffectiveness of counsel although the defendant did not meet with the attorney assigned to represent him at his retrial until a few minutes before the second trial. Similarly, in *State v. Nieto,* 78 N.M. 155, 429 P.2d 353 (1967), where counsel was employed only six days before trial, the defendant's conviction for selling marijuana was upheld despite the denial of a continuance. *See United States v. Rodgers,* 755 F.2d 533 (7th Cir.) (counsel appointed two days before jury selection and four days before actual trial), *cert. denied,* 473 U.S. 907, 105 S.Ct. 3532, 87 L.Ed.2d 656 (1985).

This is not to say that trial judges should ride roughshod over defendants who need continuances for legitimate purposes. We expect district courts to exercise their discretion with full consideration of the rights of defendants. Still, except in exceptional circumstances, we will not ignore the actual conduct of the trial and presume that the defendant has suffered prejudice from ineffective assistance of counsel due to the failure of the trial judge to grant a continuance.

Such exceptional circumstances are not present here. First, we consider the time available for preparation. Although a week is a short time to prepare for a felony case, this was a simple case, defense counsel was experienced, and defense counsel was greatly aided in preparation by the prior work on the case. Defendant does

not allege that the performance of his counsel at his first trial was ineffective. Counsel appointed to represent defendant at his second trial had the advantage of being able to listen to the preliminary hearing and the testimony of every state witness at the prior trial. The situation seems more favorable to defendant here than was the situation in *Cronic.* In *Cronic* the defendant was indicted on mail fraud charges involving more than $9,000,000 in checks allegedly kited between banks in Florida and Oklahoma during a four-month period. Defense counsel, a young lawyer with a real estate practice who had no jury-trial experience, was allowed only twenty-five days to prepare for trial. Yet, a unanimous Supreme Court held that there was no presumption of prejudice. Inquiry into the actual performance of counsel at trial was necessary. We will not presume prejudice in this case solely from the short time between the appointment of defense counsel and the trial.

Nor do the reasons expressed by defense counsel for needing a continuance create a presumption that defendant would be prejudiced at trial by ineffective assistance of counsel. Given the particular matters that defense counsel wished to pursue, we cannot say that failure to pursue them would necessarily prejudice defendant. The relevance, to say nothing of the importance, of the facts defense counsel hoped to establish cannot be evaluated without knowing the specifics of the evidence at trial. A fact that may appear to be worthwhile, even essential, to pursue may, in the light of the evidence at trial, be totally irrelevant. Of course, when, as in *March v. State,* 105 N.M. 453, 734 P.2d 231 (1987) (denial of due process resulting from district court's refusal to grant continuance and other actions foreclosing the defendant from raising mental-incapacity defense), the district court precludes the defendant from pursuing a likely defense, examination of what happened at trial could not assist in the determination of whether the defendant suffered prejudice from denial of a continuance to gather evidence concerning the defense. But that is not the situation here.

B. *Specific Claims of Ineffective Assistance*

There being no presumption of prejudice in this case, defendant must establish his claim of prejudicial ineffective assistance of counsel in light of the actual conduct of his trial. In performing this examination, we do not review the record to see how many objections were raised by defense counsel or how clever was the cross-examination of the state's witnesses. To be effective, counsel need not be a wizard. Some cases are simply hard to defend. There may be very little that counsel can accomplish at trial. That does not make counsel ineffective. As the United States Supreme Court has said, "[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *United States v. Cronic,* 466 U.S. at 656 n. 19, 104 S.Ct. at 2045 n. 19. In short, effectiveness is not measured by mindlessly adding the number of motions, objections, and questions raised by defense counsel. Instead, to establish ineffective assistance of counsel, the defendant must point to specific lapses by his trial counsel.

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. at 2066.

Moreover, even if counsel's performance was constitutionally defective, the defendant must still affirmatively prove prejudice. *Id.* at 693, 104 S.Ct. at 2067. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. *Accord State v. Taylor.*

We need not consider the two parts of this test in the above order—deficient performance and then prejudice.

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland v. Washington, 466 U.S. at 697, 104 S.Ct. at 2069. We adopt that approach in this case.

The only "lapses of counsel" identified by defendant were those allegedly caused by denial of a continuance. These were the failures: (1) to obtain Spears' medical records to support a claim that Spears had memory problems; (2) to test the decibel level of the gun allegedly possessed and fired by defendant; (3) to interview neighbors to see if they heard any shots; (4) to search the site of the fight for a bullet; and (5) to determine if Spears had powder burns or ear damage from the gunshot.

Even if we assume that competent counsel should have done what defendant's counsel said he did not have time to do, we do not find the necessary prejudice. (1) With respect to Spears' medical records, medical evidence that Spears had a memory problem would have been cumulative. Spears himself testified that he had a memory problem. Given Spears' testimony at the preliminary hearing and his statement to the police officer the day after the incident, we fail to see how medical evidence of a memory problem would have substantially assisted the defense. (2) and (3) Given the nature of the testimony at trial, we fail to see how it would help defendant to test the decibel level of the gun or to interview neighbors to see if they heard a shot. Defendant has not explained why there is a "reasonable probability" that the jury would not convict if a neighbor testified that he or she heard, or did not hear, a shot during the time of the incident. (4) Similarly, we doubt that the jury would have been influenced by the absence of a bullet in the alleged bullet hole more than a year after the incident, particularly when Officer Groves had testified that he had been unable to locate a bullet during his inspection of the crime scene shortly after the incident. (5) Finally, defendant does not explain how the absence or presence of powder burns or hearing loss suffered by Spears would create substantial doubt as to the truth of the testimony implicating defendant. In short, we do not believe that the probability that the suggested investigation would change the result of the trial is sufficient to undermine confidence in the outcome. Our determination that the evidence sought would not have been particularly probative with respect to any material issues at trial makes unnecessary a consideration of whether defendant must establish that the evidence sought would actually have been acquired if the continuance had been granted. *Compare March v. State* (for alleged violation of due process, prejudice from denial of opportunity to present potential defense of incapacity is sufficiently shown by medical records of (1) prior schizophrenia and (2) cancerous brain tumor) *with United States v. Rodgers* (to establish prejudice from denial of continuance sought to subpoena and interview witness, defendant must show that witness was willing to testify and would have given substantial favorable evidence); *Meeks v. Bergen,* 749 F.2d 322, 328–29 (6th Cir.1984) (no prejudice established by defense counsel's failure to produce expert psychological testimony at trial, because at habeas corpus hearing petitioner did not produce expert testimony that she in fact suffered from battered wife syndrome). *See generally* 2 W. LaFave & J. Israel, *Criminal Procedure* § 11.10(d) (Supp.1989), at 49–50 (discussing the prejudice element).

Therefore, we conclude that defendant is not entitled to reversal of his conviction on the ground of denial of effective assistance of counsel.

3. CONCLUSION

For the reasons stated above, we affirm defendant's conviction.

MINZNER and APODACA, JJ., concur.

790 P.2d 1040

STATE of New Mexico, Plaintiff–Appellee,

v.

Louis J. VALDEZ, Defendant–Appellant.

No. 11392.

Court of Appeals of New Mexico.

Feb. 13, 1990.

Certiorari Denied March 22, 1990.

Jacquelyn Robins, Chief Public Defender, Jerry Todd Wertheim, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HARTZ, Judge.

Defendant appeals his convictions of driving while intoxicated (DWI), driving with a revoked or suspended license, and reckless driving. He contends that the charges should have been dismissed be-

cause they were not timely brought to trial. We affirm the convictions.

BACKGROUND

The convictions challenged on appeal are for offenses committed on May 27, 1988. The state initially charged defendant with the three offenses in a criminal complaint filed on May 31, 1988, in magistrate court. On September 6, 1988, the state filed a second criminal complaint against defendant for DWI, careless driving, unlawful use of a driver's license, and no proof of insurance, allegedly committed on September 4. Shortly thereafter, on September 12, the state filed two criminal complaints against defendant in district court. The first complaint, CR–88–245, contains the same charges as in the September 6 magistrate court complaint; the other district court complaint, CR–88–246, which is the matter being appealed, charged the same offenses alleged in the May 31 magistrate court complaint. The state moved to consolidate these cases with a third case, CR–88–129, defendant's de novo appeal from a magistrate court conviction for DWI.

The district court remanded CR–88–245 and CR–88–246 to magistrate court on October 14, 1988. On October 17 the state filed with the New Mexico Supreme Court a petition for alternative writ of prohibition or alternative writ of superintending control, seeking to overturn the district court's remand of the cases to magistrate court. On October 25 the supreme court dismissed the petition because the parties had settled the matter. On October 28 the district court withdrew its remand order. The prosecution again moved to join causes CR–88–245 and CR–88–246; joinder was granted on November 28, 1988. The charges in CR–88–245 and CR–88–246 were tried to the district court on February 16, 1989. Immediately before trial, defense counsel orally moved to dismiss the charges in CR–88–246 for failure to proceed to trial within six months of the filing of identical charges in magistrate court on May 31, 1988. The court denied the motion and convicted defendant of the charges.

PROCEDURAL RULES REQUIRING TRIAL WITHIN SIX MONTHS

For each of the lower courts having criminal jurisdiction the New Mexico Supreme Court has promulgated a rule requiring that criminal charges ordinarily be tried within six months. The rules are not identical. For example, the district court rule is more flexible than the rule for magistrate courts.

Defendant contends that his trial on the charges in CR–88–246 was barred by the magistrate court rule, SCRA 1986, 6–506(B) (Repl.1988), which states:

> Any criminal charge within magistrate court trial jurisdiction, which is pending for six (6) months from the date of the arrest of the defendant or the filing of a complaint or uniform traffic citation against the defendant, whichever occurs latest, without commencement of a trial by the magistrate court shall be dismissed with prejudice unless, after a hearing, the magistrate finds that the defendant was responsible for the failure of the court to commence trial. If a complaint is dismissed pursuant to this paragraph, a criminal charge for the same offense shall not thereafter be filed in any court.

By its terms, however, that rule applies only to charges "within magistrate court trial jurisdiction." CR–88–246 was filed in district court; it was not to be tried by the magistrate court. The magistrate court no longer had jurisdiction because the original complaint filed there was deemed abandoned when the identical charges were later filed in district court. *See State v. Muise*, 103 N.M. 382, 387, 707 P.2d 1192, 1197 (Ct.App.1985). Therefore, the rule governing timely prosecution of this case was the district court rule, SCRA 1986, 5–604(B), which we quote in part:

> The trial of a criminal case * * * shall be commenced six (6) months after whichever of the following events occurs latest:
>
> (1) the date of arraignment, or waiver of arraignment, in the district court of any defendant;

(2) if the proceedings have been stayed on a finding of incompetency to stand trial, the date an order is filed finding the defendant competent to stand trial;

* * * * * *

(4) in the event of an appeal, including interlocutory appeals, the date the mandate or order is filed in the district court disposing of the appeal;

* * * * * *

The parties contest whether the six-month period originally began with the arraignment in magistrate court or with the arraignment in district court. Defendant argues that because the district court complaint charged the identical offenses as the magistrate court complaint, the six-month period should begin with the filing of the magistrate court complaint. *See State v. Lucero,* 108 N.M. 548, 775 P.2d 750 (Ct. App.1989) (six-month period does not restart upon filing of new complaint in *same court* when second complaint is identical to first except that some charges have been omitted). The state, on the other hand, argues that (1) the filing of charges in magistrate court cannot affect the application of the six-month rule to district court charges, and (2) *Lucero* is inapplicable because the state, by seeking consolidation of CR–88–245, CR–88–246, and CR–88–129, was adding additional charges to the original magistrate court complaint. *See State v. Chacon,* 103 N.M. 288, 706 P.2d 152 (1985); *State v. Lucero; State v. Benally,* 99 N.M. 415, 658 P.2d 1142 (Ct.App.1983).

We need not resolve that dispute. Rule 5–604(B)(4) provides that "in the event of an appeal, including interlocutory appeals, [the six-month period restarts from] the date the mandate or order is filed in the district court disposing of the appeal[.]" We hold that the state's petition to the supreme court in this case constituted an appeal within the meaning of the rule. Because trial commenced within six months of the supreme court's order dismissing the petition, the state complied with Rule 5–604(B).

We acknowledge that there are distinctions between an "appeal" in its technical sense and a petition for a writ. Nevertheless, our supreme court has made it abundantly clear that we are to give a "common sense" reading to Rule 5–604(B) and that the rule "is not to be technically applied 'to effect dismissals.' " *State v. Mendoza,* 108 N.M. 446, 448, 774 P.2d 440, 442 (1989) (quoting *State v. Flores,* 99 N.M. 44, 46, 653 P.2d 875, 877 (1982)). *Accord State v. Sanchez,* 109 N.M. 313, 785 P.2d 224 (1989). In *Mendoza* the trial court had entered an order suspending the proceedings to determine the defendant's mental competency to stand trial. After the evaluation the trial judge found the defendant competent. *Mendoza* held that Rule 5–604(B)(2) provided that the six-month period recommenced from the date of the order finding defendant competent, even though the literal language of the rule applies only if there had been a prior finding of incompetency.

Of special relevance to the issue before us, the *Mendoza* court referred to our decision in *State v. Felipe V.,* 105 N.M. 192, 730 P.2d 495 (Ct.App.1986) as support for its observation that a literal interpretation of the rule "would not have ... effectuated the rule's intent and purpose." 108 N.M. at 448, 774 P.2d at 442. *Felipe V.* construed the meaning of the word "appeal" in the provision of the children's court rules requiring speedy commencement of adjudicatory hearings. Children's Court Rule 46(b)(4) (Cum.Supp.1984) (now SCRA 1986, 10–226(B)(4)) stated in pertinent part:

If the respondent is not in detention ... the adjudicatory hearing shall be commenced within ninety days from whichever of the following events occurs latest:

(1) the date the petition is served on the respondent;

* * * * * *

(4) in the event of an appeal, the date the mandate or order is filed in the children's court disposing of the appeal[.]

In *Felipe V.* the respondent had petitioned the supreme court for a writ of superintending control. We held 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 re-

view under a preemptory [sic] writ." *Id.* 105 N.M. at 194, 730 P.2d at 497. *Cf. State v. Michael C.,* 106 N.M. 440, 744 P.2d 913 (Ct.App.1987) (Rule 10–226(A)(4)—the equivalent of Rule 10–226(B)(4) for children in detention—applies even when interlocutory appeal sought by state was denied by appellate court for lack of appellate jurisdiction). *See also State v. Eden,* 108 N.M. 737, 779 P.2d 114 (Ct.App.1989) (six-month period under Rule 5–604 recommences upon issuance of mandate denying defendant leave to file interlocutory appeal).

For present purposes, we see no basis for distinguishing the meaning of "appeal" in the children's court rule from the meaning of "appeal" in Rule 5–604. The only difference in the language of the two rules is that the children's court rule does not contain the words "including interlocutory appeals." Yet *Michael C.* interpreted the children's court rule to include interlocutory appeals. The approach taken in *Mendoza* and the reference in that opinion to *Felipe V.* compel us to adopt the definition of "appeal" in *Felipe V.* To adopt defendant's reasoning that insertion of the words "including interlocutory appeals" was intended to exclude interlocutory review by means of petitions for peremptory writs would be contrary to the spirit of prior interpretations of our speedy-trial rules.

Defendant argues against our interpretation of the term "appeal" on the ground that the state could seek a writ on some pretext whenever it wanted additional time before trial of a defendant. We do not, however, countenance abuse of the right to petition for a writ as a means for improperly recommencing the six-month period. *Michael C.* suggests that the rule in *Felipe V.* does not apply when review by a higher court is sought in bad faith. If abuse is shown, appropriate action can be taken. *See State ex rel. Delgado v. Stanley,* 83 N.M. 626, 627–28, 495 P.2d 1073, 1074–75 (1972). There is no evidence of such abuse in this case. On the contrary, the state obtained, apparently through agreement with defendant, the relief it sought (voiding the remand of the case to magistrate court) in its petition to the supreme court. Defendant misses the point when he suggests that the state should have applied to the supreme court for an extension of time to commence the trial, *see* Rule 5–604(C), rather than petitioning for a writ. That suggestion assumes that the purported purpose of the petition was but a subterfuge for a different purpose—to obtain an extension of time. An extension of time, however, would not have resolved the state's legitimate concern about the case being remanded to magistrate court. We also note that the district court specifically found that the state's decision to file charges in district court was not for the purpose of circumventing the six-month rule. (The state's apparent purposes for moving the case to district court were: (1) the state wished to avoid any question about the jurisdiction of the magistrate court to impose the sentences desired by the state; (2) consolidation of all three trials would conserve resources; and (3) given the likelihood of defendant's seeking a trial de novo on appeal to district court of an adverse verdict in magistrate court, trying the case in district court at the outset would avoid duplication of effort.)

Finally, defendant contends that Rule 5–604(B)(4) does not apply, because while the petition was pending before the supreme court, the magistrate court—whose speedy-trial rule has no provision for restarting the six-month period after an appeal—had jurisdiction by virtue of the district court's order remanding the case. This argument ignores the framework of the rules in providing greater flexibility in time limits for those cases deemed serious enough to be tried in district court. In any event, the district court's later withdrawal of its remand order rendered the remand a nullity for the purpose of determining which six-month rule applies.

Although it is not clear that the district court relied on Rule 5–604(B)(4) in denying defendant's claim that the six-month rule was violated, we will uphold the district court if it is right for any reason, *see State v. Urban,* 108 N.M. 744, 779 P.2d 121 (Ct. App.1989), at least when the appellant is not prejudiced by the failure of the district

court to rule on the ground upon which we rely. Defendant's reply brief addressed the merits of this issue and failed to claim that the issue was not properly before this court.

CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

Defendant also contends that he was denied his sixth amendment right to a speedy trial. Determination of whether a defendant has been denied his constitutional right to a speedy trial requires weighing four factors: length of the delay, reason for the delay, assertion of the right, and prejudice to the defendant. *See Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *Zurla v. State,* 109 N.M. 640, 789 P.2d 588 (1990); *State v. Grissom,* 106 N.M. 555, 746 P.2d 661 (Ct. App.1987). The principal stumbling block for defendant is his failure to raise his constitutional claim in the district court. In the portion of defendant's brief-in-chief that addresses the constitutional claim, defendant states, "Mr. Valdez asserted his right in a motion before trial," and cites to the taped transcript for the day of trial. The state's answer brief points out, however, that defendant's trial counsel never claimed violation of a constitutional right and never argued the four factors set out in *Barker.* Defendant's reply brief does not address the constitutional claim. Our review of the transcript shows that trial counsel discussed only violation of this state's six-month rules.

Because defendant did not raise the constitutional claim until this appeal, there were no district court proceedings to develop fully the facts relating to the *Barker* factors, and the district court had no opportunity to weigh them. In a similar circumstance, a federal court of appeals wrote:

> Although defendants and their counsel are allowed considerable leeway in delaying their demand for a speedy trial before the trial court, the issue must be raised at some point. A complete failure to raise it in the trial court, as was the case here, precludes our consideration of the issue on appeal, for the simple reason that there is nothing to review. There is no decision of the district court weighing the factors considered and no record from which we could independently evaluate the government's conduct. [Citations and footnote omitted.]

United States v. Canniff, 521 F.2d 565, 573 (2d Cir.1975), *cert. denied sub nom., Benigno v. United States,* 423 U.S. 1059, 96 S.Ct. 796, 46 L.Ed.2d 650 (1976).

Moreover, from what appears in the record, defendant's claim of denial of a speedy trial has no basis. First, the delay from the time of the original charge until the time of trial was not especially long. Second, as noted above, the motivation of the state was not oppressive. Indeed, a consolidated trial probably would not materially delay, and could accelerate, ultimate resolution of the outstanding charges against defendant. Third, defendant did not request a speedy trial prior to the date of trial. Fourth, and most importantly, there is no evidence that defendant suffered substantial prejudice from the delay. Although defendant claims that the delay caused anxiety and concern and that he suffered "oppressive incarceration" from having to post a bond and abide by its restrictions, defendant does not isolate the alleged deleterious effects due to CR–88–246 from those due to the other charges pending against him during the same period. In short, nothing in the record suggests such a striking violation of the constitutional right to a speedy trial that it would be appropriate to consider that issue for the first time on appeal. *See* SCRA 1986, 12–216(B).

CONCLUSION

We affirm the district court's judgment.

IT IS SO ORDERED.

DONNELLY and MINZNER, JJ., concur.

790 P.2d 1045

STATE of New Mexico,
Plaintiff-Appellant,

v.

Socorro JUAREZ, Arturo Navarette, and Marco Portillo,
Defendants-Appellees.

Nos. 11,088, 11,089 and 11,090.

Court of Appeals of New Mexico.

Feb. 22, 1990.

Certiorari Denied April 5, 1990.

Hal Stratton, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jacquelyn Robins, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendants-appellees.

OPINION

APODACA, Judge.

In these consolidated appeals, the state appeals the trial court's orders quashing the grand jury indictments against defendants for first degree murder and conspiracy to commit first degree murder. The orders quashing the indictments were based on the trial court's holding that the prosecutor had breached his duty to assist the grand jury in a fair and impartial manner under NMSA 1978, Section 31-6-7 (Repl.Pamp.1984) by not presenting to the jury certain witness statements that were allegedly exculpatory of defendants.

In addition to contending on appeal that the prosecutor did not violate his duty under Section 31-6-7, the state argues that the exculpatory witness statements were not evidence directly negating guilt, thus not required to be presented to the grand jury under the requirements of NMSA 1978, Section 31-6-11(B) (Repl.Pamp. 1984). We hold that (1) the witness statements were not evidence directly negating guilt under Section 31-6-11(B); and (2) failure by the prosecutor to present such statements to the grand jury did not result in a breach of duty to assist the grand jury fairly and impartially under Section 31-6-7. We therefore reverse the trial court's orders quashing the indictments.

Section 31-6-7 provides in part that "[t]he prosecuting attorney shall conduct himself in a fair and impartial manner at all times when assisting the grand jury." Section 31-6-11(B), on the other hand, states that "[t]he prosecuting attorney ... shall present evidence that directly negates the guilt of [defendant] where he is aware of such evidence."

One night in September 1983, at approximately 9:00 p.m., police responded to a telephone call informing them that shots had been fired. At the scene, they found two men shot and killed in their home. One of the victims was found lying in the front doorway with a gunshot wound to the front of his head. The other victim was found inside the house; he had been shot several times in the back and the back of the head.

Shortly after the shootings, the police took statements from three neighbors. According to the statements, only one man was seen parking a red and white or maroon and white pickup truck directly in front of the victims' house at approximately 9:00 p.m. This man got out of the truck and walked to the victims' front door. The neighbors heard shots. This same man was seen coming out of the victims' front door, walking "pretty fast" to the pickup truck. He got into the driver's side of the truck and drove south. The neighbors' description of the man generally matched the physical characteristics of defendant Portillo but did not match the other two defendants. The neighbors did not report seeing anyone else during these events. Officer Murphy, who testified during the grand jury proceedings, took the statement of one of the neighbors.

The state presented this case to the grand jury in May 1988, some four and one-half years after the killings. The prosecutor did not call the victims' neighbors to testify, nor did he inform the grand jury of the existence of their statements. Instead, the prosecutor relied solely on the testimony of Rebeckah Garcia, Officer Murphy, and Dr. Paul Mallory. Murphy, who first arrived at the scene of the homicides, testified as to what he observed and did not provide any testimony implicating defendants. He stated he was notified of the homicides at approximately 9:05 p.m. Dr. Mallory, who testified as to the cause of death, stated that he had pronounced the victims dead at 9:40 p.m. These times become significant when one considers Garcia's testimony, which provided the only crucial link implicating defendants.

Garcia testified that a drug dealer in Mexico had ordered the deaths because the

victims owed him money. She said that the three defendants and another person, Mario Olguin, who was never found, were involved in the shootings. She said that she had been instructed to wait with Portillo at a prearranged location until Navarette, Juarez, and Olguin passed in the pickup. They were then to wait fifteen minutes and drive to and around a certain neighborhood. The instructions were carried out as planned. As she and Portillo drove around the area, she saw defendants Navarette and Juarez, together with Olguin, pull up in front of the victims' home in a red and white pickup truck. Navarette, Juarez, and Olguin got out of the truck and walked toward the front of the victims' home. A few minutes later, Garcia parked her car to the northeast of the home, from where they could see the pickup truck but not the front of the victims' house. They waited there a few minutes until Portillo became impatient. He got out of Garcia's car and walked alone toward the victims' house.

Later, Garcia saw the three defendants and Olguin walk from the direction of the victims' home. Portillo signaled her to drive the car near the truck. As she pulled up next to the truck, Portillo entered the car. Navarette, Juarez, and Olguin got into the pickup truck. Both vehicles left the scene at the same time. Garcia's car headed south and the truck headed north, instead of south, as two of the neighbors had stated. In contrast to the neighbors' statements, which had approximated the time of the shots as 9:00 p.m., Garcia testified they occurred about midnight.

The prosecutor revealed to the grand jury that Garcia's testimony was the result of a plea agreement in other matters involving drug-related activities. He also disclosed that Garcia had given a statement some two years earlier that, although generally in accord with her grand jury testimony, did not mention Portillo's involvement. When the prosecutor asked Garcia during the grand jury proceedings why she had previously excluded Portillo, she explained she and Portillo were intimately involved then and that she had not wanted to hurt him.

Relying on *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981), defendants argued in the trial court that the neighbors' statements were directly exculpatory of them. The basis for this contention was that the statements purportedly proved defendants could not have been present at the scene, thus contradicting Garcia's testimony in that respect. The state, on the other hand, insisted that the statements were not directly exculpatory of defendants under *Buzbee*.

The trial court initially denied defendants' motion, presumably agreeing with the state's contention that the evidence did not directly negate guilt under *Buzbee*. After the trial court's ruling, however, our supreme court filed its opinion in *State v. Boesiger*, S.Ct. No. 17,609 (Filed August 18, 1988). In *Boesiger*, the supreme court reversed this court's holding that the indictment against the defendant was improperly dismissed. The supreme court recognized that the evidence withheld from the grand jury (a tape recording of the victim's dying declaration) was not *directly* exculpatory, thus not required to be presented under Section 31–6–11(B). The court nevertheless concluded that the indictment was properly dismissed because the prosecutor had failed to act fairly and impartially in assisting the grand jury as required by Section 31–6–7, by his failure to reveal existence of the evidence. After *Boesiger* was filed, the state moved for rehearing. Our supreme court granted the motion, withdrew the opinion and quashed certiorari.

Before the opinion in *Boesiger* was withdrawn, however, defendant Juarez filed a motion for reconsideration in the trial court, relying on *Boesiger*. The trial court changed its prior ruling and quashed the indictments against all defendants, holding that under *Boesiger* and Section 31–6–7, the prosecutor had breached his duty to assist the grand jury in a fair and impartial manner.

■ The precise question for our review may be stated as follows: In light of the specific requirement under Section 31–6–11(B) that a prosecutor present to a grand

jury any evidence *directly* negating a defendant's guilt, can the failure to present evidence that does *not* directly negate guilt nevertheless give rise to a level of prosecutorial misconduct under Section 31–6–7 warranting dismissal of the indictment? For the reasons that follow, we hold that the prosecutor is not required to present such evidence.

We emphasize that *Buzbee* interprets Section 31–6–11(B) as requiring a prosecutor to present to a grand jury only directly exculpatory evidence. *See In re Grand Jury Sandoval County,* 106 N.M. 764, 750 P.2d 464 (Ct.App.1988). Directly exculpatory evidence is evidence that, if believed, proves the existence of a fact in issue without the aid of inferences or presumptions. *State v. Sanchez,* 98 N.M. 781, 652 P.2d 1232 (Ct.App.1982). " '[D]irect evidence is proof of facts by witnesses who saw acts done or heard words spoken, while circumstantial evidence is proof of collateral facts and circumstances from which the mind infers the conclusion that the facts sought to be established in fact existed.' " *Buzbee v. Donnelly,* 96 N.M. at 700, 634 P.2d 1252 (quoting *United Textile Workers v. Newberry, Inc.,* 238 F.Supp. 366, 372 (W.D.S.C.1965)).

Defendants have attempted to distinguish the facts in this appeal from those in *Buzbee.* They claim the evidence withheld here was far more significant and compelling. It is not necessary to set out the specific facts in *Buzbee.* Instead, we state only that it is difficult to see any factual distinction. Indeed, we believe the evidence in this appeal is the kind of evidence *Buzbee* found to be only circumstantially or indirectly exculpatory. None of the neighbors' statements directly pointed to defendants' innocence. Instead, one can only infer at most that, because the neighbors saw only one individual who did not fit the description of two defendants and did not see other persons exit or enter the pickup truck, defendants must not have been at the scene and thus could not have been involved in the deaths. We believe this inference becomes even more difficult to draw when one considers that the killings occurred at night when much of the area was in darkness.

Additionally, the only neighbor who saw the truck arrive at the scene admitted that her attention was diverted for a length of time to attend to her children. She stated that when she heard the shots, she quickly laid down on her car seat and only looked up briefly as she reached to close the car door to protect the children. We believe her statement did not preclude the presence of other persons in the pickup truck or in its vicinity at a time when she was otherwise preoccupied. Neither of the other two neighbors' statements eliminated the possibility of the presence of other individuals at the scene.

We conclude the neighbors' statements were not direct evidence from witnesses who saw the murders committed and who knew the identity of the person or persons who fired the shots, even though the neighbors each saw only one man approaching and leaving the victims' house. As argued by the state in its brief, the question before the grand jury was who committed the murders. "The neighbors' statements do not present direct evidence of this fact. The neighbors' statements amount to nothing more than statements by 'a witness ... not identifying [these] defendant[s] ... as being implicated.' " Because we conclude that this kind of evidence was only circumstantial in nature, we hold that the prosecutor did not violate his statutory responsibility under Section 31–6–11(B).

Defendants argue that "[c]ommon sense dictates ... the evidence is exculpatory." Granted, testimony of the three witnesses who did not appear before the grand jury was exculpatory. Likewise, it is true, as suggested by defendants on appeal, that the grand jury could have relied on such testimony, if it had been presented, as a basis to disbelieve Garcia's testimony. This may have permitted the jury to conclude that no probable cause was shown. These arguments do not persuade us for two reasons.

First, in applying the specific provisions of Section 31–6–11(B) and the requirements under *Buzbee,* the evidence in question

must directly negate guilt. It is not all exculpatory evidence that must be presented under the statute's requirements. As we have already noted, the evidence in this appeal fails in that regard.

Second, it is generally accepted that the grand jury's function is to investigate and accuse, not to determine the guilt or innocence of a defendant or the truth of the charges brought against an accused. *See Talamante v. Romero,* 620 F.2d 784 (10th Cir.), *cert. denied,* 449 U.S. 877, 101 S.Ct. 223, 66 L.Ed.2d 99 (1980); *In re Grand Jury Sandoval County.* An indictment does not create a presumption of guilt; all charges must later be proven at trial beyond a reasonable doubt. *Buzbee v. Donnelly.* The grand jury's "duty is to indict if the prosecution's evidence, unexplained, uncontradicted and unsupported, would warrant a conviction." *Id.,* 96 N.M. at 696, 634 P.2d at 1248 (quoting *Cassell v. Texas,* 339 U.S. 282, 302, 70 S.Ct. 629, 639, 94 L.Ed. 839 (1950)). As stated in *Buzbee,* "[an] indictment merely puts the accused to trial. The difference between the function of the trial jury and the function of the grand jury is all the difference between deciding a case and merely deciding that a case should be tried." *Id.* at 696, 634 P.2d 1248 (quoting *Cassell v. Texas,* 339 U.S. at 302, 70 S.Ct. at 639 (Jackson, J., dissenting)). In summary, the grand jury only has the power to accuse, not to convict. *Id.* In this regard, we cannot second guess the grand jury or even determine what effect, if any, the omitted evidence would have had on the jury's reliance on Garcia's testimony, which was the sole basis for the finding of probable cause against defendants.

Defendants rely on various cases from other jurisdictions and certain legal references in contending that a prosecutor must present to a grand jury any evidence he knows will "*tend* to negate guilt." *See* I ABA Standards For Criminal Justice, *The Prosecution Function* § 3-3.6(b) (2d ed. 1980); *United States v. Ciambrone,* 601 F.2d 616 (2d Cir.1979) (substantially negating guilt); *Tookak v. State,* 648 P.2d 1018 (Alaska Ct.App.1982) (evidence that "tends to negate guilt"); *Johnson v. Superior Court,* 15 Cal.3d 248, 539 P.2d 792, 124 Cal.Rptr. 32 (1975) (prosecutor must present evidence "reasonably tending to negate guilt").

Defendants also draw our attention to Note, *The Prosecutor's Duty To Present Exculpatory Evidence to an Indicting Grand Jury,* 75 Mich.L.Rev. 1514 (1977). That article purportedly proclaimed the wisdom of the rule adopted in *Johnson* (evidence "reasonably tending to negate guilt") for four reasons listed by defendants. The rule (1) limits the prosecutor's ability to take advantage of his discretionary power in charging the jury; (2) improves the usefulness of the jury as a screening device; (3) brings the level of protection to an accused closer to that provided by a preliminary hearing; and (4) serves judicial economy in screening out cases that should not be tried.

We do not take exception to defendants' argument in this regard, aside from noting that *Johnson*'s broader standard has not been adopted in New Mexico. Defendants' reasoning thus fails to persuade us. Instead, we believe defendants' reliance on these cases and standards is misplaced, since the standard in New Mexico under Section 31-6-11(B) is much narrower—only exculpatory evidence *directly* negating guilt is required to be presented. In fact, *Buzbee* specifically rejected the criteria announced in *Johnson,* in view of the specific language found in our statute. Defendants would have us broaden the legislative directive found in Section 31-6-11(B), which we decline to do. Besides, *Buzbee* expressly overruled any decisions imposing a requirement that *all* exculpatory evidence be presented to the grand jury.

If this court were to uphold the trial court's dismissal of the indictments on the basis of the prosecutor's general duty of fairness and impartiality under Section 31-6-7, we would essentially be judicially expanding his specific duty to present only directly exculpatory evidence under Section 31-6-11(B). Such an expansion would run counter to the admonition in *Buzbee* that so doing "would force a prosecutor to engage in a guessing game as to what bits and pieces of evidence might tend to be excul-

patory at trial and then demand that the prosecutor produce *all* of it for the grand jury." *Id.* at 701, 634 P.2d at 1253.

Finally, we reject defendants' arguments because we believe that case law is soundly premised on the principle that dismissal of an indictment for prosecutorial misconduct is an extraordinary remedy to be granted cautiously to avoid judicial encroachment upon the historically independent function of the grand jury. *See United States v. Chanen,* 549 F.2d 1306 (9th Cir.), *cert. denied,* 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977). *But see United States v. Sears, Roebuck & Co., Inc.,* 719 F.2d 1386 (9th Cir.1983) (recognizing the independence of both the grand jury and the prosecution yet stating that indictments may be dismissed in cases of flagrant prosecutorial misconduct). This important function has been sacredly interwoven into the jurisprudential fabric of our state's constitutional law.

In summary, we hold that *Buzbee* is dispositive of the issue whether the witness statements were evidence directly negating defendants' guilt under Section 31–6–11(B) and answer that question negatively. We also hold that the prosecutor's failure to present such statements to the grand jury did not breach his duty to assist the grand jury fairly and impartially under Section 31–6–7, in light of the fact that the prosecutor did not violate his obligation to present the evidence required by Section 31–6–11(B). The trial court's orders quashing the indictments are thus reversed. We remand for reinstatement of the criminal charges against defendants and for further proceedings consistent with this opinion.

IT IS SO ORDERED.

BIVINS, C.J., and ALARID, J., concur.

790 P.2d 1050

STATE of New Mexico, Plaintiff–Appellee,

v.

James W. COTTON, Jr., Defendant–Appellant.

No. 11208.

Court of Appeals of New Mexico.

March 6, 1990.

Certiorari Denied April 5, 1990.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Linda Yen, Hugh W. Dangler, Asst. Appel-

late Defenders, Santa Fe, for defendant-appellant.

OPINION

DONNELLY, Judge.

Defendant appeals his convictions of two counts of criminal solicitation. Sixteen separate issues are raised on appeal, including a challenge as to the sufficiency of the evidence. Because we find the latter challenge meritorious, we reverse.

In 1986, defendant, together with his wife Gail, five children, and a stepdaughter, moved to New Mexico. A few months later, defendant's wife and children returned to Indiana. Shortly thereafter, defendant's fourteen-year-old stepdaughter moved back to New Mexico to reside with him. In 1987, the Department of Human Services investigated allegations of misconduct involving defendant and his stepdaughter. Subsequently, the district court issued an order awarding legal and physical custody of the stepdaughter to the Department, and she was placed in a residential treatment facility in Albuquerque.

In May 1987, defendant was arrested and charged with multiple counts of criminal sexual penetration of a minor and criminal sexual contact of a minor. While in the Eddy County Jail awaiting trial on those charges defendant discussed with his cellmate James Dobbs, and Danny Ryan, another inmate, his desire to persuade his stepdaughter not to testify against him. During his incarceration defendant wrote numerous letters to his wife; in several of his letters he discussed his strategy for defending against the pending criminal charges.

On September 23, 1987, defendant addressed a letter (State's Exhibit No. 1) to his wife. In that letter he requested that she assist him in defending against the pending criminal charges by persuading his stepdaughter not to testify at his trial. The letter also urged his wife to contact the stepdaughter and influence her to return to Indiana or that she give her money to leave the state so that she would be unavailable to testify. After writing this letter defendant gave it to Dobbs and asked him to obtain a stamp for it so that it could be mailed later. Unknown to defendant, Dobbs removed the letter from the envelope, replaced it with a blank sheet of paper, and returned the sealed stamped envelope to him. Dobbs gave the original letter written by defendant to law enforcement authorities, and it is undisputed that defendant's original letter (State's Exhibit No. 1) was never in fact mailed nor received by defendant's wife.

On September 24 and 26, 1987, defendant composed another letter (State's Exhibit No. 2) to his wife. He began the letter on September 24 and continued it on September 26, 1987. In this letter defendant wrote that he had revised his plans and that this letter superseded his previous two letters. The letter stated that he was arranging to be released on bond; that his wife should forget about his stepdaughter for a while and not come to New Mexico; that defendant would request that the court permit him to return to Indiana to obtain employment; that his wife should try to arrange for his stepdaughter to visit her in Indiana for Christmas; and that his wife should try to talk the stepdaughter out of testifying or to talk her into testifying favorably for defendant. Defendant also said in the letter that his wife should "warn" his stepdaughter that if she did testify for the state "it won't be nice * * * and she'll make [New Mexico] news," and that, if the stepdaughter was not available to testify, the prosecutor would have to drop the charges against defendant.

Defendant secured his release on bail on September 28, 1987, but approximately twenty-four hours later was rearrested on charges of criminal solicitation and conspiracy. At the time defendant was rearrested, law enforcement officers discovered and seized from defendant's car, State's Exhibit No. 2, two personal calendars, and other documents written by defendant. It is also undisputed that the second letter, State's Exhibit No. 2, was never mailed to defendant's wife.

Following a jury trial, defendant was convicted on two counts of criminal solicita-

tion. A third count of criminal solicitation was dismissed by the state prior to trial, and the court granted a directed verdict in favor of defendant on a charge of conspiracy.

SUFFICIENCY OF EVIDENCE

The charges of criminal solicitation were alleged to have occurred on or about September 23, 1987. Count I of the amended criminal information alleged that defendant committed the offense of criminal solicitation by soliciting another person "to engage in conduct constituting a felony, to-wit: Bribery or Intimidation of a Witness (contrary to Sec. 30–24–3, NMSA 1978)." Count II alleged that defendant committed the offense of criminal solicitation by soliciting another "to engage in conduct constituting a felony, to-wit: Custodial Interference (contrary to Sec. 30–4–4, NMSA 1978)."

The offense of criminal solicitation as provided in NMSA 1978, Section 30–28–3 (Repl. Pamp. 1984), is defined in applicable part as follows:

> A. Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if, with the intent that another person engage in conduct constituting a felony, he solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state.

Defendant contends that the record fails to contain the requisite evidence to support the charges of criminal solicitation against him because defendant's wife, the intended solicitee, never received the two letters, State's Exhibits Nos. 1 and 2. In reviewing this position, the focus of our inquiry necessarily turns on whether or not the record contains proper evidence sufficient to establish each element of the alleged offenses of criminal solicitation beyond a reasonable doubt.

In considering challenges to the sufficiency of the evidence, the standard of review on appeal is whether the evidence contained in the record, considered in a light most favorable to the state, is sufficient to indicate that a rational factfinder could have found defendant guilty of the offense charged beyond a reasonable doubt with respect to every element of the alleged offense. *State v. Tovar,* 98 N.M. 655, 651 P.2d 1299 (1982); *State v. Segotta,* 100 N.M. 18, 665 P.2d 280 (Ct.App.), *rev'd in part on other grounds,* 100 N.M. 498, 672 P.2d 1129 (1983).

On appeal, we view the testimony and 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). The evidence may be direct or circumstantial, *State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984), and material facts may be proved by inference. *Id.; State v. Tovar.* However, evidence supporting a criminal conviction must be based on logical inference and not upon surmise or conjecture. *Id.; State v. Romero,* 67 N.M. 82, 352 P.2d 781 (1960).

The state's brief-in-chief states that "[n]either of these letters [Exhibits 1 & 2] actually reached Mrs. Cotton, but circumstantial evidence indicates that other similar letters did reach her during this period." The state also argues that under the express language of Section 30–28–3(A), where defendant is shown to have the specific intent to commit such offense and "otherwise attempts" its commission, the offense of criminal solicitation is complete. The state reasons that even in the absence of evidence indicating that the solicitations were actually communicated to or received by the solicitee, under our statute, proof of defendant's acts of writing the letters, attempts to mail or forward them, together with proof of his specific intent to solicit the commission of a felony constitutes sufficient proof to sustain a charge of criminal solicitation. We disagree.

The offense of criminal solicitation, as defined in Section 30–28–3 by our legislature, adopts in part, language defining the crime of solicitation as set out in the Model Penal Code promulgated by the American

Law Institute. Our solicitation statute also incorporates language similar, in part, to the solicitation statute contained in the Colorado Criminal Code, Section 18-2-301. *See* Colo.Rev.Stat. § 18-2-301 (Repl.Pamp. 1986). As enacted by our legislature, however, Section 30-28-3 significantly omits one section of the Model Penal Code, Section 5.02(2), which pertains to the effect of an uncommunicated criminal solicitation.

The commentary to the American Law Institute Model Penal Code explains that "[g]eneral statutory provisions punishing solicitations were not common before the Model Penal Code." [1] Model Penal Code § 5.02, commentary 2, § 5.02, at 367 (1985). The Commentary further notes in Section 5.02 of its proposed draft of criminal solicitation that:

> Under Subsection (2) [of proposed Section 5.02 of the Model Penal Code], conduct "designed to effect" communication of the culpable message is sufficient to constitute criminal solicitation and there is therefore no need for a crime of attempted solicitation.
>
> One reason for treating the crimes of solicitation and attempt in separate provisions was the judgment, reflected in Subsection (2), that the last proximate act to effect communication with the party whom the actor intends to solicit should be required before liability attaches on this ground.

Id. at 381.

Similarly, as observed in 4 C. Torcia, *Wharton's Criminal Law* Section 717, at 520 (14th ed. 1980):

> Under the Model Penal Code, a person is guilty of 'solicitation to commit a crime' when 'with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.' It is immaterial 'that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.' [Footnotes omitted.]

However, as enacted by our legislature, Section 30-28-3 sets out the offense of criminal solicitation in a manner which differs in several material respects from the proposed draft of the Model Penal Code. Among other things, our statute requires that the solicited offense constitute a felony. *Id.* The statute also excepts from the offense of solicitation "bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others" an exception to the offense of solicitation. *Id.* Additionally, Section 30-28-3 specifically omits that portion of the Model Penal Code subsection declaring that an uncommunicated solicitation to commit a crime may constitute the offense of criminal solicitation.[2] The latter omission, we conclude, indicates an implicit legislative intent that the offense of solicitation requires some form of actual communication from the defendant to either an intermediary or the person intended to be solicited, indicating the subject matter of the solicitation.

Where the legislature has amended a statute or omitted a portion of an act, it is presumed to have intended to modify the act. *See, e.g., State ex rel. Bird v. Apodaca,* 91 N.M. 279, 573 P.2d 213 (1977) (when legislature enacts a new statute, the Supreme Court presumes that it intended to change the law as it previously existed). While inquiry into legislative intent necessarily commences with a review of the lan-

1. As observed by the drafters of the Model Penal Code in their commentary to Section 5.02, prior to the promulgation of the American Law Institute proposed Criminal Solicitation statute, uncommunicated messages by a defendant could under some circumstances constitute attempted solicitation, but "it [is] considered doubtful whether an uncommunicated message could constitute a solicitation." *Id.* n. 55 at 381.

2. The American Law Institute, Model Criminal Code, Section 5.02(2) provides: "It is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication." This language was not included in Section 30-28-3 as enacted by N.M.Laws 1979, ch. 265, § 1.

guage used in the statute in question, the history and background of the act is also instructive in determining legislative intent. *Smith Mach. Corp. v. Hesston, Inc.*, 102 N.M. 245, 694 P.2d 501 (1985).

Relying on *People v. Bloom,* 149 App. Div. 295, 133 N.Y.S. 708 (1912), the state contends that the offense of solicitation nevertheless may be recognized to constitute a completed offense even when there was no communication to the solicitee. *Bloom,* however, is not controlling in the instant case. The court in *Bloom* set aside defendant's conviction and remanded for a new trial on the charge of *attempt to incite* a criminal offense, holding that the charge of *attempt to incite* did not require that the solicitation actually be communicated to the person sought to be reached. In the present case defendant was not charged with attempted solicitation, but rather, with the offenses of solicitation.

The state also asserts that evidence of defendant's conversations with inmates Dobbs and Ryan and the defendant's notations on his personal calendars constitutes evidence of his intent to commit solicitation. While such evidence may in fact constitute proof of his intent to commit the offense of solicitation, this evidence is insufficient to prove that defendant actually communicated his request to his wife that she commit the offenses charged in the amended criminal information. Similarly, the fact that defendant wrote numerous letters to his wife, apart from Exhibits 1 and 2, is insufficient to establish that defendant in fact solicited his wife to commit the specific crimes alleged. The mere writing and sending of letters by defendant to his wife, without proof of solicitation of a specific felony, and proof of defendant's intent to induce another to commit such crime, is insufficient to establish proof of criminal solicitation. SCRA 1986, 14–2817. *See also State v. Casteneda,* 97 N.M. 670, 642 P.2d 1129 (Ct.App.1982). Verdicts may not be based on speculation, guess or conjecture. SCRA 1986, 14–6006; *see Jewell v. Seidenberg,* 82 N.M. 120, 477 P.2d 296 (1970).

The question posed in the instant case is also discussed by the authors, W. LaFave and A. Scott. "What if the solicitor's message never reaches the person intended to be solicited, as where the intermediary fails to pass on the communication or the solicitee's letter is intercepted before it reaches the addressee? The act is nonetheless criminal, *although it may be that the solicitor must be prosecuted for an attempt to solicit on such facts.*" [Footnotes omitted; emphasis added.] 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 6.1 (1986). We apply a similar result in the present case.

The state contends that under the language of Section 30–28–3, where proof is presented that defendant has the requisite intent and has "otherwise attempt[ed] to promote or facilitate another person to engage in conduct constituting a felony within or without the state," the offense of solicitation is complete. This contention must fail because Section 30–28–3 is silent as to any legislative intent to declare that uncommunicated solicitations shall constitute a criminal offense.

The state further argues that the words "otherwise attempt" contained in the statute indicates a legislative purpose to declare that an attempt to commit criminal solicitation in fact shall constitute the completed crime of criminal solicitation. We do not read the statute so broadly. In *State v. Davis,* 246 Ga. 761, 272 S.E.2d 721 (1980), the court upheld the constitutionality of the Georgia criminal solicitation statute. The court narrowly construed the phrase "or otherwise attempts to cause such other person to engage in such conduct" contained in such statute, under the principle of ejusdem generis. *Compare,* Haw.Rev.Stat. § 705–510, (1988); Kan.Stat. Ann. § 21–3303(b) (1988) (statutorily providing that it is immaterial that the actor fails to communicate with the person solicited if solicitor's conduct was designed to effect such communication).

For an attempt to constitute a criminal offense, proof is required both of an intent to commit the proscribed offense and the commission of some overt act in fur-

therance of the offense attempted. *See State v. Flowers,* 83 N.M. 113, 489 P.2d 178 (1971); *State v. Lopez,* 81 N.M. 107, 464 P.2d 23 (Ct.App.1969). The offenses of solicitation and attempt are analytically distinct in their elements because solicitation unlike attempt, is in the nature of preparation to commit an offense, rather than an act or acts in furtherance of the offense attempted. *See Gervin v. State,* 212 Tenn. 653, 371 S.W.2d 449 (1963). Proof of unilateral acts on the part of the defendant of an inducement or request to another that the latter commit a felony is, however, sufficient to establish the crime of solicitation. *State v. Gilbert,* 98 N.M. 77, 644 P.2d 1066 (Ct.App.1982).

The elements of the offense of solicitation as set out in UJI Crim. 14–2817 require proof beyond a reasonable doubt that:

1. The defendant intended that another person commit [name of felony];

2. The defendant [solicited] [commanded] [requested] [induced] [employed] the other person to commit the crime;

3. This happened in New Mexico on or about the ____ day of ____, 19____.

As indicated by the committee commentary to UJI 14–2817, relating to criminal solicitation, the committee found that under Section 30–28–3, "mere solicitation is not enough of an overt act to constitute an attempt." *See generally* Annotation, *Construction and Effect of Statutes Making Solicitation to Commit a Crime a Substantive Offense,* 51 A.L.R.2d 953 (1957). Thus, an attempt requires proof of an overt act to commit the intended criminal act. *State v. Lopez.* In contrast, a charge of solicitation is complete when the solicitation to commit the intended felony is made and it is immaterial that the object of the solicitation is not carried out or that no overt steps were in fact taken toward the consummation of the offense. *State v. Casteneda.* Under Section 30–28–3, proof that defendant solicited, commanded, requested, induced, or employed another to commit a felony necessarily requires evidence that the defendant, in some manner, in fact communicated the solicitation to the person or persons intended to be solicited.

Commission of criminal solicitation does not require, however, that defendant directly solicit another; the solicitation may be perpetrated through an intermediary. *See* § 30–1–13 (Repl.Pamp. 1984). Thus if A solicits B in turn to solicit C to commit a felony, A would be liable even where he did not directly contact C because A's solicitation of B itself involves the commission of the offense. Where the intended solicitation is not in fact communicated to an intended intermediary or to the person sought to be solicited, the offense of solicitation is incomplete; although such evidence may support, in proper cases, a charge of attempted criminal solicitation.

Since we find defendant's claim of insufficiency of evidence dispositive, we do not address the other issues raised on appeal. We have also examined each argument advanced by the state and find those arguments unpersuasive. Defendant's convictions for solicitation are reversed and the cause is remanded with instructions to set aside the convictions for criminal solicitation.

IT IS SO ORDERED.

ALARID and APODACA, JJ., concur.

790 P.2d 1055

Norma R. TOUPAL,
Petitioner–Appellee,

v.

Henry G. TOUPAL,
Respondent–Appellant.

No. 11987.

Court of Appeals of New Mexico.

March 8, 1990.

Certiorari Denied April 17, 1990.

OPINION

BIVINS, Chief Judge.

This is a community property case. The parties were divorced in 1977. In 1987, after the passage of the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408 (1982), and pursuant to NMSA 1978, Section 40–4–20 (Repl. 1986), the trial court issued a judgment dividing husband's previously undivided military retirement benefits, including disability retirement benefits, as community property. Husband appealed the court's judgment and this court affirmed. Subsequently, the United States Supreme Court decided that the USFSPA preempts states from treating military disability retirement benefits as community property. *Mansell v. Mansell,* — U.S. —, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). Husband then moved to modify the trial court's decision and, in a separate motion, to reopen the decision pursuant to SCRA 1986, 1–060(B). The trial court denied husband's motions, and husband appeals. The question before us is whether *Mansell* should be given retroactive effect to modify the trial court's 1987 judgment. We decline to give *Mansell* such effect.

We follow clear New Mexico Supreme Court precedent in making our determination. In 1981, the United States Supreme Court held that state community property principles were preempted by federal statutes governing military retirement pay, and that states could not treat such pay as community property. *McCarty v. McCarty,* 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) (superseded by the USFSPA). Following that decision, a number of retired military pensioners whose divorces had become final prior to *McCarty* filed motions for relief from those final decrees. *See Whenry v. Whenry,* 98 N.M. 737, 652 P.2d 1188 (1982). Our supreme court was faced, in *Whenry,* with the question of whether *McCarty* should be given retroactive effect, which might have allowed the retirees to reopen the judgments. The court refused to apply *McCarty* retroactively. *Id.*

Robert G. Marcotte, Albuquerque, for petitioner-appellee.

Joseph William Reichert, Albuquerque, for respondent-appellant.

The supreme court's refusal was based on a three-pronged analysis applicable to the question of retroactivity of decisions made by a court. The court reasoned as follows: (1) *McCarty* established new law by overruling prior cases from New Mexico and other states treating military retirement as community property; (2) refusing to give *McCarty* retroactive effect would not significantly affect the purposes furthered by that opinion; and (3) retroactive application would have an adverse impact on the judicial system and could work significant hardship on spouses forced to repay retirement payments they had received prior to the *McCarty* decision. *Id.*

As an alternative ground for decision, the supreme court held that the res judicata effects of judgments that had become final prior to *McCarty* were not altered by the fact that the judgments rested on New Mexico case law subsequently overruled by *McCarty*. *Id.* In sum, the supreme court ruled that retirees whose divorces had become final prior to the *McCarty* decision could not reopen the judgments based on that decision.

This case is analogous to the fact situation presented in *Whenry*. The judgment dividing husband's military retirement as community property became final before the *Mansell* decision. After *Mansell* was issued, husband moved to reopen the order pursuant to Rule 1–060(B). Therefore, only retroactive application of *Mansell* could provide husband the relief he seeks. As in *Whenry*, however, the law applicable to this question militates against a finding of retroactivity.

We begin by noting that nothing in the *Mansell* opinion mandates that it be given retroactive application. Absent such a mandate, we apply the same factors as those applied in *Whenry*. First, *Mansell* created new law by overruling prior New Mexico cases holding that disability retirement pay may be treated as community property. *See Austin v. Austin*, 103 N.M. 457, 709 P.2d 179 (1985); *White v. White*, 105 N.M. 600, 734 P.2d 1283 (Ct.App.1987). In fact, *Mansell* overruled a decision of this court specifically applicable to husband, challenging the judgment that treated his disability pay as community property. Second, the *Mansell* decision did not espouse any legitimate governmental interest to be served by preventing states from treating disability retirement as community property, so refusal to give the decision retroactive effect will not impinge on any important purpose furthered by the decision. *See White v. White* (agreeing with California case's statement that no legitimate governmental interest could be served by adopting *Mansell*-type position). Third, if *Mansell* is applied retroactively, the judicial system will be faced with the possibility of dealing with Rule 1–060(B) petitions from all military retirees whose divorces became final after 1981 and whose disability retirement payments were treated as community property. Ex-spouses who have been receiving such payments, in reliance on established New Mexico case law, will face the prospect of repaying those amounts with diminished resources. Ample grounds exist in this case to avoid the injustice and hardships which would result from retroactive application of *Mansell*.

The doctrine of res judicata provides an equally viable alternative ground for decision in this case, as it did in *Whenry*. Res judicata effects of a decision are not altered by the fact that the decision rests on case law overruled in a later case. *See Whenry v. Whenry*. This doctrine applies to United States Supreme Court opinions interpreting federal statutes, as well as to other types of opinions. *See United States v. Estate of Donnelly*, 397 U.S. 286, 90 S.Ct. 1033, 25 L.Ed.2d 312 (1970) (giving retroactive effect to a decision interpreting a federal statute, but stating that such a result would not occur in cases in which parties are bound to a contrary result by a final judgment). The trial court's decision apportioning the retirement benefits, including the disability retirement benefits, constitutes a final decision that should be given res judicata effect under the authority of *Whenry* and *Estate of Donnelly*.

■ Husband argues the issue in this case is not retroactivity, because the trial

court's decision applies to disability payments he is required to make post-*Mansell* as well as to the payments he made pre-*Mansell.* We note, however, that in his motion for modification of the decree, husband requested that wife be ordered to reimburse him for all disability benefits paid to her as community property, including amounts paid prior to the *Mansell* decision. In addition, husband's argument fails because modifying the decree at this point would require the court to apply *Mansell* to the final judgment, issued before *Mansell* was decided, establishing that husband's disability retirement payments are community property. This is the essence of retroactive application of the *Mansell* decision and would run afoul of the retroactivity and res judicata principles discussed above. The mere fact that payment of this item of community property is to be made in a series of payments stretching beyond the date of the *Mansell* decision does not change the analysis. *Whenry v. Whenry.*

Pursuant to the foregoing, we affirm the trial court's refusal to modify the judgment issued in this case.

IT IS SO ORDERED.

DONNELLY and HARTZ, JJ., concur.

790 P.2d 1058

STATE of New Mexico,
Petitioner–Appellee,

v.

HENRY DON S., A Child,
Respondent–Appellant.

No. 11340.

Court of Appeals of New Mexico.

March 13, 1990.

Certiorari Denied April 17, 1990.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for petitioner-appellee.

Jacquelyn Robins, Chief Public Defender, Peter Rames, Asst. Appellate Defender, Santa Fe, for respondent-appellant.

OPINION

ALARID, Judge.

The child appeals from the order of the children's court committing him to the New Mexico Boys' School after revocation of his probation. Three issues are properly before this court: (1) whether the original sentence placing the child on probation with incarceration was illegal and void, and thus the children's court was without jurisdiction to revoke the child's probation; (2) whether revoking the child's probation for truancy violates the prohibition against double jeopardy; and (3) whether the children's court was without jurisdiction to revoke the child's probation because the time limits had expired for both an adjudicatory hearing and the child's original probationary period. The child also seeks to amend his docketing statement to add two new issues: (4) whether the child's commitment to the Boys' School must be vacated because the child has already served time in custody under the probation order, so that any further prosecution violates the prohibition against double jeopardy; and (5) whether the child was denied effective assistance of counsel. We affirm.

We deny the child's motion to amend to add issues 4 and 5. Both issues rely on facts that were not brought to the attention of the children's court, and therefore are not part of the record on appeal. *See State v. Romero,* 87 N.M. 279, 532 P.2d 208 (Ct.App.1975) (this court cannot review matters not of record); *State v. Paul,* 82 N.M. 619, 485 P.2d 375 (Ct.App.1971) (this court cannot consider facts never brought to the attention of the trial court). Also, issue 5 is so without merit as to not be viable. *See State v. Rael,* 100 N.M. 193, 668 P.2d 309 (Ct.App.1983); *see also State v. Sanchez,* 98 N.M. 781, 652 P.2d 1232 (Ct.App.1982) (failure to file non-meritorious motions not ineffective assistance).

FACTS

A delinquency petition was filed against the child in March 1986, alleging the child had committed the crime of shoplifting. In October 1986, a disposition order was filed disposing of the March 1986 petition. This order placed the child on probation for a period not to exceed two years. The order also provided:

> THAT said child attend school regularly; for every hour the child is truant from school, he shall spend two hours in the Chaves County Juvenile Detention Center; for every day the child is suspended from school, he shall spend that school day in the Chaves County Juvenile Detention Center.

On May 12, 1988, a petition to revoke the child's probation was filed based on alleged truancy. A dispositional hearing was held on July 18, 1988. Following a commitment of the child to the Youth Diagnostic and Development Center for a diagnostic evaluation, a disposition order was filed in December 1988. The children's court found the child admitted the allegations in the petition to revoke probation, there was a factual basis for the findings, the child was in need of care and rehabilitation, and the child was a delinquent child. The order also committed the child to the New Mexico Boys' School for an indeterminate period not to exceed two years. The child appeals from the December 1988 disposition order.

VALIDITY OF INITIAL PROBATION ORDER

The child challenges the validity of the initial probation order under which his probation was revoked by challenging certain probationary conditions. The children's court may only impose penalties which the legislature has authorized. *State v. Michael V.*, 107 N.M. 305, 756 P.2d 585 (Ct.App.1988). The child contends the probation order was not valid because the children's court was not authorized, under NMSA 1978, Section 32–1–34(E) (Repl. Pamp.1989), to impose incarceration as a condition of probation. He also contends the incarceration provision set out above is invalid because it is self-executing, and thus violates due process. We need not discuss the issue of whether the children's court was authorized to impose such a condition under Section 32–1–34(E) because we find that the provision was self-executing, and therefore invalid for the reasons set out below.

The state concedes that a self-executing probation condition of incarceration for truancy is not permitted by the Children's Code. Under the Children's Code, prior to a child's probation being revoked, a petition containing the same information as a petition alleging delinquency must be filed. NMSA 1978, § 32–1–43 (Repl.Pamp.1989). A probation revocation proceeding must be held before the children's court, at which time the state is required to prove the allegations in the petition beyond a reasonable doubt. *Id.* The self-executing incarceration provision in the probation order would operate to circumvent the statutory procedural requirements by triggering automatic confinement merely upon a reported absence from school. *See In re Gerald B.*, 105 Cal.App.3d 119, 164 Cal.Rptr. 193 (1980). Therefore, we hold that, insofar as the provision of the probation order requires automatic confinement in the juvenile detention center and is self-executing, the provision is invalid.

SEVERANCE

The state contends that if this court determines the self-executing provision is invalid, that portion should be severed from the probation order. The child relies on *Jordan v. Swope*, 36 N.M. 84, 8 P.2d 788 (1932), in support of his contention that the sentence is not severable. In *Jordan*, the supreme court recognized the majority rule that a sentence exceeding the statutory limit is void only as to the excess, but held that under the facts of that case the judgment was inseverable. The supreme court also addressed the issue of severability of a sentence in *Sneed v. Cox*, 74 N.M. 659, 397 P.2d 308 (1964). The court noted in *Sneed* that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and the offense. When such excess is separable, the sentence is void only as to the excess and may be dealt with without disturbing the valid portion of the sentence.

Sentences are usually held to be severable when the excess in the sentence is one that is easily separated from the remainder of the sentence and the severance does not affect the remainder of the sentence. *See, e.g., Rutherford v. Blankenship*, 468 F.Supp. 1357 (W.D.Va.1979) (banishment provision void but did not affect validity of remaining ten-year prison sentence); *State v. Krivolavy*, 258 N.W.2d 157 (Iowa 1977) (sentence severable where valid part, penitentiary time, is distinct from invalid part, fine); *State v. Kee*, 398 A.2d 384 (Me.1979) (illegality in amount of fine severed from sentence and fine reduced to amount authorized by law): *Cain v. State*, 337 So.2d 935 (Miss.1976) (portion of sentence pertaining to work release and parole, which trial court was unauthorized to impose, severed from remaining valid portion of sentence imposing jail time).

The child does not contend that requiring him to attend school regularly is an unreasonable or unauthorized condition of probation, and we see no reason why the court could not validly impose such a condition. *See State v. Henry L.*, 109 N.M. 792, 791 P.2d 67 (Ct.App.1990); *see also State v. Donaldson*, 100 N.M. 111, 666 P.2d 1258 (Ct.App.1983) (court may impose conditions of probation reasonably related to probationer's rehabilitation, which are designed to protect public against commission

of other offenses during the term, and which have as their objective deterrence of future misconduct). We agree with the state that the provision relating to automatic incarceration for truancy is separable without disturbing the valid portion of the sentence. *See In re Jonathan M.*, 117 Cal. App.3d 530, 172 Cal.Rptr. 833 (1981) (probation condition stating that for each unexcused absence from school child would spend one day in Juvenile Hall invalid insofar as it appeared to be self-executing, but self-executing language severed from probation order). Accordingly, the underlying probation order, including the condition that the child regularly attend school, was valid; the self-executing portion is separable from the remaing portion of the probation order.

DOUBLE JEOPARDY

The child contends that, even without evidence that he actually served time in the juvenile detention center pursuant to the self-executing provision of the probation order, the prohibition against double jeopardy was violated by the fact that he faced the possibility of being confined pursuant to the self-executing provision and the possibility of also being confined upon revocation of his probation for the same act of truancy. While agreeing that the child could not suffer both local detention and commitment to the Boys' School for the same act of truancy, the state notes, and the child does not dispute, that there is nothing in the record showing the self-executing provision was ever employed. The child's contention that the prohibition against double jeopardy is violated by the mere possibility that he would be punished twice for his act of truancy is without merit.

This court recently set out the protections afforded by the double jeopardy clause. *See State v. Hamilton,* 107 N.M. 186, 754 P.2d 857 (Ct.App.1988). Contrary to the child's contention, it does not provide protection for the mere possibility of double punishment. Rather, it affords a defendant protection against a second prosecution for the same offense after acquittal, protection against a second prosecution for the same offense after conviction, and protection against multiple punishments for the same offense. *Id.* The child does not allege, nor does the record reveal, that the state has attempted to prosecute the child more than once for the same offense. Also, there was no evidence presented to the children's court establishing that the child was punished more than once for the same offense. Therefore, there is no evidence before this court to support the child's claim that the prohibition against double jeopardy was violated. We express no opinion regarding what the result should be if the child presents evidence in a proper proceeding attacking the legality of his detention on double jeopardy grounds. Based on the foregoing, we find no violation of the prohibition against double jeopardy.

TIMELINESS OF ADJUDICATION AND COMMITMENT UNDER SCRA 1986, 10–226 and NMSA 1978, SECTION 32–1–38 (Repl.Pamp.1986)

Rule 10–226 provides that the adjudicatory hearing shall be commenced within ninety days from the date the petition is served if the child is not in detention. The child was not in detention and he was served with the petition to revoke on May 17, 1988. The record shows that a hearing was held on June 13, 1988, at which the child admitted to violating conditions of probation. A dispositional hearing was held on July 18, 1988, at which the child was continued under the supervision of the Juvenile Probation Office, and further action was deferred for sixty days. The child concedes that the July 18, 1988, adjudicatory hearing satisfies the requirements of Rule 10–226. Since the adjudicatory hearing was commenced within ninety days from the date the petition was served on the child, we find that the adjudicatory hearing was commenced within the time limit of Rule 10–226(B), and the children's court had jurisdiction to revoke probation.

The child maintains that the children's court was without jurisdiction to commit him to the Boys' School in Decem-

ber 1988 because his original probationary term expired in October 1988, since the child was originally placed on probation in October 1986. At a dispositional hearing on September 19, 1988, the children's court deferred disposition and committed the child to the custody of the Corrections Department for diagnostic evaluation. After the diagnostic evaluation was completed, the child was committed to the Boys' School for a period not to exceed two years.

If the child is found to have violated a term of his probation, the children's court may make any disposition that would have been appropriate in the original disposition of the case. § 32–1–43. On June 13, 1988, the child admitted he violated a term of his probation. Since the children's court may commit a child to the Corrections Department for diagnostic evaluation in the original disposition of a delinquent child, *see* § 32–1–34(E)(2), it may do so upon violation of probation. In this case, because the child's admission to the violation of probation and the deferral of disposition and commitment for diagnostic evaluation were done within the two-year period of the original disposition, and the commitment was within ninety days of the diagnostic evaluation, we find that the children's court had jurisdiction to commit the child to the Boys' School. §§ 32–1–43, –34(E)(2).

For the reasons stated above, the order of the children's court committing the child to the Boys' School for an indeterminate period not to exceed two years is affirmed.

IS SO ORDERED.

BIVINS, C.J., and APODACA, J., concur.

790 P.2d 1062

STATE of New Mexico, Plaintiff–Appellee,

v.

Floyd SANTILLANES, Defendant–Appellant.

No. 10921.

Court of Appeals of New Mexico.

March 15, 1990.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Linda Yen, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

APODACA, Judge.

Defendant appeals his jury conviction for aggravated battery with a deadly weapon. He raises several issues on appeal, among them: (1) the trial court erred in denying his motion for a new trial based on ineffective assistance of counsel; and (2) the evidence was insufficient to support his conviction. Defendant's first issue is founded on his contention that a conflict of interest denied defendant effective assistance of counsel when trial counsel represented both defendant and defendant's brother, a co-defendant. We agree with defendant that an existing conflict of interest deprived him of his right to effective assistance of counsel under the United States Constitution Amendment VI. We thus reverse the trial court.

We must address the substantial evidence issue, since defendant would be afforded greater relief on appeal if this court determined the evidence was insufficient to support the conviction. *See State v. Losolla,* 84 N.M. 151, 500 P.2d 436 (Ct.App.1972) (if evidence is insufficient to support a conviction, cause is remanded with instructions to release defendant). Because we hold that there was sufficient evidence supporting the jury's verdict, we also examine defendant's claim that the trial court erred in denying his motion for new trial. Under the record in this appeal, we determine that the trial court erred in denying defendant's motion for new trial. We therefore remand for a new trial. Our disposition does not require us to address defendant's remaining issues.

Defendant and his brother, who apparently bear a strong resemblance as siblings, were involved in a fight with other persons. During the altercation, three victims were wounded; one victim was shot in the leg and two others were stabbed with a knife. Defendant and his brother were arrested. Defendant's brother was charged with the two stabbings and defendant was charged with the shooting.

Both of them retained Estevan Martinez as defense counsel. Immediately before trial, defendant's brother entered into a plea agreement under which he pled guilty to the two stabbings and swore under oath that he did not fire the weapon. After the plea, defendant's brother informed trial counsel that he had done the shooting. Trial counsel failed to inform the trial court or defendant about defendant's brother's admission. It was not until midway through defendant's trial that trial counsel told defendant of the admission. At trial, Art Garcia, a witness, testified that he saw the fight and it was defendant's brother, not defendant, who fired the shot. Ruben Salazar, another witness, testified that, before trial, he met with defense counsel, defendant and defendant's brother. He stated defendant's brother wanted to confess that he had fired the shot, but that defense counsel told him not to say anything about the admission of defendant's brother, indicating that he was the one who had fired the shot.

At the hearing on the motion for new trial, defense counsel stated that, after the trial, defendant's brother signed an affidavit admitting he, not defendant, had fired the shot. Counsel also admitted that, to protect defendant's brother, he had to avoid calling him as a witness at defendant's trial. Defendant testified at the same hearing that he wanted to take the stand at the trial to deny firing any shot, but that defense counsel told him he did not want him to take the stand. Additionally, Dolores Salazar and Darlene Martinez testified at the hearing that defendant's brother told him he had fired the shot.

It is well established in New Mexico that trial counsel representing a defendant has a duty to avoid a conflict of interest. *See State v. Talley,* 103 N.M. 33, 702 P.2d 353 (Ct.App.1985). Our function in this appeal is to determine whether the joint representation by trial counsel created an actual conflict of interest, thus depriving defendant of effective assistance of counsel. In making this determination, we view the proceedings as a whole. *Id.* The standard we apply generally is whether counsel exercised the skill of a reasonably competent attorney. *Id.*

When ineffective assistance of counsel is based on a conflict of interest, prejudice is presumed and need not be proved. *State v. Aguilar,* 87 N.M. 503, 536 P.2d 263 (Ct. App.1975) (a defendant is denied his constitutional right of effective assistance of counsel if his attorney represents two defendants with conflicting interests, without disclosing such conflicts and obtaining waivers). However, there must be an actual conflict of interest and not just a possibility of a conflict. *State v. Robinson,* 99 N.M. 674, 662 P.2d 1341, *cert. denied,* 464 U.S. 851, 104 S.Ct. 161, 78 L.Ed.2d 147 (1983). The test for determining the existence of an actual conflict is whether counsel "actively represented conflicting interests" that adversely affected his performance. *Id.* at 679, 662 P.2d at 1346. *United States v. Abner,* 825 F.2d 835 (5th Cir. 1987). *United States v. Aiello,* 681 F.Supp. 1019 (E.D.N.Y.1988), stated it differently. That case required that a defendant show some plausible defense might have been pursued but was not because it would be damaging to another's interest.

In *People v. Macerola,* 47 N.Y.2d 257, 417 N.Y.S.2d 908, 391 N.E.2d 990 (1979), the court held that where one attorney represented two defendants charged with the same crimes under circumstances similar to those in this case, a conflict existed, denying both defendants their right to counsel. Although this appeal does not involve two defendants charged with the same crime, we believe the rationale under *Macerola* applies because the charges here stemmed from the same incident. New Mexico also has previously addressed the issue of conflict of interest in *State v. Hernandez,* 100 N.M. 501, 672 P.2d 1132 (1983). *See also State v. Tapia,* 75 N.M. 757, 411 P.2d 234 (1966).

Hernandez held that the conflict in question there was too slight to constitute an actual conflict of interest. The court emphasized there was, in effect, no joint representation by counsel because there was a time lapse of several months between the representation of the co-defendant and defendant. Co-defendant's attorney had ended his association with co-defendant several months before trial for defendant commenced. *Id.* Distinguishing *Tapia,* the court concluded that the co-defendant in *Hernandez* was subject to cross-examination by defendant.

The facts in this appeal lead us to a different result. We believe the interests of defendant and co-defendant here could not be effectively represented by one attorney. By attempting to establish a defense for co-defendant, trial counsel was forced to abandon strategy that could have been used to exonerate defendant. *United States v. Auerbach,* 745 F.2d 1157 (8th Cir.1984) (joint representation prevents attorney from using best efforts to prove innocence of defendant). In the interest of maintaining client confidentiality and avoiding perjury charges against co-defendant, trial counsel was unable to use co-defendant as a witness for defendant. In violation of the requirements recognized in *Hernandez,* co-defendant was not subject to

cross-examination by defendant. Unlike the facts in *Hernandez,* trial counsel's joint representation of defendant and co-defendant here continued to the time defendant's trial began. At that juncture, it was difficult to escape the implication that defendant did the shooting. This was because co-defendant stated under oath he had not fired the shot that wounded the victim. This scenario impermissibly limited trial counsel's strategy.

The state argues that, at the hearing on defendant's motion for a new trial, the trial court believed defendant and his witnesses were liars. The state then reasons that, because the witnesses were unbelievable, shifting the blame of the shooting to co-defendant was not a plausible defense strategy. The state's basis for this argument is that if there was no plausible defense that would afford defendant a significant gain, there was no actual conflict.

A plausible strategy need not be successful. *United States v. Fahey,* 769 F.2d 829 (1st Cir.1985); *Foxworth v. Wainwright,* 516 F.2d 1072 (5th Cir.1975). The court in *Foxworth* refused to speculate on the effect the credibility of the witnesses would have on the defense strategy. When the defendant used a "shifting blame" strategy, *Foxworth* held it was a plausible strategy because there was medical evidence to show that the blame could possibly be shifted to someone other than defendant. *Id.* A "shifting blame" strategy is not plausible when there is no indication that a co-defendant committed the crime. *Oliver v. Wainwright,* 782 F.2d 1521 (11th Cir.), *cert. denied,* 479 U.S. 914, 107 S.Ct. 313, 93 L.Ed.2d 287 (1986) (alternative strategy was not plausible when there was no evidence indicating that a co-defendant might have stabbed the victim).

In this appeal, the witnesses' credibility was not indicative of the success or failure of a plausible strategy, as the state would have us conclude. *See Foxworth v. Wainwright.* There was testimony at trial by a witness indicating that a "shifting blame" strategy could be used in an attempt to prove that co-defendant was the person who fired the shot. This witness had testified at trial that he actually saw co-defendant, not defendant, shoot the victims.

Addressing the state's argument that the trial court disbelieved the witnesses, we conclude New Mexico law supports the proposition that an adversary can make more of evidence than the possibility envisioned by a judge. *See State v. Orona,* 92 N.M. 450, 589 P.2d 1041 (1979); *State v. Romero,* 87 N.M. 279, 532 P.2d 208 (Ct. App.1975). Thus, we hold that a new trial is required under the facts in this appeal, where defense counsel undertook to represent two co-defendants without disclosing the conflict or obtaining a waiver, and certain avenues of defense were precluded for defendant. *See State v. Orona.*

The state argues generally that defendant waived his conflict of interest claim. Specifically, the state claims there was a waiver because defendant participated in a devious scheme to clear both himself and his brother. We disagree.

At the hearing on defendant's motion for a new trial, defense counsel testified that defendant's brother had told him on the day of trial that he, not defendant, fired the shot. He also stated he had no recollection of specifically advising defendant that his brother confessed to the shooting. When the right to counsel is involved, the presumption is against waiver and loss of a fundamental right. *State v. Hamilton,* 104 N.M. 614, 725 P.2d 590 (Ct.App.1986). A waiver must be clearly shown on the record. *Id.* There is no indication in this appeal that defendant was aware of a conflict or that he even expressed a clear waiver of the conflict of interest claim. Additionally, a waiver of a right must be made knowingly and intelligently. *Wheat v. United States,* 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *State v. Hamilton.* There was no showing in the record that defendant made a knowing and intelligent waiver of the existing conflict of interest.

Finally, we address defendant's contention that the evidence presented at trial was insufficient to support his conviction.

See State v. Losolla. The test to determine sufficiency of evidence is whether substantial evidence exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to the conviction. *State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984). In testing the sufficiency of the evidence, we must view the evidence in the light most favorable to support the jury's verdict. *Id.* In this regard, it is true that there was conflicting evidence with respect to whether defendant or co-defendant was holding a gun when the victim was wounded. Where testimony is conflicting, the trier of fact must resolve the conflict. *State v. Ellis,* 89 N.M. 194, 548 P.2d 1212 (Ct.App.1976).

There was evidence showing that defendant was the person who shot the victim. Specifically, the victim testified he saw defendant aim a gun at him just before he was wounded. Although the victim may have mistaken defendant for co-defendant because of their resemblance, we hold this was substantial evidence nonetheless. *See State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978).

We conclude there was an actual conflict of interest that denied defendant his right to effective assistance of counsel. We therefore hold that the trial court erred in denying defendant's motion for a new trial. We also hold that there was substantial evidence supporting the conviction, thus not requiring a dismissal of the charges against defendant.

We reverse defendant's conviction and remand for a new trial.

IT IS SO ORDERED.

DONNELLY and ALARID, JJ., concur.

791 P.2d 61

Gregory HORNE, Plaintiff–Appellant,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY, Defendant–Appellee.

No. 18597.

Supreme Court of New Mexico.

April 25, 1990.

Rehearing Denied May 25, 1990.

OPINION

SOSA, Chief Justice.

Horne was rendered a paraplegic as a result of an injury sustained while driving an insured vehicle during the course of his employment for New Mexico Security Patrol, Inc. (NMSP). A negligent underinsured motorist caused Horne's injury. NMSP had insured five company vehicles with United States Fidelity & Guaranty Company (USF & G). Each vehicle had uninsured motorist coverage. The named insured was the company, NMSP, which was equivalent under the policy to "you," whenever that word was used in the policy. The policy was a business auto policy, but provided a rider for uninsured/underinsured motorist coverage that was worded for family and individual coverage.

USF & G paid Horne the policy limits of $60,000 for the uninsured coverage on the vehicle he was driving when injured, less the negligent driver's liability payment, but refused Horne's demand to stack coverage on the other four vehicles. It is undisputed that Horne's injuries exceed in dollar amount the sum total of $300,000, or the amount payable if Horne were permitted to stack uninsured motorist coverage for all five vehicles. After Horne failed to win the additional $240,000 through arbitration, he filed an action for declaratory judgment. The trial court found for USF & G.

In its findings and conclusions, the court ruled, *inter alia:* (1) that NMSP had purchased uninsured motorist coverage to protect employees such as Horne from negligent drivers who were uninsured/underinsured; (2) Horne was an insured under the policy for liability purposes; (3) for purposes of uninsured/underinsured motorist coverage, the uninsured rider provides that three classes of persons are insured, in the following language:

(i) You or any family member.

(ii) Anyone else occupying a covered auto * * * or a temporary substitute for a covered auto.

(iii) Anyone for damages he is entitled to recover because of bodily injury sustained by another insured.

(4) Family member is defined in the policy as "a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child"; (5) the attachment of the family or individual rider to the business policy did not create an ambiguity as to whether Horne would qualify as a class-one insured; (6) because no ambiguity existed Horne clearly was excluded from class-one coverage and thus was unable to stack coverage.

On appeal, we disagree with the court's ruling on the question of ambiguity and thus reverse the court's judgment and remand the case with instructions to enter judgment in Horne's favor for $240,000.

ARGUMENT ON APPEAL

USF & G's argument on appeal raises the classic logical fallacy of "begging the question." USF & G's reasoning is as follows: It is undisputed that under a business policy which names a corporation as the insured, an employee of the corporation is not a class-one insured for purposes of stacking uninsured motorist coverage. Horne is an employee. Therefore Horne may not stack coverage.

Our disagreement with this line of reasoning is as follows. If the rider in question had explicitly defined the extent of the uninsured coverage in a corporate insurance policy, then we would have no difficulty in reaching the same conclusion as did the trial court and which is urged upon us by USF & G. USF & G, however, in its own policy, in language that it had written, did not use language explicitly defining the extent of its coverage. Rather, it defined class-one insureds as: "You or any family member."

What does that language mean in the context of a business policy? That is the issue. To say that Horne is a class-two insured because he was an occupant of the vehicle is to beg the question, or to leap to a conclusion unmerited by the major premise of the argument. The place to start is with a discussion of whether Horne was a class-one insured or a class-two insured. We cannot presume *ab initio* from the wording of the rider, as the trial court and USF & G have done, that Horne was not a class-one insured. To have made its position clear, USF & G explicitly could have excluded Horne by attaching a different rider to the policy, one in which the insurer stated that employees could avail themselves of uninsured motorist coverage only if they were occupants in an insured vehicle, that is, only if they were class-two insureds. If USF & G had done this, then Horne, as a class-two insured, under our prior holdings on this issue, justifiably would have been denied the right to stack coverage on the other four vehicles.

It is axiomatic in New Mexico insurance law that ambiguities in an insurance policy are to be construed against the insurer. *See Safeco Ins. Co. v. McKenna,* 90 N.M. 516, 565 P.2d 1033 (1977). Nor do we find it necessary to traverse once again the law on class-one and class-two insureds and the criteria used for assessing the availability of stacking to the former and not to the latter. Our recent decision in *Padilla v. Dairyland Insurance Co.,* 109 N.M. 555, 787 P.2d 835 (1990), aptly summarizes New Mexico law on these issues. The question before us here, an issue of first impression, is whether an employee otherwise insured under a business policy's uninsured motorist rider can stack benefits on other covered vehicles when class-one insureds under the policy are defined as: "you or any family member."

In holding that this language creates a patent ambiguity which must be construed against USF & G, we follow the reasoning of the Supreme Court of Ohio, which held, in a recent case involving, except for the question of stacking, the same issue:

> Because "you" and "your" refer to [the insured company] as a legal entity, the ordinary meaning of the phrase "[r]elatives living in your household" used in the policy is "manifestly absurd." However, in the context of the policy as a whole, the phrase "[r]elatives living in your household" may be interpreted as referring to all employees of [the company], as referring to designated drivers only, or as a nullity. Therefore, the

phrase is ambiguous and must be construed in favor of the insured.

King v. Nationwide Ins. Co., 35 Ohio St.3d 208, 212, 519 N.E.2d 1380, 1384 (1988) (citations omitted).

It seems clear that had *King* involved stacking, and had it been based on an interpretation of the three classes of insureds defined in the rider before us, the Ohio Supreme Court would have permitted stacking. Under our prior holdings on stacking, we now extend the rationale in *King* to the issue before us. We thus hold that Horne should have been permitted to stack coverage for the other four vehicles. *See Padilla,* 109 N.M. at 560–61, 787 P.2d at 840–41.

USF & G makes a worthy argument on appeal, but it argues for the wrong issue. It exhaustively has cited cases standing for the general proposition that an employee in Horne's situation may not stack coverage when the employee is a class-two insured. What USF & G fails to address is the question of whether, under the ambiguously worded rider here, Horne should be considered merely a class-two insured in the first place. A brief look at USF & G's cited cases makes this clear. For example, in *Utica Mutual Insurance Co. v. Contrisciane,* 504 Pa. 328, 473 A.2d 1005 (1984), the court held:

> [R]esolution of the stacking issue is not disposed of by merely voiding the limitation of liability clauses. We must also decide whether a person who is insured only because he is an occupant in a vehicle insured under a fleet policy is entitled to stack coverages. We hold that he may not.

Id. at 337–38, 473 A.2d at 1010.

While the court in *Utica* reaches a different result than we do, we disagree with its framing of the issue. To our way of thinking the injured person is not insured "only because he is an occupant." To us the issue is *why* is he insured? Is it because he is an occupant, or is it because he is a "family member?" That is the issue which must be addressed, and because the rider in question gives rise to an ambiguity on that issue, we adopt the approach taken by the Ohio Supreme Court in *King* rather than that taken by the Pennsylvania Supreme Court in *Utica.*

We make the same observation regarding the other cases USF & G has cited. *See, e.g., Murphy v. Milbank Mut. Ins. Co.,* 388 N.W.2d 732, 738 (Minn.1986) ("Gary Murphy was an insured under Kemper's uninsured motorist coverage solely because he was an occupant of the truck involved in the accident."); *Travelers Ins. Co. v. Bartoszewicz,* 404 So.2d 1053, 1055 (Fla.1981) ("It is not unreasonable that the parties would declare the corporation the named insured without necessarily meaning to include the employees."); *Cano v. Travelers Ins. Co.,* 656 S.W.2d 266, 269 (Mo.1983) (en banc) ("[W]e see no reason why the parties should not have the power to contract for the limitations on uninsured motorist coverage as set out in the policy, as to a person who is insured only when occupying an insured vehicle.").

We agree with all the statements taken from the cases cited. We do not agree, however, that simply because there is a class-two insured who is covered because he/she is an occupant of the company's vehicle that an employee is necessarily a class-two insured. Especially, as here, where the insurer inserts in the policy a rider that defines class-one insureds as: "You or any family member," we think the first inquiry that must be made is whether the insured belongs, or arguably belongs, by reason of the clause's ambiguity, to class-one insureds as opposed to class-two insureds. Construing all such ambiguities against the insurer, we hold that Horne was a class-one insured and could stack coverage on the other four vehicles covered under the policy.

For the foregoing reasons this case is reversed and remanded to the trial court for judgment consistent with this opinion.

IT IS SO ORDERED.

BACA, J., and ALARID, Judge, Court of Appeals, sitting by designation, concur.

RANSOM, J., dissenting.

MONTGOMERY and WILSON, JJ., not participating.

RANSOM, Justice (dissenting).

I agree with the trial court that the inappropriate attachment of the family or individual rider to the business policy did not create an ambiguity as to whether an employee of the insured corporation would qualify as a family member, i.e., a household resident related by blood, marriage, or adoption. No argument is advanced that, aside from use of the term "family member," there is evidence or reason to believe the parties meant for employees to be class-one insureds.

791 P.2d 64

STATE of New Mexico, Petitioner,

v.

JONATHAN M., a child, Respondent.

No. 18751.

Supreme Court of New Mexico.

May 8, 1990.

Hal Stratton, Atty. Gen., Margaret B. Alcock, Asst. Atty. Gen., Santa Fe, for petitioner.

Jacquelyn Robins, Chief Public Defender, Peter Rames, Asst. Appellate Defender, Santa Fe, for respondent.

OPINION

WILSON, Justice.

We granted the State's petition for a writ of certiorari to clarify whether NMSA 1978, Section 32-1-27(F) (Repl.Pamp.1989) prohibits the admission of statements made by a child under the age of fifteen years in a hearing to adjudicate delinquency. The district court held that such statements were admissible and the court of appeals, in an unpublished memorandum opinion, reversed the district court. We affirm the court of appeals and reverse the district court.

FACTS

On September 26, 1987, Lawrence G. Nilsen (Nilsen) was cleaning his computer store. Jonathan, a thirteen-year-old boy who lived in the neighborhood, was the only other person present in the store. Nilsen went into the store's back office to retrieve his glasses. When he exited the office he was hit on the back of the head and knocked unconscious. When he regained consciousness he realized his throat had been cut and he was bleeding profusely. Nilsen's wounds prevented him from speaking and he urged Jonathan, who was still in the store, to call an ambulance for assistance. After some delay, Jonathan called for assistance then left the store.

When ambulance personnel arrived at the store, Nilsen was in critical condition and was unable to tell them what happened.

That evening Jonathan's mother called the police and said that her son had reported the incident. The police asked Jonathan and his mother to meet them at the store to explain what had happened. At the meeting, Jonathan made certain statements that were introduced into evidence at a delinquency hearing. At the time of the meeting Jonathan was not a suspect in the case and was not in custody. Inconsistencies in Jonathan's statements and other circumstances contributed to the district court's finding that he had committed aggravated battery and was a delinquent child in need of supervision.

ISSUE

The single issue in this case is whether the district court erred in admitting statements made by a child under age fifteen against that child at a hearing to adjudicate delinquency. Section 32–1–27(F) clearly states that: "[n]otwithstanding any other provision to the contrary, no confessions, statements or admissions may be introduced against a child *under the age of fifteen years prior to an adjudication on the allegations of the petition.*" (emphasis added). When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation. *Storey v. University of N.M. Hosp./BCMC,* 105 N.M. 205, 207, 730 P.2d 1187, 1189 (1986); *New Mexico Beverage Co. v. Blything,* 102 N.M. 533, 534, 697 P.2d 952, 953 (1985); *State v. Michael R.,* 107 N.M. 794, 796, 765 P.2d 767, 769 (Ct. App.), *cert. denied,* 107 N.M. 748, 764 P.2d 879 (1988).

We must construe this statute in view of the express legislative purposes of the Children's Code. *See Doe v. State,* 100 N.M. 579, 581, 673 P.2d 1312, 1314 (1984). The purposes of the Children's Code are:

> A. first to provide for the care, protection and wholesome mental and physical development of children coming within the provisions of the Children's Code and then to preserve the unity of the family whenever possible * * *.
>
> B. consistent with the protection of the public interest, to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable for their actions to the extent of the child's age, education, mental and physical condition, background and all other relevant factors, and to provide a program of supervision, care and rehabilitation * * *[.]
>
> * * * * * *
>
> E. to provide judicial and other procedures through which the provisions of the Children's Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced[.]

NMSA 1978, § 32–1–2 (Repl.Pamp.1989).

In *Doe* we held that Section 32–1–27 does not prevent the admission of either voluntary statements or answers to "threshold or general on-the-scene questioning" in a hearing to adjudicate delinquency. 100 N.M. at 581, 673 P.2d at 1314. The defendant in that case was seventeen years old. We did not determine whether such statements would be admissible if made by a child under age fifteen. The State argues that the restrictions in Section 32–1–27(F) only apply to children's statements made in circumstances in which a *Miranda* warning would be required if those statements had been made by one over age fifteen. Along these lines, the State urges this court to extend the holding in *Doe* to cover children under the age of fifteen.

Section 32–1–27(F) clearly prohibits the admission of statements made by children under age fifteen in proceedings prior to adjudication. As stated above, we must interpret this language in accord with its plain meaning. This interpretation is consistent with the purposes of the Children's Code. Once a child is deemed "within the Children's Code" the court must fashion a remedy beneficial to both the child and society. It is at the remedial stage, after

adjudication, that statements made by a child under age fifteen aid the court's determination of how to provide the child with the necessary care, protection, supervision, or rehabilitation. *See generally State v. Favela,* 91 N.M. 476, 576 P.2d 282 (1978) (Children's Code establishes system of treatment, care and rehabilitation for children who have committed delinquent acts), *overruled on other grounds, State v. Pitts,* 103 N.M. 778, 714 P.2d 582 (1986).

Children of tender years lack the maturity to understand constitutional rights and the force of will to assert those constitutional rights. Children are encouraged to respect and obey adults and should not be expected to assert their constitutional rights even under the most perfunctory questioning by any adult, particularly an adult of authority. By prohibiting the admission of statements made by children under age fifteen, Section 32–1–27(F) encourages children to freely converse with adults without fear that their statements will be used against them at a later date. In contrast, an adult or a child over age fifteen is unlikely to make an involuntary statement in a noncustodial, noncoercive atmosphere or after receiving *Miranda* warnings. The additional protection that Section 32–1–27(F) grants children under age fifteen helps to balance these differences in sophistication.

CONCLUSION

We conclude that the district court improperly admitted Jonathan's statements in the delinquency hearing, contrary to Section 32–1–27(F). Accordingly, we affirm the court of appeals and reverse the district court. We remand this matter for proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C.J., and RANSOM and MONTGOMERY, JJ., concur.

BACA, J., specially concurs.

BACA, Justice (specially concurring).

Although I concur in the judgment of the court, I believe the majority's conclusion can be reached without umbrage to the rationale of *Doe v. State,* 100 N.M. 579, 673 P.2d 1312 (1984), and without judicial expansion of the policy on which the Children's Code is based. I write separately to explain how the majority's conclusion can be distinguished from *Doe* based solely on interpretation of the statutory language. As the majority indicates, when statutory language is clear and unambiguous, we should give effect to that language and refrain from further interpretation. *See Storey v. University of N.M. Hosp./BCMC,* 105 N.M. 205, 730 P.2d 1187 (1986).

In *Doe,* we focused on NMSA 1978, Section 32–1–27(C) and (D) (Repl.Pamp.1989), to determine that the Children's Code's additional protections were implicated only in a situation where *Miranda* safeguards come into play. We emphasized the language of subsection (C) stating that no suspected delinquent child could be "*interrogated or questioned*" without having been advised of his constitutional rights and without a valid waiver. *Doe,* 100 N.M. at 582, 673 P.2d at 1315. With reference to subsection (D), we emphasized that "the state must prove that the statement or confession offered in evidence was *elicited* only after a knowing, intelligent and voluntary waiver of the child's constitutional rights was obtained." *Id.*

Subsection (F) states: "*Notwithstanding any other provision* to the contrary, *no confessions, statements or admissions may be introduced* against a child under the age of fifteen years prior to an adjudication on the allegations of the petition." (Emphasis added.) Subsection (F) does not contain the ameliorating language that the *Doe* opinion emphasizes to indicate the legislative intent that Section 32–1–27 applies only in the post-*Miranda* situation. It does not refer to interrogation, questioning, or elicited statements, and it does not require a knowing, intelligent and voluntary waiver of constitutional rights. In the context of subsections (C), (D), and (E), *Doe* reasonably interpreted this language to show the legislature's intent that these requirements refer to post-*Miranda* constitutional safeguards, which can be implicated only in the post-*Miranda* context. However, subsec-

tion (F) broadly excludes all confessions, statements or admissions, "[n]otwithstanding any other provisions." This broad exclusion, without qualification, by its plain language is not limited to the post-*Miranda* context, and it demonstrates the intent to give children under the age of fifteen broader protection.

I believe that analysis of the statutory language clearly indicates the legislature's intent regarding subsection (F) and further judicial gloss on the statute is unnecessary. I would hold simply that the language employed by the legislature indicates its intent that children under the age of fifteen should be treated differently than older minors. Accordingly, I would exclude on this basis all statements, confessions or admissions, both prior or subsequent to *Miranda,* before an adjudication on the allegations of the petition.

791 P.2d 67

STATE of New Mexico,
Petitioner–Appellee,

v.

HENRY L., A Child,
Respondent–Appellant.

No. 11572.

Court of Appeals of New Mexico.

March 13, 1990.

Certiorari Denied April 17, 1990.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for petitioner-appellee.

Jacquelyn Robins, Chief Public Defender, Jonathan A. Abbott, Asst. Appellate Defender, Santa Fe, for respondent-appellant.

OPINION

ALARID, Judge.

Respondent (child) appeals from an order of the children's court revoking his probation and committing him to the New Mexico Boys' School for an indeterminate period not to exceed two years. The sole issue the child raises is that the children's court order revoking his probation is void because the underlying probation order is invalid due to illegal and unconstitutional conditions of probation. We affirm the judgment and disposition of the children's court.

FACTS

The child was found to be a delinquent child in January 1988, based on his admission to two counts of possession of marijuana, and was placed on probation for a period not to exceed two years. In May 1988, the state moved to revoke the child's January 1988 probation. The child admitted having violated his probation by failing to attend school and possessing marijuana. In lieu of commitment to the Boys' School, the child was placed on the Juvenile Intensive Probation Supervision (JIPS) Program in September 1988. One of the terms of the JIPS probation confined the child in the Juvenile Detention Center "for a period of 24 days, to be served four days per month as directed by the child's Probation Officer." The order also provided that "[t]he Probation Officer will have full discretion to credit the child with up to four days per month for the child's good performance in complying with the terms and conditions of the JIPS Program."

In November 1988, the state moved to revoke the child's JIPS probation. On May 4, 1989, a judgment and disposition was filed with respect to the November 1988 petitions to revoke probation. The children's court found that the child violated the curfew conditions of his JIPS probation agreement and was a delinquent child in need of care and rehabilitation, revoked the child's JIPS probation, and committed the child to the Boys' School for a full term not to exceed two years. The child appeals from the May 1989 order, arguing that the detention conditions of the JIPS program are illegal, thereby rendering the JIPS probation order void, which in turn renders the subsequent order of commitment void as well. *See State v. Michael V.*, 107 N.M. 305, 756 P.2d 585 (Ct.App.1988) (where initial order placing child on probation is void, subsequent orders revoking probation are without legal effect).

DISCUSSION

The child argues that the JIPS probation is void because the Children's Code, NMSA 1978, Sections 32–1–1 to –59 (Repl. Pamp.1989), does not authorize the imposition of twenty-four days confinement as a condition of probation. *See State v. Michael V.* (children's court may only impose penalties which the legislature has authorized). The child contends that under Section 32–1–34(E), the children's court is given six options for disposing of a case after

finding a child to be delinquent. The child notes the children's court may place the child on probation pursuant to Section 32–1–34(E)(3), or it may place the child in a local detention facility for a period not to exceed fifteen days pursuant to Section 32–1–34(E)(4). He contends the listed options are mutually exclusive; therefore, more than one of the six options may not be imposed. We do not discuss the question of whether the options available to the children's court under Section 32–1–34(E) are mutually exclusive, because we find the language of Section 32–1–34(E)(3) sufficiently expansive to contemplate the imposition of limited detention as a condition of probation.

Section 32–1–34(E)(3) provides that the court may "place the child on probation under those conditions and limitations as the court may prescribe." We have previously held that the Children's Code must be read as an entirety and each section interpreted so as to correlate as faultlessly as possible with all other sections. *State v. Doe,* 95 N.M. 88, 619 P.2d 192 (Ct.App. 1980). Among the legislative purposes of the Children's Code are: preservation of family unity when possible; provision of a program of supervision, care and rehabilitation; and provision of "effective deterrents to acts of juvenile delinquency, including an emphasis on community-based alternatives." *See* § 32–1–2(A), (B), (F). We find that a broad reading of Section 32–1–34(E)(3), allowing a reasonable period of detention as a condition of probation, comports with the legislative intent that the Children's Code be "interpreted and construed to effectuate" the purposes identified above. The record below reflects that the JIPS program is a last-chance alternative for many boys who might otherwise be sent to Boys' School. We view probation including detention as an alternative to transfer of custody to the youth authority of children like Henry who have been unsuccessful in completing less restrictive probation, and therefore as an alternative consistent with the legislative purposes of family unity and community-based alternatives.

The child argues that even if Section 32–1–34(E)(3) allows detention as a condition of probation, his JIPS probation was invalid because it imposed twenty-four potential days of detention, when Section 32–1–34(E)(4) provides for a period of detention not to exceed fifteen days. We view Section 32–1–34(E)(4) as an alternative disposition available to the court and not as a limitation on the conditions of probation the court may prescribe under Section 32–1–34(E)(3). Section 32–1–34(E)(4) allows the children's court the option of imposing a brief period of detention as a potential disposition and is inapplicable to the conditions and limitations the court may prescribe when placing a child on probation pursuant to Section 32–1–34(E)(3).

The child also relies on the general rule that probation consists of the release of a defendant without imprisonment. *See State v. Chavez,* 94 N.M. 102, 607 P.2d 640 (Ct.App.1979) (probation defined as the release by the court without imprisonment of an adult defendant convicted of a crime). We find this definition of probation inapplicable because it refers to adults rather than children, and both the courts and the legislature have recognized distinctions between probationary conditions that are allowable for adults and conditions that are allowable for children.

An adult may not be sentenced to both probation and a fine. *State v. Holland,* 91 N.M. 386, 574 P.2d 605 (Ct.App. 1978). With respect to a child, however, Section 32–1–34(E) specifically authorizes the children's court to impose a fine and any enumerated disposition, including probation, when a child is found to be delinquent. An adult's probation conditions cannot be changed so that the penalty is increased once a legal sentence is imposed. *State v. Crespin,* 96 N.M. 640, 633 P.2d 1238 (Ct.App.1981). A child's sentence can be increased when he is found to have violated conditions of probation because the children's court is authorized to make any disposition it could have originally made, with no restrictions on increasing the penalty. *See* §§ 32–1–38(G), –43. A child gets no credit for time served on probation,

whereas an adult does receive credit. *Compare State v. Dennis F.,* 104 N.M. 619, 621, 725 P.2d 595, 597 (Ct.App.1986) ("[a]llowance of credit for time served on probation has not been authorized by the state legislature for dispositions under the Children's Code") *with State v. Travarez,* 99 N.M. 309, 657 P.2d 636 (Ct.App.1983) (an adult defendant must be given credit for time served on probation).

We also note that other jurisdictions have determined that a certain period of detention as a condition of probation is appropriate in juvenile cases. *See In re Appeal in Pima County Juvenile Action No. J-20705-3,* 133 Ariz. 296, 650 P.2d 1278 (Ct.App.1982) (court held probation and six weekends in jail as condition of probation bore reasonable relation to rehabilitation); *In re John S.,* 83 Cal.App.3d 285, 147 Cal. Rptr. 771 (1978) (condition of probation that child spend between five and ten days in juvenile hall authorized by statute which states that a purpose of the juvenile court law is "to impose on the minor a sense of responsibility for his own acts"). We find the above distinctions, together with the authority from other jurisdictions, persuasive in support of our finding that the definition of probation set out in *Chavez,* precluding confinement as a condition of probation, should not be applied in this case.

The child's final arguments are that the JIPS program violates double jeopardy, due process, equal protection, and separation of powers. We do not consider the child's equal protection and separation of powers arguments because he cites no authority in support of his contentions. *See In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984). We deal briefly with his double jeopardy and due process claims.

The child argues the JIPS program violates his right to avoid double jeopardy because he can be punished once for bad performance (four days detention) by JIPS personnel and then have his probation revoked and be punished again. The state responds, and we agree, that the child's argument overlooks the fact that the detention imposed pursuant to the JIPS probation was imposed by the children's court judge for the child's past behavior, and any future punishment (probation revocation) would be for future violations of the JIPS probation. The state also notes that, upon probation violation, the children's court is authorized to impose detention again since it can impose any disposition that could have been originally made. § 32-1-43. Under these circumstances, we see no violation of the child's right against double jeopardy.

The child contends due process is violated because the terms of the JIPS probation give the probation officer full discretion to credit the child with a maximum of four days per month, against his twenty-four-day period of incarceration, for the child's good performance in complying with the terms and conditions of the JIPS program. The child argues that this delegation of authority to the probation officer has the effect of allowing the probation officer to act as a police officer, prosecutor, and jury in determining whether a probation violation has occurred. We again note that it is the children's court that imposes the detention. The probation officer does decide whether the child will actually serve time in detention, but only insofar as the probation officer can give the child credit against the time imposed by the court. However, the detention itself was imposed after a hearing, with notice of allegations that the child had violated the conditions of his regular probation. The child was also represented by counsel and given an opportunity to be heard prior to imposition of the JIPS probation. We find no violation of the child's right to due process.

For the reasons discussed above, we affirm the judgment and disposition of the children's court in this matter.

IT IS SO ORDERED.

BIVINS, C.J., and APODACA, J., concur.

791 P.2d 71

Brenda Lynn ORCUTT,
Claimant–Appellant,

v.

S & L PAINT CONTRACTORS, LTD., and Aetna Casualty & Surety,
Respondents–Appellees.

No. 11032.

Court of Appeals of New Mexico.

March 20, 1990.

[redacted]

[redacted]

[redacted]

Stacey A. Johnson, Phyllis Oman Bowman, Stacey A. Johnson, P.A., Albuquerque, for claimant-appellant.

Julie W. Brown, Beall, Pelton, O'Brien & Brown, Albuquerque, for respondents-appellees.

OPINION

APODACA, Judge.

Claimant Brenda Orcutt (worker) appeals the workers' compensation judge's (judge) denial of her claim under NMSA 1978, Section 52–1–64 (Repl.Pamp.1987) of the Workers' Compensation Act (the Act), based on an out-of-state injury. Worker, a New Mexico resident, was injured in Nevada while working for respondent S & L Paint Contractors, Ltd. (employer). Determining that worker's "contract of hire" was made in Nevada and not in New Mexico, the judge concluded that worker did not meet the extraterritorial coverage requirements under Section 52–1–64 and was thus not entitled to benefits under the Act. We agree with the judge's determination and affirm the denial of coverage.

On appeal, worker raises three issues. She argues that the judge erred in: (1) concluding that worker did not meet the "contract of hire" requirements under Section 52–1–64; (2) failing to give full faith and credit to certain "findings and conclusions" of a workers' compensation agency in Nevada concerning the place of hire; and (3) failing to conclude that employer was estopped from denying coverage under the Act by representing to worker and a Nevada hospital after the injury that employer would provide coverage for medical expenses incurred for treatment.

BACKGROUND

Worker was injured while working for employer, which was in the business of repairing and painting heavy equipment for sale at auctions. Ken Clark (Clark), employer's owner, was a New Mexico resident. Although employer transacted business in New Mexico, its primary place of business was located in Iowa. Employer's employees traveled interstate to different job sites.

Employer contracted for a job in Las Vegas. Clark telephoned and hired worker's husband in Albuquerque, New Mexico, for the Nevada job. Worker and her husband were New Mexico residents. During the telephone conversation with the husband, Clark also offered employment to worker. Because he did not want worker to work, worker's husband did not relay the offer to her. After worker and her husband arrived in Nevada, Clark directly offered worker a job. Before the Nevada offer, worker had not talked to employer about a job.

Worker accepted the offer and began work. She worked for about three hours before falling from a dump truck she was preparing for painting. She injured her back and ankle. As a result of the work-related injury, worker incurred $4,623.60 in medical expenses. She applied for workers' compensation benefits in Nevada. The Nevada agency denied coverage, concluding that worker was an out-of-state employee only temporarily in the state and that employer had failed to obtain coverage there.

DISCUSSION

Section 52–1–64 provides:

> If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he * * * would have been entitled to the benefits provided by the [Act], had such injury occurred within this state, such employee * * * shall be entitled to [such] benefits * * * provided that at the time of such injury:
>
> A. his employment is principally localized in this state;
>
> B. he is working under a contract of hire made in this state in employment not principally localized in any state;
>
> C. he is working under a contract of hire made in this state in employment principally localized in another state

whose workmen's compensation law is not applicable to his employer; *or*

D. he is working under a contract of hire made in this state for employment outside the United States and Canada. [Emphasis added.]

Under the statute, unless a worker's employment is principally localized in New Mexico, which neither party contends was the case in this appeal, it is a prerequisite that the contract of hire be made in this state before a worker is entitled to benefits.

State Where Contract of Hire Was Made

In enacting Section 52–1–64, the New Mexico legislature statutorily adopted the "place-of-contract or place-of-hiring test." *See generally* 4 A. Larson, *Larson's Workmen's Compensation Law* § 87.31 (1989). Under this theory, the place where the employment contract was made is determinative of coverage. Although the theory has led to unsatisfactory and even contradictory results, according to *Larson's*, it has become established as a common test of coverage. *Id.*

In construing a statute, a reviewing court's central concern is to determine and give effect to the intent of the legislature. *Smith Mach. Corp. v. Hesston, Inc.*, 102 N.M. 245, 694 P.2d 501 (1985). In determining this intent, we look primarily to the language used in the statute. *See First Nat'l Bank of Santa Fe v. Southwest Yacht & Marine Supply Corp.*, 101 N.M. 431, 684 P.2d 517 (1984). This court must give the words used in the statute their ordinary meaning unless the legislature indicates a different intent. *State v. Rodriguez*, 101 N.M. 192, 679 P.2d 1290 (Ct.App.1984). Unreasonable or strained statutory constructions are proscribed. *Anaya v. New Mexico Steel Erectors, Inc.*, 94 N.M. 370, 610 P.2d 1199 (1980).

Section 52–1–64 is not ambiguous. New Mexico can provide extraterritorial coverage only if the employment is "localized" here or the "contract of hire" was formed in the state. The plain language of a statute is the primary indicator of legislative intent. *General Motors Acceptance Corp. v. Anaya*, 103 N.M. 72, 703 P.2d 169 (1985).

The place-of-contract test depends on the technical formalities present with respect to elements required for contract formation. 4 A. Larson, *supra*, at § 87.34. The manifestation of mutual assent to an exchange ordinarily takes the form of an *offer* by one party followed by an *acceptance* by the other party. *Restatement of Contracts (Second)* § 22 at 66 (1981). It is elementary in contract law that mutual assent ordinarily must be expressed by parties to an agreement before a contract is made. *Trujillo v. Glen Falls, Inc.*, 88 N.M. 279, 540 P.2d 209 (1975). Since an acceptance is required to make a binding contract, the geographical place where the acceptance is given will control the location of the formation of the contract. *See U.S. Steel Corp., Gary Works v. Industrial Comm'n*, 161 Ill.App.3d 437, 109 Ill.Dec. 584, 510 N.E.2d 452 (1987).

The rule is that an offer becomes a binding promise and results in a contract only when it is accepted. *McCoy v. Alsup*, 94 N.M. 255, 609 P.2d 337 (Ct.App.1980). A proposal by an offeror is not effective and is not an "offer" until it is made known to the other party, who is then in the position to accept or reject the offer. *Foster v. Udall*, 335 F.2d 828 (10th Cir.1964). In the formation of a contract, an offeror is entitled to know in clear terms whether the offeree accepts his proposal. *Ross v. Ringsby*, 94 N.M. 614, 614 P.2d 26 (Ct.App. 1980). An offeree's acceptance must be clear, positive, and unambiguous in order to result in a binding contract. *Tatsch v. Hamilton–Erickson Mfg. Co.*, 76 N.M. 729, 418 P.2d 187 (1966).

Acceptance of an offer is a manifestation of assent to the terms of the offeree in a manner invited or required by the offer. *Restatement of Contracts (Second)* § 50 (1981). Acceptance may be by performance or by promise. *See id.* In an employment contract, an employer's offer may create a power to accept by performance. *Corbin on Contracts* § 65 at 271

(1963). The employee may be fully authorized by the employer's proposal to proceed with performance without any further assent by the employer. *Id.* If this is so, the employee has the power to accept by action rather than words. *Id.* Thus, an employment contract may arise when an employer authorizes a prospective employee to accept an offer of employment by rendering services.

In the present case, the evidence is undisputed that worker did not find out about the offer until she arrived in Nevada. From her testimony, it appears that worker went to Nevada only to accompany her husband. Her plans were "to walk around" during the day. Since she was not going to be employed by employer, her husband had agreed to pay employer for half of the motel room. Employer did not pay worker any travel expenses. She was not regularly employed by employer in New Mexico. In fact, worker had never worked for employer before. There was no evidence supporting an inference that worker's travel to Nevada was an act of "acceptance" to a known job offer made by employer in New Mexico. It seems clear that, whether the contract of hire is classified as unilateral or bilateral, it was formed, as a matter of law, in Nevada.

As applied to the facts of this appeal, case law dictates that both the offer and its acceptance took place in Nevada. Worker admits that no offer of employment was made by employer directly to her while she was in New Mexico, nor did she accept any offer of employment while in New Mexico. Worker first knew of her opportunity to work for employer after she arrived in Nevada and it was there that she accepted the offer.

The cases relied on by worker fail to support her argument. In *Franklin v. Geo. P. Livermore, Inc.*, 58 N.M. 349, 270 P.2d 983 (1954), the court never addressed the issue of where the employee was hired. The court merely accepted the apparently undisputed fact that the employee was hired in New Mexico.

In *Roan v. D. W. Falls, Inc.*, 72 N.M. 464, 384 P.2d 896 (1963), on facts much different from those in this appeal, the court held that, rather than determining where the employment contract was formally made, it was satisfied there was "substantial evidence" that the employee was hired in New Mexico. Similarly, in *Reed v. Fish Engineering Corp.*, 74 N.M. 45, 390 P.2d 283 (1964), the court was not required to rule on the question of where a party was hired.

Although the purpose of the Act in New Mexico is to provide a humanitarian and economical system for compensating injured workers, unreasonable or strained constructions are proscribed. *Anaya v. New Mexico Steel Erectors, Inc.* "If specific guidance cannot be gleaned from the text of the Act, fundamental fairness to both parties is the guideline. These maxims do not mean a total disregard for the Workmen's Compensation Act or a repeal of it under the guise of construction." *Id.*, 94 N.M. at 372, 610 P.2d at 1201 (citations omitted).

We believe the interpretation requested by worker would lead to strained, impractical or absurd results. Although we note that public policy encourages coverage under workers' compensation principles, we are bound by the statutory provisions of the Act and cannot provide a remedy that is not specifically included in the statute. *See Williams v. Amax Chem. Corp.*, 104 N.M. 293, 720 P.2d 1234 (1986).

Full Faith and Credit

Full faith and credit applies to final judgments of sister states. U.S. Const. art. IV, § 1. The United States Constitution requires each state to recognize the legislative acts, public records and judicial decisions of other states. *See id.* A judgment of record has the same conclusive effect and obligatory force in other states as it has by law or usage in the state of origin. *Christmas v. Russell*, 72 U.S. (5 Wall.) 290, 18 L.Ed. 475 (1866). Full faith and credit principles, however, as worker would have us apply them, are not germane to the issue presented to us.

Worker argues that full faith and credit should apply to the Nevada determination that "[worker] was an out of state employee and temporarily within the state." Employer counters that no "administrative or judicial hearings were held in Nevada, [thus] there is [no] judgment or decision to even consider." Even if we accept worker's argument that the Nevada agency's findings and conclusions were entitled to full faith and credit, worker cannot prevail on this issue for the following reasons.

Essentially, worker reasons that, although the Nevada agency did not directly address the question of where the contract of hire was made, nevertheless the effect of the ruling was to deny benefits to worker, which she now requests this court to remedy under color of full faith and credit. Worker specifically argues that, due to Nevada's determination, worker "is in danger of falling down a 'crack' created by discrepancies in the wording of the Nevada [ruling that] made no *specific* determination of where the contract for hire was made and a strict contract law interpretation of [our statute]." (Emphasis in original.)

We have already noted that the dispositive issue in this case is where "the contract of hire" was made. Because only Nevada and New Mexico had any connection with worker's employment, it follows that the contract had to be formed in one of those two states. However, the Nevada agency did not determine where the "contract of hire" was made, as worker urges us to hold. The agency only concluded that, under Nevada law, worker "was an out of state employee and temporarily within the state." This conclusion was in fact adopted by the judge in New Mexico. Thus, in effect, it was given full faith and credit. The fact that the judge recognized Nevada's specific determination, however, did not preclude him from making his own determination that the contract was made in Nevada. This determination did not conflict with Nevada's conclusion that worker "was an out of state employee and temporarily within the state."

This court is not at liberty to broaden the specific and limited determination made in Nevada, even under full faith and credit principles. We cannot do so even to assure that worker does not fall down a "crack" of the two states' different laws, as worker describes her dilemma. We are unable to help worker in her predicament. Instead, we are confined to construing this state's statutory provisions based on construction principles previously discussed, not based on a misapplication of full faith and credit principles to insure worker is provided workers' compensation benefits.

Estoppel of Employer

Lastly, worker argues that employer should be estopped from denying workers' compensation benefits because of Clark's representations to worker and the hospital, made to secure worker's admission as a patient. Clark secured admission to the hospital for claimant by representing to her and the hospital that *he* would provide full coverage for medical expenses. Nothing was said regarding workers' compensation coverage. First, we find no workers' compensation statute or any New Mexico case authority supporting worker's estoppel argument. Even if such authority existed, however, the facts do not support a theory that employer is estopped from denying coverage under the Act. *See* 2 A. Larson, § 67.10.

For estoppel to apply, it must be shown that worker *knew* or *heard* of the coverage and that such knowledge *induced* her to accept the employment or to take any action or position *in reliance* upon it which she would not have taken otherwise. *Garrison v. Bonfield,* 57 N.M. 533, 260 P.2d 718 (1953) (quoting *Keeney v. Beasman,* 169 Md. 582, 182 A. 566 (1936)). There was no evidence that worker relied on any previous representation by Clark to either accept employment or change her position in any significant way. Clark's representation after the accident did not meet any of the required elements for estoppel, especially since he did not specifically represent there was workers' compensation coverage.

In this appeal, the judge not only admitted but apparently considered the testimony regarding Clark's assurances to worker

and the hospital. In making these assurances, Clark could have been referring to methods of payment, including direct payment by employer, rather than specifically guaranteeing that workers' compensation benefits were available. Thus, the facts in this record do not support a claim that employer should be estopped from denying the existence of workers' compensation coverage. To the extent worker intended to argue that she was entitled to a recovery at common law, that issue is not before us.

Our task here is not to determine whether worker may have a common law cause of action based on estoppel against employer. Even if employer's assurances could be said to have afforded worker or even the hospital a cause of action against employer under other theories unrelated to workers' compensation, they were not sufficient grounds on which to permit benefits under the statute. We are compelled to follow the clear language of the statute.

Worker's reliance on *Romero v. Mervyn's,* 106 N.M. 389, 744 P.2d 164 (1987) is misplaced. In *Romero,* the trial court entered summary judgment in favor of the defendant, after having disallowed testimony of a statement made by the defendant's employee with respect to payment of the plaintiff's medical bills. *Romero,* in reversing the summary judgment, concluded that the trial court had improperly ruled on a disputed factual issue that should have been decided by the jury. The court held that the issue of an agent's actual or apparent authority is usually one of fact. *Romero* is thus distinguishable. It dealt with a claim to a common law remedy. *See also Romero v. Mervyn's,* 109 N.M. 249, 784 P.2d 992 (1989).

CONCLUSION

In summary, we hold that, because worker's contract of hire was not made in New Mexico, she did not meet the coverage requirements of Section 52-1-64, and thus was not entitled to workers' compensation benefits. We hold further that the judge did not err in failing to give full faith and credit to the Nevada agency's adjudication or in failing to conclude that employer was estopped from denying coverage. We therefore affirm the judge's order denying worker's claim for benefits.

IT IS SO ORDERED.

BIVINS, C.J., and MINZNER, J., concur.

791 P.2d 76

STATE of New Mexico, Plaintiff-Appellant,

v.

Carlos TARTAGLIA, Defendant-Appellee.

No. 11751.

Court of Appeals of New Mexico.

April 12, 1990.

Hal Stratton, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

CHAVEZ, Judge.

The state appeals the dismissal of the indictment against defendant on the ground that defendant's right to a speedy trial was violated. This case is here, after remand to the district court, to allow defendant to present evidence of prejudice. The third calendar notice proposed summary affirmance of the dismissal. The state has timely filed a memorandum in opposition to the proposal. Not being persuaded, we affirm.

The facts of this case are set out in *State v. Tartaglia,* 108 N.M. 411, 773 P.2d 356 (Ct.App.1989), *overruled in part, Zurla v. State,* 109 N.M. 640, 789 P.2d 588 (1990). In analyzing a defendant's claim that his right to a speedy trial has been violated, we consider the four factors set forth in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). These factors are the length of the delay, the reason for the delay, the assertion of the right to a speedy trial, and the prejudice to defendant resulting from the delay. *Id.; see also Zurla v. State.* We weigh these factors independently on appeal, taking into account the particular facts and circumstances of the case. *State v. Grissom,* 106 N.M. 555, 746 P.2d 661 (Ct.App.1987). These four factors are interrelated and must be evaluated in light of other relevant circumstances in the particular case. *Barker v. Wingo; Zurla v. State.* No one factor constitutes either a necessary or sufficient condition to finding a deprivation of the right to a speedy trial. *Zurla v. State.* These factors have no talismanic qualities and we do not tally the factors favoring one party or the other. Rather, we must "engage in a difficult and sensitive balancing process" in which the conduct of both the prosecution and the defendant is weighed. *Barker v. Wingo,* 407 U.S. at 533, 92 S.Ct. at 2193; *Zurla v. State.*

LENGTH OF DELAY

Defendant claimed, and the state agreed, that the relevant time period was

twenty-four months from defendant's indictment until his arrest and arraignment. A two-year delay in a relatively simple drug case is presumptively prejudicial, thereby triggering an examination of the other factors. *See State v. Kilpatrick,* 104 N.M. 441, 722 P.2d 692 (Ct.App.1986). A twenty-four month delay in a simple drug case weighs somewhat heavily against the state. *Zurla v. State.* Although both the state and defendant agree that the length of delay was twenty-four months running from the date of the indictment to the date of the arraignment, it should be noted that the hearing on the speedy trial motion took place five months after the date of the arraignment. The length of the delay could arguably be twenty-nine months rather than the twenty-four months agreed to by the parties.

REASON FOR THE DELAY

The reason for the delay is also undisputed. The district attorney's office did not know that defendant had been incarcerated on a probation revocation at the time of his indictment. Although the evidence does not show that the delay was intentional, the state is presumed to know a defendant's whereabouts when he is in its custody. *Raburn v. Nash,* 78 N.M. 385, 431 P.2d 874 (1967). Although the reason for the delay could be termed negligent rather than intentional, this is not sufficient to fix the weight to be given this consideration. *Zurla v. State.* The extent to which the state's negligence is weighed against it is increased by the length of time during which no attempt was made to locate defendant. Bureaucratic indifference rather than simple case overload will weigh more heavily against the state. *Id.* The reason for the delay will weigh heavily against the state, where the state fails to make an effort to locate a defendant who is imprisoned in its own corrections facilities.

ASSERTION OF THE RIGHT

Defendant timely asserted his right by filing a motion to dismiss shortly after his arrest on the indictment. An early assertion of the speedy trial right weighs in defendant's favor.

PREJUDICE

After the remand for an evidentiary hearing on prejudice to defendant resulting from the delay, the trial court found that defendant had suffered no prejudice. The issue here is whether the first three factors weigh so heavily in defendant's favor that, even though he has shown no prejudice, the indictment must be dismissed for violation of defendant's right to speedy trial. A showing of prejudice is not required in order for a defendant to be entitled to a dismissal. *Moore v. Arizona,* 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973).

The state argues, however, that the showing of prejudice or absence of prejudice should be weighed more heavily than the other factors. *See State v. Leslie,* 147 Ariz. 38, 708 P.2d 719 (1985) (In Banc); *Sheriff, Clark County v. Berman,* 99 Nev. 102, 659 P.2d 298 (1983). It is true that the prejudice factor focuses most directly on the goals of the speedy trial clause, and that prejudice can be the determining factor when the other factors do not weigh heavily in favor of defendant. *See United States v. Henry,* 615 F.2d 1223 (9th Cir. 1980). However, undue emphasis should not be placed on whether the defendant is able to produce evidence of identifiable prejudice. *Zurla v. State.* If the other three factors weigh heavily in defendant's favor, the fact that he cannot show prejudice is not dispositive.

Two years passed between the time of defendant's indictment and his arrest for possession of a controlled substance. During that time, defendant was in the state's custody serving time in the penitentiary on a parole violation. For two years, the state made no attempt to locate him. Almost immediately after he was arrested, defendant asserted his right to a speedy trial. We find that in this case the length of the delay, the reasons for the delay, and the timely assertion of the right weigh so heavily in defendant's favor that the dismissal for a speedy trial violation must be affirmed.

The dismissal of the indictment with prejudice is affirmed.

IT IS SO ORDERED.

ALARID, J., concurs.

HARTZ, J., dissents.

HARTZ, Judge (Dissenting).

I respectfully dissent.

Given the imprecision of the guidelines provided by the United States Supreme Court in determining whether the sixth amendment right to a speedy trial has been violated, one should not be surprised by the differences of opinion on the subject among appellate courts. Such differences of opinion have arisen in situations like the one before us, in which the following elements are present: (1) the state fails to locate the defendant, even though he is in a state correctional facility; (2) as a result, trial is delayed for a substantial period of time; but (3) the defendant has not established any prejudice, other than the elimination of the possibility of concurrent sentences. *Compare People v. Belcher,* 186 Ill.App.3d 202, 134 Ill.Dec. 240, 542 N.E.2d 419 (1989) (violation of right to speedy trial) *and Williams v. Darr,* 4 Kan.App.2d 178, 603 P.2d 1021 (1979) (same) *with McCutcheon v. Superior Court,* 150 Ariz. 312, 723 P.2d 661 (1986) (In Banc) (remand for determination of whether there was prejudice) *and Commonwealth v. Willis,* 21 Mass.App. 963, 488 N.E.2d 1193 (1986) (no violation).

Thus, one can hardly be overly confident about one's conclusions in this area of the law. Nevertheless, I believe that the holding of the majority fails to consider adequately the purposes of the constitutional right to a speedy trial. I would remand for further proceedings on the issue of prejudice.

In my view, the appropriate method of applying the balancing test of *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) is to examine the four factors in light of the interests of the defendant protected by the right to a speedy trial. The less those interests have been prejudiced, the greater must be the state's indifference to those interests for there to be a violation of the constitutional right. *Cf. Commonwealth v. Willis,* 488 N.E.2d at 1194–95 (determine whether constitutional right has been violated by examining whether "(1) the conduct of the prosecuting attorney in bringing the defendant to trial has been unreasonably lacking in diligence and (2) this conduct on the part of the prosecuting attorney has resulted in prejudice to the defendant.").

The state's indifference to the right can be assessed by examining the three factors of: (1) length of the delay, (2) reason for the delay, and (3) defendant's assertion of the right. (One should not forget, however, that these three factors may also be relevant in assessing the extent to which the defendant's interests have been prejudiced.) For example, a reason for delay may not seem too egregious until the delay is extensive. Failure to proceed due to a paper-work error is less justifiable as time goes on, because the state has a responsibility to review cases periodically to see whether they can be brought promptly to trial. During a review the error ordinarily should be corrected. Similarly, negligent delay becomes substantially less tolerable if it occurs after a defendant has declared a desire to proceed to trial.

The interests of defendants that are protected by the constitutional right have been described in various ways. The United States Supreme Court has identified the purposes of the right to a speedy trial as being "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell,* 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966). *Accord United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971). *Smith v. Hooey,* 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969) noted a particular type of "oppressive incarceration" for a defendant already in prison on other charges while awaiting trial. Such a prisoner not only may lose the opportunity to serve sentences that are at least partially

concurrent, but also "the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened * * * *" *Id.* at 378, 89 S.Ct. at 577.

Must the defendant suffer prejudice to those interests protected by the constitutional right in order to obtain dismissal of charges? *Moore v. Arizona,* 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) has been cited for the proposition that prejudice is not required for there to be a violation of the right to a speedy trial; but the holding of that case does not go so far. The Arizona Supreme Court had ruled that "a showing of prejudice to the defense at trial was essential to establish a federal speedy trial claim." *Id.* at 25, 94 S.Ct. at 189. The United States Supreme Court responded that "prejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings." *Id.* at 26–27, 94 S.Ct. at 190 (footnote omitted). Moore was not tried until almost three years after he was charged and more than two years after he first demanded that the state of Arizona either drop the detainer against him or extradite him from California for trial. The Arizona charge might well have caused him to suffer in his California incarceration the type of oppression described in *Smith v. Hooey.* In addition, for more than two years before trial, Moore had made repeated demands to be tried. As stated in *Barker,* "The defendant's assertion of his speedy trial right ... is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id.,* 407 U.S. at 531–32, 92 S.Ct. at 2192–93. A defendant may be hard-pressed to prove the emotional stresses and other potential prejudice caused by delaying trial, but repeated demands for trial suggest the sincerity of such claims.

To understand the Supreme Court's attitude concerning whether prejudice must be present, it helps to turn to the seminal concurring opinion of Justice Brennan in *Dickey v. Florida,* 398 U.S. 30, 39, 90 S.Ct. 1564, 1569, 26 L.Ed.2d 26 (1970), in which he discusses prejudice at some length. He wrote:

> Finally, what is the role of prejudice in speedy-trial determinations? The discharge of a defendant for denial of a speedy trial is a drastic step, justifiable only when further proceedings against him would harm the interests protected by the Speedy Trial Clause. Thus is it unlikely that a prosecution must be ended simply because the government has delayed unnecessarily, without the agreement of the accused.

Id. at 52, 90 S.Ct. at 1576. Justice Brennan continues, however, by noting that prejudice may be difficult to prove, even though it actually exists. Therefore, he suggests that when the delay is sufficiently long, "there arises a probability of substantial prejudice." *Id.* at 55, 90 S.Ct. at 1577. In other words, a defendant can prevail on a speedy-trial claim by relying on a presumption based on delay as a substitute for an evidentiary showing of prejudice. (Delay is not the only possible source of a presumption of prejudice. As already noted, a demand for speedy trial may itself imply prejudice, at least for the period postdating the demand. A presumption of prejudice may also arise when the defendant shows that the state intentionally delayed trial to gain a tactical advantage or to harass the defendant, because then the state's conduct itself indicates the strong probability of prejudice. *See Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281, 289 (1988) (a showing of bad faith on the part of the police in failing to preserve evidence "indicate[s] that the evidence could form a basis for exonerating the defendant.").)

In light of Justice Brennan's analysis, the key language in *Moore* is that, "*Barker v. Wingo* expressly rejected the notion that *an affirmative demonstration of prejudice* was necessary to prove a denial of the constitutional right to a speedy trial." 414 U.S. at 26, 94 S.Ct. at 189–90 (emphasis added). A defendant who is unable to present evidence of prejudice can still obtain an order of dismissal if one could draw a rational inference from the circumstances of the case that the defendant probably suffered substantial prejudice from improp-

er delay in the proceedings. On the other hand, in the absence of evidence or a rational presumption of substantial prejudice, the court must deny a claim of constitutional deprivation. In particular, to consider a situation that may be present here, a defendant could not prevail under the following circumstances: (a) there is no evidence that the state intentionally delayed to gain a tactical advantage or to harass the defendant; (b) the delay plainly did not substantially reduce the likelihood of an acquittal; and (c) the unnecessary delay could not have caused material collateral consequences to defendant, such as anxiety and injury to reputation (because, for example, defendant was unaware of the charge and the charge was not publicized).

Turning to this case, the district court's finding of no prejudice to defendant would ordinarily preclude dismissal. The prejudice considered by the district court, however, appears to have been only prejudice to the defense at trial. Moreover, the finding of an absence of prejudice may refer only to the absence of an "affirmative showing" of prejudice; the district court may not have fully considered applicable presumptions on which a finding of prejudice might be based. In addition, during the prior hearing on remand in this case, the district court and the parties did not have the benefit of *Zurla v. State,* 109 N.M. 640, 789 P.2d 588 (1990), which overruled some of this court's statements in our earlier opinion ordering remand, to guide their presentations and analysis. Therefore, I would remand once again for a further evidentiary hearing, followed by the district court's weighing of the four *Barker* factors in light of *Zurla.*

Several additional observations may assist the district court on remand. With respect to the prosecution's conduct, one must not confuse the situation here with that in *Zurla.* Although, as the New Mexico Supreme Court stated in *Zurla,* "[B]ureaucratic indifference should weigh more heavily against the state than simple case overload," *id.* at 644, 789 P.2d at 592, the context of that indifference can be of determinative importance. In *Moore v. Arizona; Dickey v. Florida; Smith v. Hooey; Zurla v. State;* and *State v. Harvey,* 85 N.M. 214, 510 P.2d 1085 (Ct.App.1973) the bureaucratic indifference was in response to a specific demand for trial by a defendant who was at the time of the demand incarcerated on other charges. In each of these cases the prosecution, despite the demand, made no effort during an extended period of time to bring the defendant to trial. As the United States Supreme Court has written, "Upon the petitioner's demand, [the state] had a constitutional duty to make a diligent, good-faith effort to bring him before the [county] court for trial." *Smith v. Hooey,* 393 U.S. at 383, 89 S.Ct. at 579. When the prosecutor had actual notice of the defendant's whereabouts and of the defendant's demand for a speedy trial, the prosecutor's inaction (even if not intentional) should weigh much more strongly against the state than in a case such as this, in which defendant's demand for speedy trial was made only two weeks before the date already set for trial. *See Zurla v. State,* 109 N.M. at 644, 789 P.2d at 592 (bureaucratic indifference is of particular weight "when the defendant has attempted to safeguard his rights"). Of course, the court cannot "hold against" defendant his failure to demand a speedy trial prior to his being on notice that the formal charge had been filed, but that is not what I am suggesting. The point is simply that failure by the prosecution to act is significantly more culpable when the prosecution has actual knowledge of the defendant's whereabouts and knowledge of the defendant's desire for a trial. These considerations distinguish this case from *Zurla.*

In evaluating prejudice, I would supplement *Zurla* with the following observations. First, defendant faces the obvious potential prejudice resulting from the inability of the court to sentence him to a term concurrent with the sentence that he was serving on another charge while trial was delayed in this case. The district court may have ignored this possibility because of this court's precedents, rejected by *Zurla,* suggesting that the loss of the opportunity for concurrent sentences should not be considered in weighing the *Barker* factors.

Nevertheless, the unavailability of concurrent sentencing is not necessarily prejudicial to defendant. The district court must look at the specifics of the case. For example, the district court may, in reviewing the nature of the alleged offense, conclude that a concurrent sentence would probably not have been imposed or, conversely, that incarceration for the alleged offense was unlikely. In either of those situations defendant lost little or nothing by the unavailability of concurrent sentences. Even if the district court thought that a concurrent sentence would have been likely, the court could adjust the sentence for the charged offense to reduce or eliminate the resulting prejudice to defendant. The district court could suspend a portion of the sentence or might even be able to reduce the sentence pursuant to NMSA 1978, Section 31-18-15.1 (Repl. Pamp.1987) (permitting reduction of basic sentence by up to one-third because of "mitigating * * * circumstances surrounding the offense"). All such possibilities must be considered in determining the extent of prejudice suffered by defendant from denial of the opportunity to have concurrent sentences. *See Commonwealth v. Willis,* 488 N.E.2d at 1196 n. 5.

Second, the district court must take care in applying two presumptions that could be used to evaluate the prejudice to defendant. As the Supreme Court stated in *Barker,* 407 U.S. at 531-32, 92 S.Ct. at 2192-93.

> The strength of [defendant's] efforts [to assert his constitutional right] will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.

Accord Zurla v. State, 109 N.M. at 644, 789 P.2d at 592. In other words, although it may be difficult to evaluate such matters as the emotional burden on the defendant while awaiting trial and the problems that delay may cause to the defendant's preparation of his defense, the defendant's assertion of his right ordinarily is persuasive evidence that the defendant has calculated that the advantages of having a trial in the near future exceed the disadvantages. When the circumstances of an assertion imply that the defendant has calculated that the benefits of a prompt trial exceed the disadvantages, courts should presume prejudice to the defendant for the period of time after the defendant's demand for a trial. In *Zurla* the delay from the defendant's demand until the date initially set for trial was about fifteen months. In this case, in contrast, there is no basis for a presumption of prejudice, because the circumstances do not suggest any calculation by defendant of the advantages and disadvantages of a prompt trial. By the time defendant raised his speedy-trial claim, the date for trial had already been set.

The other presumption is that resulting from the delay itself. All else being equal, the longer the delay, the greater the chance of prejudice to the defendant. At some point one may even be able to conclude that the delay has been sufficiently long that the defendant probably suffered substantial prejudice. As already noted, Justice Brennan's concurrence in *Dickey* suggested the potential for this approach to evaluating prejudice.

Still, one precaution is necessary in adopting such a presumption. The delay of which Justice Brennan wrote is not the same as the delay necessary to trigger the *Barker* balancing test, even though the latter delay is termed "presumptively prejudicial." *Barker* states:

> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example,

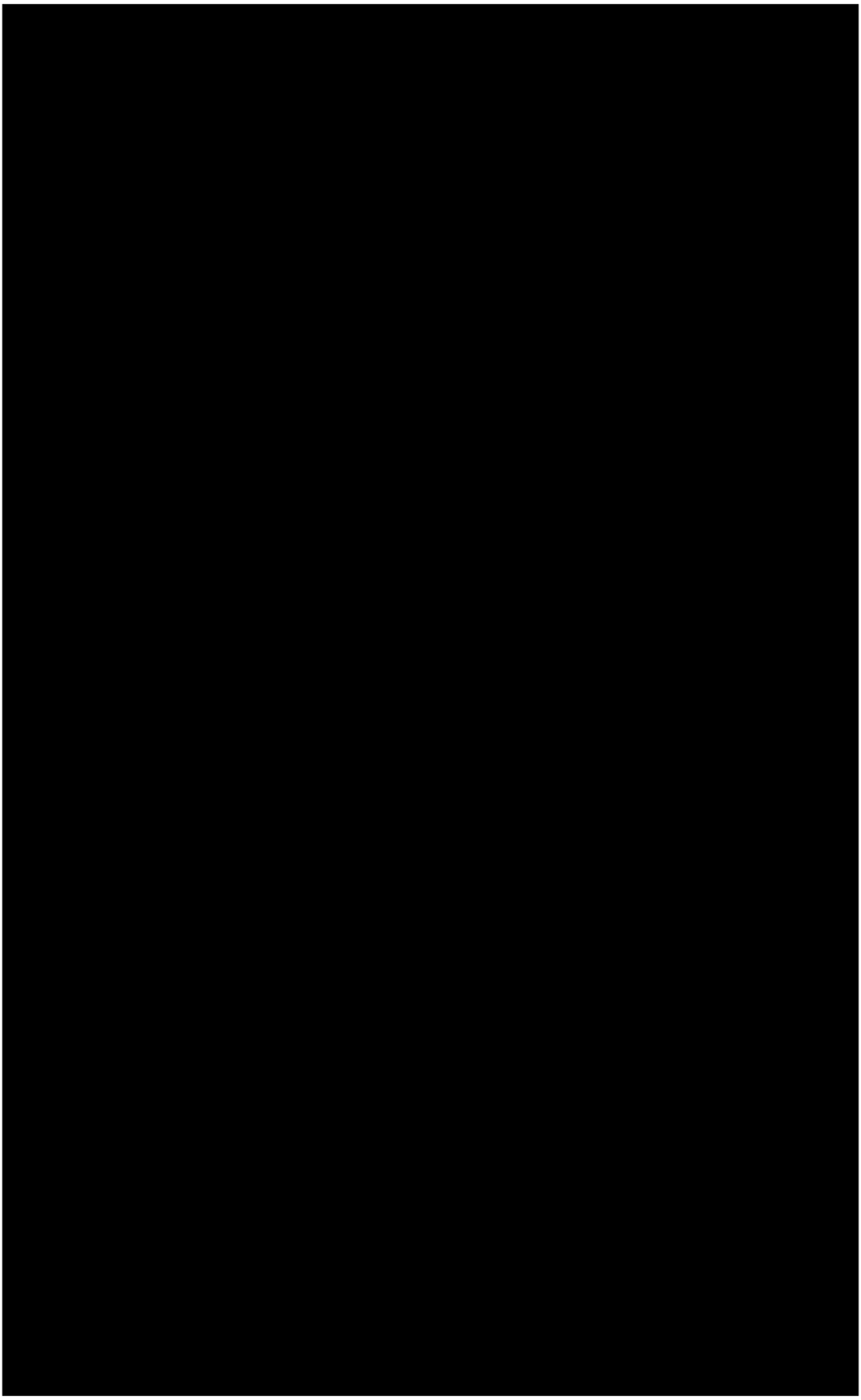
> the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge. [Footnote omitted.]

Id. at 530–31, 92 S.Ct. at 2192.

As the last quoted sentence suggests, a finding that a delay is sufficient to trigger the four-factor analysis is determined more by whether the prosecution should have been able to bring the case to trial within the pertinent time period than by whether it appears that such a delay is likely to have caused actual prejudice. Indeed, no empirical evidence or logic suggests that delay hampers the defense more in a simple case than in a complex case. On the contrary, in a complex case, subtle failures of memory and the disappearance of documents that may have been routinely destroyed may have a much greater impact on the defense than they would in a case of simple assault. Also, there is surely no reason to believe that the emotional stress on defendants is greater for simple cases than for complex ones. *Cf.* 2 W. LaFave & J. Israel, *Criminal Procedure* § 18.2(b), at 405 (1984) ("[I]t makes no sense to say that the more serious the charge the less likely prejudice will arise from a given passage of time."). The only reason why the length of delay triggering the *Barker* analysis should be shorter for simpler cases is that the state needs less time to prepare simpler cases.

Moreover, if "presumptive prejudice" meant "probable prejudice," then a court would not start to apply *Barker's* four-factor analysis until it had determined that the delay was sufficiently long that the defendant probably suffered substantial prejudice. Such a result would excessively limit the application of the right to a speedy trial. After all, a defendant may have actually suffered prejudice even though the existence of prejudice would not be a probable result of the delay in itself.

Thus, the "presumptively prejudicial" delay mentioned in *Barker* is apparently the equivalent of "unreasonable" delay. *See* 2 W. LaFave & J. Israel, *supra,* § 18.2(b). This interpretation produces the satisfactory result that the *Barker* analysis is triggered whenever the delay, given the nature of the case, is beyond the time that the prosecution should reasonably need to bring the case to trial. My impression is that courts have interpreted "presumptively prejudical" delay to mean just such a delay.

As a result, when courts are weighing the prejudice factor in applying *Barker,* they must not make too much of the "presumptive prejudice" to which they refer in determining when a delay triggers the *Barker* analysis. Although presumptively prejudicial delay may be a factor in the court's evaluation of prejudice, *see Zurla v. State,* 109 N.M. at 646, 789 P.2d at 594 ("the presumption of prejudice does not disappear"), the weight of that delay must turn on the specific facts of the case. For example, in this case the lengthy delay between the formal charge and defendant's arrest—although presumptively prejudicial—could not have caused emotional stress to defendant, since he had no knowledge of the charge during that period.

For the above reasons, I would remand to the district court for a supplemental hearing.