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820 P.2d 436

Jose A. ANTILLON, Claimant-Appellee/Cross-Appellant,

v.

NEW MEXICO STATE HIGHWAY DEPARTMENT, Respondent-Appellant/Cross-Appellee.

No. 12449.

Court of Appeals of New Mexico.

July 16, 1991.

Frederick H. Sherman, Sherman & Sherman, P.C., Deming, for claimant-appellee/cross-appellant.

Daniel G. Acosta, Reeves, Chavez, Greenfield, Acosta & Walker, P.A., Las Cruces, for respondent-appellant/cross-appellee.

OPINION

MINZNER, Judge.

Employer appeals and claimant cross-appeals the compensation order of the workers' compensation administration. We discuss (1) whether certain fringe benefits are included in the definition of "wages" under NMSA 1978, Section 52–1–20(A) (Orig. Pamp.), and (2) whether this claim should be resolved under the provisions of the 1986 Act, NMSA 1978, §§ 52–1–1 to –69 (Orig.Pamp. & Cum.Supp.1986), commonly referred to as the Interim Act, or the 1987 Act, NMSA 1978, §§ 52–1–1 to –70 (Repl. Pamp.1987). We reverse the workers' compensation judge (WCJ) on those issues. We address two other issues summarily, and affirm on those issues. Claimant's cross-appeal raises various issues concerning the award of attorney fees made under the 1987 Act. Because we conclude that this claim was actually resolved in part under the Interim Act, we remand to permit the WCJ to clarify his ruling and for redetermination of attorney fees without addressing the issues raised in the cross-appeal. We discuss the relevant facts in connection with our discussion of each issue.

Procedural Issues.

At the outset, we note that claimant contends that the issues raised on appeal were not properly raised in the docketing statement, or were not properly briefed, or, in some cases, were waived below by statements made by employer's attorney during certain telephone conferences. We have reviewed the docketing statement, the brief-in-chief, and the telephone conferences. We hold that the issues argued on appeal were properly raised and preserved below, were adequately raised in the docketing statement, and have been properly briefed.

Whether "Wages" as Used in Section 52–1–20(A) Includes Fringe Benefits.

Claimant was employed by the New Mexico State Highway Department. As a state employee, he received a base salary of $1,180 per month plus certain fringe benefits. The fringe benefits at issue in this appeal are group insurance and retirement benefits available to claimant under the Public Employees' Retirement Act, NMSA 1978, §§ 10–11–1 to –38 (Repl.Pamp.1983 & Cum.Supp.1986), for which employer contributed $28.52 and $32.47 a week, respectively. In addition, claimant received per diem payments for out-of-town travel pursuant to the provisions of the Per Diem and Mileage Act, NMSA 1978, § 10–8–1 to –8 (Repl.Pamp.1983 & Cum.Supp.1986), in an amount that the WCJ found to average $12 a week. The WCJ included all three of these amounts as part of claimant's "wages" under Section 52–1–20(A). We address the group insurance and retirement benefits together, and the per diem separately.

Group Insurance and Retirement Benefits.

Section 52–1–20(A) reads as follows:

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

Both parties focus on whether these benefits are a "similar advantage" to those enumerated in the statute, relying on cases from other jurisdictions and their reading of the leading workers' compensation law treatise. *See* 2 A. Larson, *Workmen's Compensation Law* §§ 60.12(a), (b) (1989) (*Larson's*). In addition, claimant argues that this issue was already decided in his favor in a district court decision subsequently appealed on a different issue. *See Montney v. State ex rel. State Highway Dep't,* 108 N.M. 326, 772 P.2d 360 (Ct.App. 1989) (holding that, in the absence of statutory authorization, PERA disability benefits may not be used to offset compensation due under the workers' compensation act). We assume without deciding that the district court's judgment in *Montney* included the fringe benefits at issue here. *But see Reeves v. Wimberly,* 107 N.M. 231, 236, 755 P.2d 75, 80 (Ct.App.1988) (where appellant attacked trial court ruling on basis of collateral estoppel, it was his burden to bring up record sufficient to review the basis of the attack and where he failed to do so all inferences as to sufficiency of evidence would be resolved in favor of trial court's ruling). Nevertheless, ordinarily the doctrine of collateral estoppel should not bar a state agency from arguing a point of law on the ground that it lost on that issue in prior litigation with a different party. *See Restatement (Second) of Judgments* § 29(7) and comment i (1982). Thus, we conclude employer was not precluded from litigating the fringe benefits issue in this case.

Although both parties claim their position on this issue is supported by *Larson's,* we believe that treatise supports employer's position. Professor Larson notes that the term "wages" generally includes anything of value received as consideration for the work, such as tips, bonuses, commissions, and room and board, constituting real economic gain to the employee, 2 *Larson's* § 60.12(a), but he also notes that fringe benefits similar to the insurance and retirement benefits at issue in this case are not generally included as wages. *Id.,* § 60.12(b). Professor Larson relies on *Morrison–Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs,* 461 U.S. 624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983), in which the United States Supreme Court resolved a similar issue involving the term "wages" as used in a federal statute with language similar to our own. Professor Larson argued the case for petitioners (employer and insurance company) in *Morrison–Knudsen.*

Because this issue is an issue of New Mexico rather than federal law, we do not consider *Morrison–Knudsen* controlling; however, we consider it for whatever persuasive value its reasoning may have. Thus, we discuss only those portions of the opinion we find to be particularly persuasive or germane to this case.

Morrison–Knudsen held that the term "wages" did not include payments made by an employer to union trust funds that purchased, inter alia, group insurance and retirement benefits for workers. The Court based its decision in part on the language of the statute and in part on the policy reasons behind the Act. With respect to the language of the statute, the Court held that the contributions were not a "similar advantage" to board, rent, lodging, or housing provided by the employer. The Court reasoned that the items referred to in the statute, like lodging, have a present value that can be readily converted into a cash equivalent on the basis of market values. By contrast, the value of an employee's interest in group insurance and retirement benefits is not easily converted into a cash equivalent. In particular, the employer's cost in purchasing these benefits does not accurately measure the value of these benefits to the employee. For example, the employee could not take the amount of the employer's contribution and purchase the same benefits for that amount on the open market.

In addition, the Court rejected the claimant's policy argument that inclusion of fringe benefits was required by the remedial nature of the statute. The Court noted that workers' compensation acts are based on a complex legislative balancing of the interests of employers and employees. Thus, for example, employees give up their

rights to sue their employers in tort, which would require them to prove that the employer was negligent, in exchange for the greater certainty of a more limited recovery without proof of negligence. In a similar vein, the Court indicated that for a number of decades the term "wages" had been interpreted in a manner that excluded consideration of fringe benefits. *Id.* at 634–35, 103 S.Ct. at 2050–51. The Court believed that adopting an interpretation that would include fringe benefits in the definition of "wages" would upset this balancing of interests, and was best left to the legislature.

Professor Larson specifically cautions in his treatise against interpreting the term "wage" to cover such fringe benefits. He states:

> Workers' compensation has been in force in the United States for over seventy years, and fringe benefits have been a common feature of American industrial life for most of that period. Millions of compensation benefits have been paid during this time. Whether paid voluntarily or in contested and adjudicated cases, they have always begun with a wage basis calculation that made "wage" mean the "wages" that the worker lives on and not miscellaneous "values" that may or may not someday have a value to him depending on a number of uncontrollable contingencies. Before a single court takes it on itself to say, "We now tell you that, although you didn't know it, you have all been wrongly calculating wage basis in these millions of cases, and so now, after seventy years, we are pleased to announce that we have discovered the true meaning of 'wage' that somehow eluded the rest of you for seven decades," that court would do well to undertake a much more penetrating analysis than is visible in the Circuit Court's opinion in [*Morrison–Knudsen*] of why this revelation was denied to everyone else for so long.

2 *Larson's* § 60.12(b) at 10–635, –636.

A number of other courts that have considered this issue have reached the same result that the United States Supreme Court reached in *Morrison–Knudsen,* although on a different rationale. *See, e.g., Still v. Industrial Comm'n,* 27 Ariz.App. 142, 551 P.2d 591 (1976); *Nelson v. SAIF Corp.,* 302 Or. 463, 731 P.2d 429 (1987). This appears to be the majority position. *See generally Schlotfeld v. Mel's Heating & Air Conditioning,* 233 Neb. 488, 502, 445 N.W.2d 918, 927 (1989) (reviewing authority and adopting majority view as "the more practical and reasonable approach").

We recognize that Florida has rejected the reasoning of *Morrison–Knudsen;* under Florida law, the question of whether fringe benefits are included in the definition of "wage" is controlled by whether the claimant's rights in the particular benefit have vested. *See Sunland Training Center v. Irving,* 384 So.2d 745 (Fla.Dist.Ct. App.1980); *City of Tampa v. Bartley,* 413 So.2d 1280 (Fla.Dist.Ct.App.1982). We also recognize that Colorado, which has a very similar statute to that of New Mexico, has interpreted "wages" to include group health and life insurance coverage, reasoning that the benefits were bargained-for advantages similar to board and lodging, *Murphy v. Ampex Corp.,* 703 P.2d 632 (Colo.Ct.App.1985), and that the Alabama statute, which uses different language than our statute, has been interpreted to include employer-paid health insurance premiums as wages. *Ex parte Murray,* 490 So.2d 1238 (Ala.1986).

Nevertheless, on balance, we are not persuaded that the fringe benefits at issue in this case are sufficiently similar to lodging or meals provided by the employer to be included in the phrase "similar advantages" as used in Section 52–1–20(A). However, because the benefits are not expressly excluded, we also look to the legislative history for any indication that the legislature may have intended to include these benefits in the definition of "wages."

Section 52–1–20 was reenacted by 1965 New Mexico Laws, Chapter 295, Section 13, without change from language of many years standing. *See* NMSA 1941, § 57–912(m)(1). Although by 1965 fringe benefits had been around for some time, we are

aware of no New Mexico authority including them within the meaning of "wages."

The fact that the legislature repeated language that had been interpreted as not including fringe benefits indicates a legislative intent to exclude fringe benefits. The legislature is presumed to know the law. *See Bettini v. City of Las Cruces,* 82 N.M. 633, 485 P.2d 967 (1971) (referring to New Mexico statutory and judicial law); *Tomlinson v. State,* 98 N.M. 213, 214–15, 647 P.2d 415, 416–17 (1982) ("We must presume that the Legislature was aware of [a relevant] common law doctrine ... when it enacted [a statute]"). *See also* N. Singer, *Sutherland Statutory Construction* § 52.01 at 521 (4th ed. 1984) ("Similar statutes of other states comprise a type of extrinsic aid deserving special attention in the process of interpretation"). Therefore, we hold that the PERA and insurance benefits in this case are not within the definition of "wages" in Section 52–1–20.

The benefits must be considered wages if they are part of the "money rate at which the services rendered are recompensed under the contract of hire in force at the time of the accident, either express or implied." *Id.* However, we hold that they are not. The worker is not entitled to receive money in place of the benefits. Further, the Workers' Compensation Act, like the Longshoremen's and Harbor Workers' Compensation Act at issue in *Morrison–Knudsen,* was "designed to strike a balance between the concerns of the * * * workers on the one hand, and their employers on the other." *Id.,* 461 U.S. at 636, 103 S.Ct. at 2052. Such a balance creates reasonable expectations which should be altered only by the legislature. *Id.*

Per Diem.

Employer also challenges the WCJ's determination that claimant's per diem should be considered part of his wage. Employer points out that, by law, a state employee's per diem is reimbursement for travel expenses incurred in performance of the public business. *See* § 10–8–4. Under *Gonzales v. Mountain States Mutual Casualty Co.,* 105 N.M. 100, 728 P.2d 1369 (Ct.App.1986), reimbursement for expenses incurred in performance of the job is not considered part of a worker's wage unless the reimbursement is in excess of the employee's actual expenses and thus constitutes a real economic gain to the employee.

We agree with employer that, as a matter of law, the claimant did not make a sufficient showing on this issue to warrant inclusion of per diem in his wage. Claimant testified that he received an average of $12 or $12.50 a week per diem. This testimony is sufficient to support the finding concerning the amount of per diem. However, under *Gonzales,* claimant was also required to show that the per diem he received was in excess of his actual expenses, and thus constituted a real economic gain, rather than reimbursement for actual expenses. Claimant did not testify one way or the other on this issue. Thus, claimant failed to make a legally sufficient showing that the average amount of per diem should be included in his wage.

Which Act Applies?

Claimant was injured on January 26, 1987. As a result of this injury, he had surgery in April 1987. Both these dates are dates during which the 1986 Act, or Interim Act, was in effect. It is undisputed that claimant did not return to work until March 1988. The WCJ found as fact that "[c]laimant's back condition was aggravated by his return to work" and that the aggravation was a "subsequent and secondary accidental injury." The WCJ also found that for the period from May 23, 1988, the date that claimant underwent a second surgery, until further order, claimant was totally temporarily disabled and the disability "began on May 23, 1988 * * * [and was] the direct and proximate result * * * of the accident of January 26, 1987 and the subsequent aggravation."

The WCJ concluded that the claim, including the issue of attorney fees, was controlled by the 1987 Act, which was the act in effect on May 23, 1988. *See Strickland v. Coca–Cola Bottling Co.,* 107 N.M. 500, 760 P.2d 793 (Ct.App.1988); *Bateman v. Springer Bldg. Materials Corp.,* 108

N.M. 655, 777 P.2d 383 (Ct.App.1989). Employer argues that the Interim Act should apply because by April 1987 claimant had suffered a compensable injury and knew he had suffered a compensable injury. Employer contends that the events in 1988 do not bring claimant's claim under the 1987 Act. "At best," according to employer, "the May 23, 1988 surgery could be considered an aggravation of Appellee's condition and should result in a motion to increase Workers' Compensation benefits rather than commencing a new claim for disability."

We believe that the proper result is somewhere between the positions of the WCJ and employer. Employer seems to assume that NMSA 1978, Section 52–1–56, which permits an increase in disability award when the disability of the worker has become more aggravated, governs all claims when a work-related injury is aggravated during employment. That assumption is not correct. As stated in 3 *Larson's* § 81.31(b), "When it is said that change in condition includes aggravation of the first injury, this must be understood to include aggravation only under circumstances that would not amount to a new compensable injury." Here, the WCJ found that the aggravation of claimant's back condition was a "subsequent and secondary accidental injury." Reading the WCJ's compensation order as a whole, we conclude that the WCJ found that claimant had suffered a new compensable injury in 1988, when the 1987 Act was in effect. Determining when an aggravation of an injury constitutes a new compensable injury is a matter of some difficulty, *see id.*, but we need not address that issue in this appeal because employer's briefs do not appear to raise that issue and, in any case, do not provide a sufficient summary of the pertinent evidence for us to review the matter. *See* SCRA 1986, 12–213(A)(3).

In short, the WCJ's findings establish two compensable injuries, the first being governed by the Interim Act and the second being governed by the 1987 Act. As a consequence, any attorney's fees must be apportioned between the two claims and then awarded in accordance with the Act governing each claim.

In making the apportionment, the WCJ first should determine what benefits claimant would have received had he not suffered a second compensable injury. Next, the WCJ should determine what portion of the benefits obtained as a result of his attorney's efforts is represented by benefits attributable to the first compensable injury. Fees associated with benefits awarded for the first compensable injury are computed under the Interim Act and fees associated with benefits awarded for the second compensable injury are computed under the 1987 Act. Of course, the benefit obtained by worker's attorney is only one factor in determining attorney fees. *See generally Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 695 P.2d 483 (1985) (in setting attorney fee award in workers' compensation case, it is proper for trial court to consider amount of compensation and to use percentage of that award as one factor, along with others, in arriving at proper attorney fees).

Issues addressed summarily.

1. Employer argues that the WCJ abused his discretion in amending the findings and conclusions without providing employer an opportunity to be heard or to submit new evidence. Employer's arguments are based on the assumption that the findings and conclusions entered on March 15, 1990, were a final judgment. They were not. *See Curbello v. Vaughn*, 76 N.M. 687, 417 P.2d 881 (1966). We know of no authority that would prevent the WCJ from amending an order that is not final, and employer has not cited any authority for the proposition. Accordingly, we do not address this issue further. *See In re Adoption of Doe*, 100 N.M. 764, 676 P.2d 1329 (1984).

2. The WCJ found as fact that Dr. Smith, a provider whose authority to treat claimant was not in dispute, referred claimant to Dr. Bieganowski; that the provision of services through several doctors, including Dr. Bieganowski, was adequate and satisfactory; and that the bills for medical

treatment, including the bill for the second surgery, were reasonable and necessary. On appeal, employer contends that the hearing officer erred because the care provided by Dr. Bieganowski was not authorized and was unnecessary.

Employer argues that the care provided was adequate, and therefore employer was not required to provide additional care through Dr. Bieganowski. *See Gregory v. Eastern N.M. Univ.*, 81 N.M. 236, 465 P.2d 515 (Ct.App.1970). However, this argument overlooks the fact that the finding of adequacy was predicated on the inclusion of Dr. Bieganowski's services. Similarly, employer points to conflicting evidence on the issue, specifically Dr. O'Neal's opinion, expressed two days before the surgery, that the surgery was unnecessary, and contends that this case is similar to *Gregory.* However, in *Gregory,* the trial court found as fact that the surgery was unnecessary, and this court affirmed the finding as supported by substantial evidence. Thus, *Gregory* does not require reversal in this case. *See State v. Anderson,* 107 N.M. 165, 754 P.2d 542 (Ct.App.1988) (possibility that another fact-finder would have drawn different inferences on similar facts does not require reversal). We hold that the testimony of Dr. Bieganowski and the evidence concerning the outcome of the second surgery, which confirmed the presence of structural abnormalities, is substantial evidence in the record as a whole to support the finding. *See Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct.App.1988). We do not address employer's arguments concerning Dr. Bieganowski's authorization to perform the surgery because, in light of the other findings, the issue would not change the result. *See Wright v. Brem,* 81 N.M. 410, 467 P.2d 736 (Ct.App.1970).

Cross-Appeal.

Claimant's cross-appeal raises various issues concerning the award of attorney fees in this case. All the issues are based on the assumption that the 1987 Act applies to the attorney fee issues. In view of our disposition, we do not address claimant's arguments involving the 1987 Act. Instead, we direct the WCJ to vacate the findings and conclusions previously entered on this issue, and redetermine the issue of attorney fees.

Conclusion.

The compensation order is reversed. This case is remanded to the workers' compensation administration with instructions that the compensation order previously entered be vacated, and new findings of fact and conclusions of law not inconsistent with this opinion be entered on both the merits of the claim and claimant's entitlement to attorney fees. The WCJ may consider the services of claimant's counsel on appeal in awarding attorney fees on remand.

IT IS SO ORDERED.

HARTZ and CHAVEZ, JJ., concur.

820 P.2d 1323

GOLDEN CONE CONCEPTS, INC., a New Mexico corporation, d/b/a Pam's Ice Cream, Plaintiff–Appellee,

v.

VILLA LINDA MALL, LTD., a New Mexico limited partnership; Villa Linda Mall Company, a Texas limited partnership; and Herring Marathon Group, Inc., a Delaware corporation, Defendants–Appellants.

No. 19367.

Supreme Court of New Mexico.

Nov. 21, 1991.

Rehearing Denied Dec. 13, 1991.

Sutin, Thayer & Browne, Ronald E. Segel, Mary E. McDonald, Albuquerque, for defendants-appellants.

Roth, VanAmberg, Gross & Rogers, F. Joel Roth, Santa Fe, for plaintiff-appellee.

OPINION

FRANCHINI, Justice.

We have granted appellee's motion for rehearing. The opinion filed September 24, 1991, is hereby withdrawn, and this opinion is substituted therefore. Defendant below, Villa Linda Mall (Mall), in Santa Fe, New Mexico, celebrated its grand opening on July 31, 1985. In October of that year, plaintiff Golden Cone Concepts, Inc. (Golden Cone) signed a ten-year lease for space in the Mall's food court. Golden Cone operated an ice cream business for four months before filing suit against the Mall to rescind the lease and recover damages.[1] Following a bench trial[2], the district court rescinded and canceled the lease, awarded $105,723.00 in restitutionary special damages, $22,000.00 in attorney fees, and $1,190.77 in costs. In addition, the court awarded $50,000.00 in punitive damages based upon the court's conclusion that the Mall committed fraud, negligent misrepresentation, and constructive fraud upon Golden Cone in executing the lease. The Mall's counterclaim for rent was dismissed by the district court. We affirm in part and reverse in part.

Prior to executing the lease, the parties held many meetings, discussions, and negotiations concerning the food court facilities and lease terms. The district court entered numerous findings of fact regarding representations made to the Golden Cone principals by the Mall's leasing agent and marketing director, concerning the planning and development of the mall, past development successes, the trade area and "regional mall" idea, the food court concept, location of the ice cream business within the mall in relation to the movie theater, other prospective food court tenants including national fast food chains, and projected gross annual sales for the ice cream busi-

1. Golden Cone's complaint alleged six counts—three based upon rescission of the lease and three seeking compensatory damages for alleged fraud, negligent misrepresentation and constructive fraud. The court granted the Mall's motion to compel an election of remedies with Golden Cone electing to pursue the remedy of rescission. *See Smith v. Galio,* 95 N.M. 4, 8, 617 P.2d 1325, 1329 (Ct.App.1980) (when one remedy depends upon affirmance of a contract and another remedy depends upon the opposite, the remedies are inconsistent and the party seeking relief must elect one of them).

2. Rescission is an equitable remedy to be tried by the court without a jury. SCRA 1986, 13-814 committee commentary.

ness based on the agent's knowledge of sales of other food vendors. The leasing agent assured Golden Cone that it would be the only ice cream business in the food court and that it could remain open past 9:00 p.m. to serve late movie goers.

The district court also found that Golden Cone's reliance on the representations led to its willingness to pay high rent, make leasehold improvements, and purchase equipment. Golden Cone's gross sales and the number of customers visiting the Mall were below the projections made by the Mall's agents. After closing its business Golden Cone owed rent and other charges to the Mall in the amount of $10,939.32. The Mall relet the premises as of December 1, 1987.

The following issues are raised on appeal:

(1) Whether the district court erred in allowing Golden Cone to proceed on its claims of fraud, negligent misrepresentation, and constructive fraud in light of an integration and exculpatory clause in Article 33 of the lease;

(2) Whether the district court erred in ruling that the representations concerning projected revenues were actionable as a matter of law;

(3) Whether nondisclosure of complaints of low mall traffic is a sufficient basis upon which to rescind the lease;

(4) Whether substantial evidence exists to support the findings of fact regarding representations regarding the identity of other food court tenants, traffic flow at the mall, the role of a food court, and Golden Cone's justifiable reliance upon representation concerning projected revenues;

(5) Whether the court erred in dismissing the Mall's counterclaim for unpaid rent;

(6) Whether the judgment amount is consistent with the court's finding of an offset for "minimum annual rental and other charges not paid" during Golden Cone's occupancy; and

(7) Whether substantial evidence supports the awards of punitive damages and attorney fees to Golden Cone.

LEASE PROVISION

The Mall asserts the following provision in the lease bars the misrepresentation claims made by Golden Cone:

> It is understood and agreed by Tenant that Landlord and Landlord's agents have made no representations or promises with respect to the leased premises or the making or entry into this lease, except as in this lease expressly set forth, and that no claim or liability, or cause for termination, shall be asserted by Tenant against Landlord for, and Landlord shall not be liable by reason of, the breach of any representations or promises not expressly stated in this lease.

With regard to this provision, Golden Cone contends that the exculpatory clause argument by the Mall is being raised for the first time on appeal. The district court, however, entered a finding of fact relating to the lease provision, identical to the Mall's requested finding, stating:

> The attorney for [Golden Cone] specifically brought to [its] attention the provisions of Article 33 of the lease which states, among other things, that no representations have been made to the tenant by the landlord unless specifically set forth in the lease.

The finding demonstrates that the provision was brought to the court's attention and was considered before it decided to rescind the lease. Additionally, in New Mexico exculpatory clauses do not preclude liability. *Western States Mechanical Contractors, Inc. v. Sandia Corp.*, 110 N.M. 676, 798 P.2d 1062 (Ct.App.), *cert. denied*, 110 N.M. 653, 798 P.2d 1039 (1990).

> Where one party to the contract has perpetrated a fraud upon the other, by means of which the latter was induced to enter into the contract, [one] cannot be precluded from seeking redress by a provision inserted in the contract by the party perpetrating the fraud, designed to shut the mouth of the adverse party as to such fraudulent representations which led up to the making of the contract. And this is true, whether the action be

for rescission of the contract or for damages for deceit.

Berrendo Irrigated Farms Co. v. Jacobs, 23 N.M. 290, 296, 168 P. 483, 484 (1917). After the district court ordered Golden Cone to elect its remedy, it correctly permitted Golden Cone to proceed on its claims despite the language in Article 33 of the lease.

REPRESENTATIONS OF PROJECTED REVENUES

The district court found that the Mall's leasing agent represented to Golden Cone that its gross sales in the first year of business would be $300,000.00. This statement was found to be reckless and misleading and that Golden Cone justifiably relied thereon in entering into the lease. The court concluded that the representation was one of fact rather than opinion, justifiably relied upon by Golden Cone, which gave rise to the right to rescind the lease.

We disagree with the Mall's contention that the court erred as a matter of law in its ruling that fraud could be premised upon promises or conjectures as to future acts or events. When a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them in a manner most favorable to the prevailing party, indulging all reasonable inferences in support of the court's decision, and disregarding all inferences or evidence to the contrary. *Texas Nat'l Theatres, Inc. v. City of Albuquerque,* 97 N.M. 282, 639 P.2d 569 (1982).

Unlike the circumstances presented by this case, the Mall's reliance on *Berrendo* and those cases cited from other jurisdictions are distinguishable in that they involved the sales of existing businesses with representations made by the seller concerning future income, rather than representations concerning projected revenues for a new business enterprise under circumstances such as these. *Register v. Roberson Construction Co.,* 106 N.M. 243, 741 P.2d 1364 (1987), stated the following on promises concerning future events to support an action for fraud:

> While it is true that an action for fraud will ordinarily not lie as to a pattern of conduct based on promises that future events will take place, there are nonetheless the following well-established exceptions to this rule ... where the promises are based on contrary facts peculiarly within the promisor's knowledge, or where the promise is based on a concealment of known facts. Further, if the promise as to future events is part of an overall pattern designed to lead a party to act to his/her detriment, and in such a way as harmfully to alter a legal right possessed by the party, then promises as to future actions will support an action for fraud, especially in a situation where the defendant states an opinion or belief as to future occurrences which are shown to have had no support by the facts at the time the opinions or beliefs were given.

Id. at 246, 741 P.2d at 1367 (citations omitted). Accordingly, the district court was correct to permit the representations of projected revenues to serve as a basis for Golden Cone's claims.

NONDISCLOSURE AS A BASIS FOR RESCISSION

The Mall claims that nondisclosure to Golden Cone of complaints of low mall traffic is insufficient as a matter of law to rescind the lease. The uncontested finding of fact, however, that the Mall had a pattern of conduct of gaining prospective tenants' confidence, triggered the Mall's duty to disclose information about low levels of mall traffic under *R.A. Peck, Inc. v. Liberty Federal Savings Bank,* 108 N.M. 84, 766 P.2d 928 (Ct.App.1988).

Whether a duty exists is generally a question of law for the trial court to decide. *Schear v. Board of County Comm'rs,* 101 N.M. 671, 687 P.2d 728 (1984). Several types of relationships between parties give rise to the duty to disclose—one being where it appears that one or each of the parties to the contract expressly reposes a trust and confidence in the other. *Peck,* 108 N.M. at 89, 766 P.2d at 933. Other findings of fact entered by the court indicate that the Mall had received reports

from several food vendors regarding lack of traffic before signing the lease with Golden Cone. The court found that:

> Prior to [Golden Cone] signing its lease, the [Mall] had already received complaints from a food court tenant about the lack of customers in the Mall and food court, which they did not tell [Golden Cone.] While [Golden Cone] continued to construct its leasehold space and purchase equipment, the [Mall was] receiving many complaints from various food court tenants and other tenants at the Mall about the lack;ack [sic] of customers coming to the Mall and low gross sales, which they did not tell [Golden Cone].

One month after opening, the Mall offered Golden Cone rent relief due to a lack of customers. As found by the court, Golden Cone "was shocked to find out that [the Mall] had been receiving complaints about the lack of customers and low sales before it had signed the lease and during the construction of its leasehold space and that the information had not been told to [Golden Cone]." As discussed in the following section, the owners of Golden Cone were newcomers to the food vending business, and, where traffic flow information was peculiarly within the Mall's knowledge, a continuing duty on the part of the Mall existed to disclose these material facts to the prospective lessee. Therefore, under these circumstances, nondisclosure was a proper basis for rescission.

SUBSTANTIAL EVIDENCE ISSUES

The Mall alleges that Golden Cone offered no substantial evidence of misrepresentations or justifiable reliance. The Mall also challenges the punitive damages award, which will be discussed later in this opinion, and alleges conflict between the court's findings and its conclusion that the Mall committed negligent misrepresentation, constructive fraud, and fraud against Golden Cone. Our review of the record proper and proceedings indicate that substantial evidence exists to support the court's findings of negligent misrepresentation, constructive fraud and fraud based upon the representations made and nondisclosure of facts concerning traffic at the Mall.

"A negligent misrepresentation is one where the speaker has no reasonable ground for believing that the statement made was true." SCRA 1986, 13–819. The degree of proof required of a party asserting negligent misrepresentation is a preponderance of the evidence. *State ex rel. Nichols v. Safeco Ins. Co.*, 100 N.M. 440, 671 P.2d 1151 (Ct.App.), *cert. denied*, 100 N.M. 327, 670 P.2d 581 (1983). Negligent misrepresentation is grounded in negligence rather than an intent to deceive. *Id.* The district court's findings that the principals of Golden Cone "had no retail operating experience with shopping malls," that the representations made by the Mall's agents concerning daily car traffic, national food chains, and the food court's function as an anchor store encompassed information only within its scope of knowledge, and that the Golden Cone principals were justified in their reliance thereon, all are supported by substantial evidence and support the court's conclusion of negligent misrepresentation.

Breach of a legal or equitable duty is constructive fraud and it is not necessary to prove actual dishonesty of purpose nor intent to deceive. *Archuleta v. Kopp*, 90 N.M. 273, 276, 562 P.2d 834, 837 (Ct.App.) *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977). A finding of constructive fraud need not be based upon a fiduciary relationship between the parties, as constructive fraud is defined as "acts contrary to public policy, to sound morals, to the provisions of a statute, etc., however honest the intention with which they may have been performed." *Wolf & Klar Cos. v. Garner*, 101 N.M. 116, 118, 679 P.2d 258, 260 (1984). Although not required as proof of a claim of constructive fraud, several of the court's findings indicate that the representations at issue were made with the intent to deceive. Another uncontested finding refers to the Mall's pattern of conduct of making representations for the purpose of gaining confidence of prospective tenants and inducing them into entering a lease contrary to equitable principles of

fairness, justice, and right dealing that dominate all commercial practices and dealings. *See Newman v. Basin Motor Co.*, 98 N.M. 39, 644 P.2d 553 (Ct.App.1982).

A successful fraud claim must prove a misrepresentation of fact, known by the maker to be untrue, made with the intent to deceive and to induce the other party to act upon it, and upon which the other party relies to his detriment. *See Poorbaugh v. Mullen*, 96 N.M. 598, 601, 633 P.2d 706, 709 (Ct.App.1981) (*Poorbaugh I*). Though each element of fraud must be shown by clear and convincing evidence, if disputed, a reviewing court will resolve all conflicting evidence in favor of the prevailing party. *Poorbaugh v. Mullen*, 99 N.M. 11, 653 P.2d 511 (Ct.App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982) (*Poorbaugh II*). On appeal, our duty is to liberally construe the trial court's findings in order to sustain a judgment. *Arnold v. Ford Motor Co.*, 90 N.M. 549, 566 P.2d 98 (1977). Based upon our review of the record, and as discussed above, we find that the required level of proof was established and the evidence supports the court's findings of fraud by representations and nondisclosure.

The Mall also challenges the court's findings that Golden Cone justifiably relied upon the representations regarding projected revenues of $300,000.00 per year. Our review of the record, as well as the unchallenged findings of fact, support the court's findings on this point. The principals of Golden Cone had never operated a business in a food court of a shopping mall and were entitled to rely on the Mall's representations regarding material facts peculiar to this type of location. *See Ledbetter v. Webb*, 103 N.M. 597, 602, 711 P.2d 874, 879 (1985). Misrepresentation of a material fact, even if innocently made, will entitle the party who has justifiably relied thereon to rescind the contract. *Prudential Ins. Co. v. Anaya*, 78 N.M. 101, 428 P.2d 640 (1967). Ordinarily the question of materiality is one of fact. *Modisette v. Foundation Reserve Ins. Co.*, 77 N.M. 661, 427 P.2d 21 (1967). The finding of reliance upon the Mall's representation of projected revenues is supported by substantial evidence.

DISMISSAL OF COUNTERCLAIM

The Mall grounds its argument that it is entitled to judgment on its counterclaim for unpaid rent upon the premise that the lease was enforceable and not subject to rescission. Based upon all of the above, however, we find no abuse of discretion by the district court and affirm the dismissal of the counterclaim.

OFFSET OF JUDGMENT

The evidence supports the Mall's claim that the court's judgment failed to incorporate the finding of fact that "[a]ny rescission damages will be offset by $10,939.32." Accordingly, we remand with instruction to reduce the restitutionary special damages by this amount. *See Mendez v. Southwest Community Health Servs.*, 104 N.M. 608, 612, 725 P.2d 584, 588 (Ct. App.), *cert. quashed*, 104 N.M. 632, 725 P.2d 832 (1986) (when finding conflicts with conclusion or judgment, finding will prevail as long as it is supported by substantial evidence).

PUNITIVE DAMAGES

The district court awarded punitive damages based on the reckless or grossly negligent acts of the Mall. The court found that representations made by the Mall concerning projected revenues and car counts were made recklessly with the intent to deceive and the representations made concerning national chain food vendors were untrue and made with the intent to deceive. As to the representation the food court would serve the same as an anchor store, the district court found the statement to be recklessly made and misleading. The Mall argues that the court made no specific findings of fact of gross negligence and further claims that the award of punitive damages is not supported by substantial evidence.

We stated in *Romero v. Mervyn's*, 109 N.M. 249, 784 P.2d 992 (1989), that "punitive damages may be recovered for breach of contract when the defendant's conduct was malicious, fraudulent, oppres-

sive, or committed recklessly with a wanton disregard for plaintiff's rights." *Id.* at 255, 784 P.2d at 998. Any of the listed terms, standing alone, will support an award of punitive damages. *Id.* The substantial evidence that supports the district court's finding of fraud, as stated herein, also supports the court's finding of intentional deceit because intentional deceit is one of the elements of fraud. *See Poorbaugh I,* 96 N.M. at 601, 633 P.2d at 709. In addition, there is substantial evidence to support the trial court's findings as to the Mall's reckless conduct. Accordingly, we affirm the district court's award of punitive damages.

ATTORNEY FEES

We reverse the court's award of attorney fees. Rescission of the lease, which contained a provision for attorney fees, precluded any basis for such an award. Absent a specially authorizing statute or agreement, each party to a lawsuit bears its own attorney fees. *First Nat'l Bank of Clovis v. Diane, Inc.,* 102 N.M. 548, 698 P.2d 5 (Ct.App.1985). The trial court incorrectly relied upon the lease provision in making its awards, and, accordingly, we reverse.

Based upon the above, the judgment is affirmed in part, reversed in part, and remanded to the district court for entry of judgment consistent with this opinion.

IT IS SO ORDERED.

RANSOM, C.J., and BACA, J., concur.

[redacted]

821 P.2d 355

Charles H. LENZ, Plaintiff-Appellee,

v.

Chris CHALAMIDAS, Defendant-Appellant.

No. 19625.

Supreme Court of New Mexico.

Dec. 3, 1991.

Carl Schmidt, Albuquerque, for defendant-appellant.

Kemp, Smith, Duncan & Hammond, John P. Eastham, Alan Hall, Albuquerque, for plaintiff-appellee.

OPINION

FRANCHINI, Justice.

This appeal calls on us to consider once again the trial court's award of attorney fees pursuant to NMSA 1978, Section 48–2–14 (Repl.Pamp.1987). The original action underlying this appeal was for foreclosure on a residence pursuant to a materialmen's lien. The plaintiff, contractor Lenz, prevailed and was awarded damages of $13,364.82 and attorney fees in the amount of $26,268.03. We considered that initial award of attorney fees in *Lenz v. Chalamidas,* 109 N.M. 113, 782 P.2d 85 (1989) (*Lenz I*), and found it necessary to remand for a new trial on attorney fees in light of the trial court's failure to make findings of fact and conclusions of law regarding fees. *Id.* at 119, 782 P.2d at 91. We now consider the result of the remand proceedings in which the trial court reduced the original fee award to $15,116.00; awarded $1,000.00 for fees incurred following the jury verdict for services related to foreclosure, setting an appeal bond, and prior attorney fee hearings; and awarded an additional $1,500.00 for the remand proceedings, for a total award of $17,616.00. We reverse.

Chalamidas again argues that the trial court abused its discretion in awarding attorney fees. Award of attorney fees rests in the discretion of the trial court and this court will not alter the fee award absent an abuse of discretion. *Montgomery v. Karavas,* 45 N.M. 287, 114 P.2d 776 (1941). Section 48–2–14 empowers the court to award *reasonable* attorney fees in the district and supreme courts in actions to enforce mechanics' and materialmen's liens. "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." *Lenz I,* 109 N.M. at 118, 782 P.2d at 90. *Lenz I* formulates the factors and criteria to be considered in arriving at a reasonable award of attorney fees under Section 48–2–14, including the five factors that have been utilized to determine the reasonableness of attorney fees between client and attorney.[1] While these five factors provide guidance in arriving at a fee under Section 48–2–14, we again stress the proposition that the award of attorney fees is a question distinct from the determination of a fee between an attorney and client. Application of these factors, together with the other considerations articulated in *Lenz I,* is not a rigid, mechanical process, and the weight accorded each factor will vary from case to case. We also emphasize that in the context of lien litigation, this court has declined "to adopt time spent and quality of representation as determinative criteria in the allowance of attorney fees as costs in the successful enforcement of liens." *Ulibarri v. Gee,* 106 N.M. 637, 639, 748 P.2d 10, 12 (1987).

In the remand proceedings, the trial court received exhibits prepared by the plaintiff's attorney that included time logs and summaries of those logs. Based on hourly billings, the total attorney fees requested were $24,295.00. The trial court determined its award by identifying questionable portions of the hourly billings and reducing the total fee requested accordingly. While the trial court refers to the other factors delineated in *Lenz I,* its method of determining fees is susceptible to being based on inflated hourly billings and in any event relies on time spent as the determinative criteria for the award. Allowing time spent to be the pervasive factor in awarding attorney fees is apt to result in rewarding waste of time and resources. While we realize that compensation based on hourly rates is often a necessary factor in determining attorney fees, time spent is not always synonymous with the amount of time reasonably required to provide servic-

1. "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." *Lenz I,* 109 N.M. at 118, 782 P.2d at 90.

es for which compensation is to be afforded. Rather than rely on time spent, the district court should determine the time reasonably necessary to provide the services required in a particular case, apply the remaining factors articulated in *Lenz I,* and ultimately arrive at a reasonable fee. The trial court's emphasis on time spent in determining the fee at issue here resulted in an excessive award and constitutes an abuse of discretion.

We are mindful that the job of determining what constitutes a reasonable fee belongs to the trial court and prefer to remand these matters for the trial court to make that determination as we did in *Lenz I.* However, we now have a more fully developed record before us, and in the interest of judicial economy deem it prudent to settle this matter. "The allowance of a particular fee may be reduced if it is determined to be unreasonable or excessive." *Thompson Drilling, Inc. v. Romig,* 105 N.M. 701, 706, 736 P.2d 979, 984 (1987).

The record reveals relatively straightforward proceedings below. Pleadings were uncomplicated and there was minimal motion practice. The facts were controverted but the applicable law was well settled. The only novel or difficult issue litigated was the admission of evidence of defendant's prior criminal gambling convictions as an attack on his credibility. Plaintiff's lead attorney had not previously litigated a lien foreclosure action and was trying her first case to a jury. However, there is evidence of her good reputation in the community and skill as an attorney. While her hourly fee was not inappropriate, her inexperience before a jury and in this type of action may well have required greater expenditures of time than would be reasonably required and for which compensation should be afforded. Under these circumstances, we conclude an attorney fee award of $8,000.00 for all proceedings in this matter is reasonable. Interest on this award will accrue from the date of the original judgment. *Ulibarri v. Gee,* 107 N.M. 768, 764 P.2d 1326 (1988) (*Ulibarri II*).

Accordingly, we reverse the district court's award of attorney fees and remand for entry of a judgment consistent with this opinion. The parties will bear their own costs on appeal.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

821 P.2d 357

AMREP SOUTHWEST, INC., a New Mexico Corporation, Plaintiff–Appellee,

v.

The TOWN OF BERNALILLO, a Municipal Corporation, Defendant–Appellant.

The TOWN OF BERNALILLO, a Municipal Corporation, Plaintiff–Appellant,

v.

CITY OF RIO RANCHO, a Municipal Corporation, Defendant–Appellee.

In the Matter of an Appeal from the Ruling of the Municipal Boundary Commission on the Petition of the CITY OF RIO RANCHO, SANDOVAL COUNTY, New Mexico, for the Annexation of Certain Lands.

No. 13084.

Court of Appeals of New Mexico.

Sept. 25, 1991.

Certiorari Denied Nov. 5, 1991.

Matthew M. Spangler, Lastrapes & Spangler, Rio Rancho, for plaintiff-appellee Amrep Southwest, Inc.

George H. Perez, Bernalillo, for defendant-appellant, plaintiff-appellant Town of Bernalillo.

John A. Aragon, Coppler and Aragon, Santa Fe, for defendant-appellee City of Rio Rancho.

OPINION

HARTZ, Judge.

The Town of Bernalillo appeals a district court order partially affirming and partially reversing a decision of the Municipal Boundary Commission. The calendar notice proposed summary affirmance. All parties have timely responded to the calendar notice. Not persuaded by Bernalillo's arguments, we affirm. We apply the doctrine of prior jurisdiction to resolve a conflict between inconsistent annexation proceedings.

Bernalillo and the City of Rio Rancho both desire to annex approximately 500 acres north of Rio Rancho and west of Bernalillo. We must consider proceedings initiated by three different annexation petitions. The disputed 500 acres is included within the land described in each petition.

On November 6, 1985, Rio Rancho made the first move by submitting a petition with the boundary commission for annexation of 11,455 acres. The commission accepted the petition and on November 21 published notice that a hearing on the petition would be held on January 2, 1986. In response to Rio Rancho's action, more than 120 landowners signed a petition to annex to Bernalillo a parcel including their lands. This petition was filed with the Bernalillo town clerk on November 23. Amrep Southwest, Inc., the owner of substantial acreage surrounding Rio Rancho, had been forewarned that such a petition was being prepared. On November 21 Amrep had petitioned Rio Rancho to annex certain territory and requested the mayor to declare an emergency so that the annexation could be accomplished before Bernalillo annexed any portion of the territory. In the absence of an emergency declared by the mayor "to be an immediate danger to the public health, safety and welfare of the municipality," two weeks' published notice would be required before the annexation ordinance could be considered by the governing body of the municipality. NMSA 1978, § 3–17–3(A) (Repl.Pamp.1985).

The Rio Rancho mayor declared an emergency and the annexation ordinance was adopted by the city governing body at 8:00

a.m. on November 23. Bernalillo, however, had already acted. At 3:00 a.m. the same day, the landowners' petition had been received by the Bernalillo town clerk and the town board of trustees had adopted its annexation ordinance a few minutes thereafter. On December 9, 1985, the Rio Rancho governing body adopted a second ordinance approving the same Amrep annexation petition; the second ordinance apparently was adopted because of concern that the emergency had not been properly declared.

The boundary commission conducted hearings on Rio Rancho's petition on January 2 and February 1, 1986. Because of a possible conflict of interest, one of the commissioners did not participate. The two remaining commissioners found that the area described in the petition was contiguous to Rio Rancho and that Rio Rancho may provide services to the area.[1] Acting Chairman Floyd Kezle voted in favor of annexation of the entire area described in the petition. Commissioner John Balagna agreed, except for the disputed 500 acres. He expressed concern about jurisdiction and pending litigation but concluded, "[I]f the courts finds [sic] the conflict of jurisdiction question, which presently exists, no longer viable, I believe the order should be written to annex (the disputed area) to Rio Rancho." The commission's order stated that the disputed area "not be annexed to the City of Rio Rancho at this time."

Amrep petitioned Sandoval County district court for review of Bernalillo's annexation ordinance and petitioned Santa Fe County district court for review of the boundary commission's denial of annexation of the disputed area. Bernalillo petitioned Sandoval County district court for review of Rio Rancho's annexation ordinances. The three court proceedings were consolidated in Santa Fe County district court. The district court held that the commission had priority of jurisdiction over the annexation. It ordered the commission to approve annexation since it had found that the land was contiguous to Rio Rancho and that Rio Rancho may provide services. *See* NMSA 1978, § 3–7–15(B) (Repl.Pamp.1987).

We affirm the ruling of the district court. After Rio Rancho filed its petition with the boundary commission, the commission acquired jurisdiction over the annexation issue. Thereafter, the commission's decision-making process was entitled to priority. Neither the City of Rio Rancho nor the Town of Bernalillo was authorized to adopt annexation ordinances in competition with the commission. New Mexico has long followed the doctrine of prior jurisdiction to resolve conflicts between courts having overlapping jurisdiction. In *In re Doe,* 98 N.M. 442, 445, 649 P.2d 510, 513 (Ct.App.1982), we wrote, "Simply stated, the court first obtaining jurisdiction retains it as against a court of concurrent jurisdiction in which a similar action is subsequently instituted between the same parties seeking similar remedies involving the same subject matter." The reason for the rule is that it "is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons." *State ex rel. Parsons Mining Co. v. McClure,* 17 N.M. 694, 707, 133 P. 1063, 1067 (1913) (quoting *Farmers' Loan & Trust Co. v. Lake St. Elevated R.R.,* 177 U.S. 51, 61, 20 S.Ct. 564, 568, 44 L.Ed. 667 (1900)).

Bernalillo contends that the doctrine of prior jurisdiction should not apply to annexation proceedings in the absence of a statute adopting the doctrine. To be sure, in at least one decision the doctrine was supported by a statutory codification. *See Borghi v. Board of Supervisors of County of Alameda,* 133 Cal.App.2d 463, 284 P.2d 537 (1955). The California statute, however, merely codified the common-law rule previously recognized in California, *see People v. Town of Corte Madera,* 115 Cal.

1. We note our disagreement with Bernalillo's contention that Commissioner Balagna failed to find that Rio Rancho had established the statutory prerequisites to annexation. Although some language of the opinions, taken out of context, could be so interpreted, any doubt is removed by the statement in Commissioner Balagna's opinion that annexation should be ordered if the courts find that the commission had jurisdiction.

App.2d 32, 251 P.2d 988 (1952), and the commentators appear to be unanimous in stating that the common-law rule applies to annexation proceedings. *See* 2 E. McQuillin, *The Law of Municipal Corporations* § 7.22a (3d ed. 1988); 1 C. Antieau, *Municipal Corporation Law* § 1A.16 (1989); O. Reynolds, Jr., *Handbook of Local Government Law* § 71 (1982). We hold that the doctrine of prior jurisdiction governs annexation disputes in New Mexico. *City of Burlington v. Town of Elon College,* 310 N.C. 723, 314 S.E.2d 534 (1984); *People ex rel. City of Prospect Heights v. Village of Arlington Heights,* 171 Ill.App.3d 766, 121 Ill.Dec. 663, 525 N.E.2d 970 (1988); *In re Appeal of City of Lenexa to Decision of Bd. of County Comm'rs. of Johnson County,* 232 Kan. 568, 657 P.2d 47 (1983). The policy reasons supporting the doctrine's application to judicial proceedings are equally valid in the context of administrative proceedings.

Bernalillo next contends that the doctrine of prior jurisdiction could no longer give precedence to the boundary commission proceeding once the commission declined to order that the disputed territory be annexed to Rio Rancho. We disagree. Perhaps if the boundary commission had ruled on the merits that the disputed territory should not be annexed to Rio Rancho, then we would need to determine whether Rio Rancho or Bernalillo was entitled to the benefit of the doctrine of prior jurisdiction with respect to the ordinance each adopted. *See Landis v. City of Roseburg,* 243 Or. 44, 411 P.2d 282 (1966) (incorporation defeated at election so second municipality may proceed with incorporation); *Town of Clive v. Colby,* 255 Iowa 483, 123 N.W.2d 331 (1963) (after first town found to be incapable of extending services to the area, second municipality can proceed with annexation); *In re Appeal of City of Lenexa to Decision of Bd. of County Comm'rs. of Johnson County* (once board of county commissioners denies city's petition, city's efforts at annexation lose any priority). But that is not what happened here. The opinions of the two members of the commission who sat on the matter show that both believed that the annexation proposed in Rio Rancho's petition met statutory requirements. The only problem was that one commissioner had concerns about whether the commission had jurisdiction to provide for annexation of the disputed 500 acres. His opinion made clear that annexation should be ordered if the courts found jurisdiction in the commission. As we understand his opinion, he simply conditioned annexation on a judicial determination of jurisdiction. Thus, the commission made a decision subject to the result of further judicial proceedings. In substance, the commission approved the annexation of all territory described in Rio Rancho's petition, but stayed annexation of the disputed area pending a judicial determination of the commission's jurisdiction over that matter. We see no reason to carve out an exception to the doctrine of prior jurisdiction in this context.

Finally, Bernalillo contends that there was not substantial evidence to support a determination by the boundary commission that the requirements of Section 3–7–15(A)(2) were satisfied with respect to annexation by Rio Rancho of the disputed area. We reject this contention because Bernalillo has neither shown how it preserved this issue in the district court nor has it set forth the evidence pertinent to the issue. *See Thornton v. Gamble,* 101 N.M. 764, 769, 688 P.2d 1268, 1273 (Ct.App. 1984); SCRA 1986, 12–208(B)(3), (4).

Having decided that the doctrine of prior jurisdiction applies, we need not address the propriety of the declarations of emergency by Rio Rancho and Bernalillo. For the reasons stated above, we affirm the decision of the district court.

IT IS SO ORDERED.

MINZNER and CHAVEZ, JJ., concur.

822 P.2d 121

Wallace O'KELLEY, Petitioner,

v.

STATE of Mexico, Respondent.

No. 19857.

Supreme Court of New Mexico.

Nov. 25, 1991.

Jacquelyn Robins, Chief Public Defender, Hugh W. Dangler, Asst. Appellate Defender, Santa Fe, for petitioner.

Tom Udall, Atty. Gen., William McEuen, Asst. Atty. Gen., Santa Fe, for respondent.

ORDER

WHEREAS, it appearing to the Court that an Order was entered on November 18, 1991, granting the motion of Respondent for rehearing and it further appearing to the Court that the order granting motion for rehearing should be vacated and set aside;

NOW, THEREFORE, IT IS ORDERED that the Order entered herein on November 18, 1991 is hereby vacated and set aside;

IT IS FURTHER ORDERED that the opinion handed down by the Court on September 23, 1991 is hereby withdrawn;

IT IS FURTHER ORDERED that the Order entered herein on June 12, 1991, granting the petition for writ of certiorari is hereby vacated and set aside, and the writ of certiorari heretofore issued in this matter on June 12, 1991 is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 12618, 822 P.2d 122, is hereby returned to the Clerk of the Court of Appeals.

822 P.2d 121

In the Matter of Thomas C. ESQUIBEL An Attorney Suspended from Practice Before the Courts of the State of New Mexico.

No. 20113.

Supreme Court of New Mexico.

Jan. 8, 1992.

Virginia L. Ferrara, Chief Disciplinary Counsel, Albuquerque, for Disciplinary Bd.

Timothy M. Padilla, Albuquerque, for respondent.

DISCIPLINARY PROCEEDING

PER CURIAM.

OPINION

This matter is before the court following disciplinary proceedings conducted pursuant to the Rules Governing Discipline, SCRA 1986, 17-101 to -316 (Repl.Pamp. 1991), in which attorney Thomas C. Esquibel, in accordance with an agreement for discipline by consent, admitted to various violations of the Rules of Professional Conduct, SCRA 1986, 16-101 to -805 (Repl. Pamp.1991). Pursuant to Rule 17-211(B)(1)(a), we adopt the Disciplinary Board's recommendation that the conditional agreement and consent to discipline be accepted and that Esquibel be disbarred pursuant to Rule 17-206(A)(1).

On September 17, 1991, Esquibel was convicted by way of a guilty plea in the District Court for the Thirteenth Judicial District of the State of New Mexico, of the crime of Demanding or Receiving Bribe by Public Officer or Public Employee, a felony offense in violation of NMSA 1978, Section 30-24-2 (Repl.Pamp.1984). On the basis of the conviction, this court summarily suspended Esquibel from the practice of law on October 9, 1991, pursuant to SCRA 1986, 17-207(A)(1) and remanded the matter to the Disciplinary Board for further proceedings.

Formal disciplinary proceedings were initiated by the filing of formal charges against Esquibel on October 21, 1991, alleg-

ing (on the basis of Esquibel's felony conviction) violations of Rules 16–804(B), (C), (D), (F) and (H) of the Rules of Professional Conduct. In the Agreement Not to Contest and Consent to Discipline filed on November 19, 1991, Esquibel agreed that his conduct was violative of Rules 16–804(B), (D) and (H) and that the sanction of disbarment was appropriate under the circumstances.

IT IS THEREFORE ORDERED that Thomas C. Esquibel be and hereby is disbarred from the practice of law pursuant to SCRA 1986, 17–206(A)(1).

IT IS FURTHER ORDERED that Esquibel may file a motion for permission to apply for reinstatement, pursuant to SCRA 1986, 17–214(A), three years from the date of his original summary suspension, provided that he has been fully released from probation as having successfully fulfilled all requirements of the Department of Corrections in connection with the sentence imposed upon him as the result of his felony conviction.

IT IS FURTHER ORDERED that Esquibel's compliance with Rules 17–212 and 17–213 will not be required at this time in view of his having filed the appropriate documents at the time of his original suspension.

IT IS FURTHER ORDERED that this opinion be published in the State Bar of New Mexico *Bar Bulletin* and the *New Mexico Reports.*

No costs were incurred in this action.

IT IS SO ORDERED.

822 P.2d 122

STATE of New Mexico, Plaintiff–Appellant,

v.

Wallace O'KELLEY, Defendant–Appellee.

No. 12618.

Court of Appeals of New Mexico.

April 25, 1991.

Certiorari Granted June 12, 1991.

Certiorari Quashed and Cause Remanded Nov. 25, 1991.

Tom Udall, Atty. Gen., William McEuen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jacquelyn Robins, Chief Public Defender, Hugh W. Dangler, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

MINZNER, Judge.

Defendant was indicted for vehicular homicide and driving while intoxicated. After a trial on both charges, the jury convicted him of driving while intoxicated, but could not agree as to vehicular homicide. The state appeals an order granting defendant's motion to dismiss the charge of homicide by vehicle on the basis of double jeopardy. The sole issue presented on appeal is whether the constitutional prohibition against double jeopardy precludes a retrial of the vehicular homicide charge. We reverse.

FACTS AND PROCEDURAL BACKGROUND.

On November 27, 1989, defendant was charged with the following two-count criminal information: Count I: driving under the influence of intoxicating liquor or recklessly and thereby causing a death (vehicular homicide), contrary to NMSA 1978, Section 66-8-101 (Cum.Supp.1990); and Count II: driving while under the influence of intoxicating liquor or with an impermissible blood alcohol content level, contrary to NMSA 1978, Section 66-8-102 (Cum. Supp.1990).

On May 23, 1990, a jury trial commenced on the charges. The jury was instructed as to both counts charged in the criminal information. In its instructions to the jury, the state dropped the "reckless" language from the vehicular homicide count and relied solely on an explanation of intoxication for defendant's conduct. The jury found defendant guilty of driving while under the influence of intoxicating liquor, as charged in Count II. However, it was unable to reach a verdict under Count I. Accordingly, the trial judge declared a mistrial as to Count I, vehicular homicide, and directed a retrial of Count I.

Before the vehicular homicide charge could be retried, defendant filed a motion to dismiss in which he argued that a retrial would constitute double jeopardy because (1) a retrial would violate the principles set forth in *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), and (2) a conviction of driving while intoxicated is a lesser-included offense of homicide by vehicle. The trial court agreed and granted defendant's motion to dismiss. On appeal, the state contends that the trial court erred in granting defendant's motion to dismiss. We agree.

DISCUSSION.

The fifth amendment to the United States Constitution, applicable to the states through the fourteenth amendment, and Article II, Section 15 of the New Mexico Constitution each contain a clause providing that no person shall be twice put in jeopardy for the same offense. *State v. Hamilton,* 107 N.M. 186, 754 P.2d 857 (Ct.

App.1988). Neither party has argued that on the facts of this case there is any difference in the application of the state and the federal constitutional provisions. For the purposes of this opinion, then, we assume the two clauses require the same analysis and result.

The double jeopardy clause 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.* Jeopardy attaches when the jury is impaneled and sworn to try the case. *See State v. James,* 93 N.M. 605, 603 P.2d 715 (1979). Here, jeopardy has attached as to the charges contained in both counts.

Because jeopardy has attached, the trial court apparently believed that under *Grady* it was required to dismiss the charge on which the jury was unable to agree. We note that the test laid out in *Grady* could be read to bar any future prosecution of the vehicular homicide charge in this case. *See id.,* 495 U.S. at 510, 110 S.Ct. at 2087, 109 L.Ed.2d at 557. However, we conclude that *Grady* was not intended to apply on these facts.

The defendant in *Grady* pled guilty to the misdemeanors of driving while intoxicated and failure to keep to the right of the median. Subsequently, he was indicted and charged with reckless manslaughter, criminally negligent homicide, and third-degree reckless assault. The bill of particulars revealed that the prosecution would rely on three reckless or negligent acts to prove the charges: (1) operating a motor vehicle in an intoxicated condition, (2) failing to keep to the right of the median, and (3) driving at a speed too fast for the weather and road conditions. The defendant moved to dismiss the indictment on statutory and constitutional double jeopardy grounds. Upon review, the Supreme Court held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 521, 110 S.Ct. at 2093, 109 L.Ed.2d at 564. Accordingly, because the state planned to prove the entirety of the conduct for which the defendant was previously convicted to establish the essential elements of the crimes charged in the indictment, the Court held that double jeopardy barred the prosecution.

The facts of this case, however, are distinguishable from those in *Grady.* In *Grady,* the defendant was charged in two separate proceedings. We note the *Grady* Court's admonition that "[w]ith adequate preparation and foresight, the State could have prosecuted [defendant] for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding, thereby avoiding this double jeopardy question." *Id.* at 524, 110 S.Ct. at 2095, 109 L.Ed.2d at 566. *Grady* also indicated that "[s]uccessive prosecutions, whether following acquittals or convictions, raise concerns that extend beyond merely the possibility of an enhanced sentence." *Id.* at 509, 110 S.Ct. at 2086, 109 L.Ed.2d at 556.

In the present case, however, the state initially brought all the charges against defendant in one proceeding. Although the trial court's directive for a retrial and successive prosecution followed a conviction of Count II, such "successive prosecution" resulted from a hung jury and a mistrial on Count I. Accordingly, we can characterize the "successive prosecution" more properly as a "continuing prosecution" of the charges in Count I as initially brought as part of one prosecution. The jury having failed to either acquit or convict, the prosecution has not ended.

There is no basis under New Mexico cases for barring a retrial of the vehicular homicide charge. It is well established under New Mexico case law that a retrial after a mistrial caused by a hung jury does not violate the constitutional prohibition on double jeopardy. *See Cowan v. Davis,* 96 N.M. 69, 628 P.2d 314 (1981); *State v. Wardlow,* 95 N.M. 585, 624 P.2d 527 (1981); *O'Kelly v. State,* 94 N.M. 74, 607 P.2d 612

(1980). In such circumstances, the further proceeding has been viewed as a continuation of the prior one. *See State v. Spillmon,* 89 N.M. 406, 553 P.2d 686 (1976).

Considerations to be balanced against a defendant's interest in avoiding a retrial following a declaration of mistrial are: (1) whether there was manifest necessity for discharge of the first jury, or (2) whether the ends of public justice will be defeated by carrying the first trial to a final verdict. *See State v. De Baca,* 88 N.M. 454, 541 P.2d 634 (Ct.App.1975). The most common form of "manifest necessity" is a mistrial declared by the trial judge following the jury's declaration that it is unable to reach a verdict. *See Oregon v. Kennedy,* 456 U.S. 667, 672, 102 S.Ct. 2083, 2087–88, 72 L.Ed.2d 416 (1982); *see also Arizona v. Washington,* 434 U.S. 497, 509, 98 S.Ct. 824, 832, 54 L.Ed.2d 717 (1978).

> The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country. Instead, without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.

Id. The rule is long standing, having first been articulated by Justice Story, writing for a unanimous court. *See generally Illinois v. Somerville,* 410 U.S. 458, 461–66, 93 S.Ct. 1066, 1069–71, 35 L.Ed.2d 425 (1973) (discussing *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824)). Nothing in *Grady* suggests that it was intended to change this long-standing rule.

We recognize that a central concern underlying the "same conduct" test in *Grady* is that multiple prosecutions permit the state to rehearse its presentation of the proof. *Id.,* 495 U.S. at 518, 110 S.Ct. at 2091–2092, 109 L.Ed.2d at 562. That potential exists in every case that must be retried after a mistrial. Nevertheless, we are not persuaded that the United States Supreme Court meant to modify the long-standing rule of *Perez.* In referring to "successive prosecutions," we believe the Court in fact retained the rule, under which retrial is viewed as a continuation of the prior proceeding.

Moreover, to the extent that defendant argues that his conviction for driving while intoxicated constitutes an "implied acquittal" of vehicular homicide, we disagree. An implied acquittal generally occurs when the jury is instructed to choose between a greater and a lesser offense, and chooses the lesser. "In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal" of the greater offense. *See Green v. United States,* 355 U.S. 184, 190 (1957). The charges in the present case, however, were presented as separate counts, as opposed to lesser-included offenses. *See State v. Castrillo,* 90 N.M. 608, 611, 566 P.2d 1146, 1149 (1977) (the predecessor to SCRA 1986, 5–611(C) allowed retrial for counts upon which the jury cannot agree if the charges are "presented to a jury as separate or alternative counts rather than included offenses"). The jury convicted defendant for driving while intoxicated, but it was deadlocked as to the charge of vehicular homicide.

It is clear from the record that the jury was unable to agree on the highest level of the offense charged, but it did agree that defendant was guilty of a lesser degree of the offense. Neither the express language of the rule nor the case law address this situation. The language in *Castrillo* and other cases stating that "a conviction of a lesser included offense bars further prosecution for the greater offense" might appear to bar reprosecution. *Id.* at 611, 566 P.2d at 1149. However, we think a common sense reading of the rule and of *Castrillo* and its progeny refute this contention. The purpose of the rule is to determine the *highest* level of an offense at which the jury has been unable to agree, and allows reprosecution at that and any lesser level, provided only that the jury has not voted to acquit the defendant at a lesser level. *See* R. 5–611(D). In the present case, the jury was unanimous that

defendant was guilty of DWI. This is not inconsistent with a verdict of guilty of vehicular homicide, and presents no grounds for dismissing that charge. The jury's disagreement on the vehicular homicide charge is therefore, legitimately, the highest level of the charge at which the jury disagreed.

One cannot infer from these facts that the jury found that defendant should be acquitted as to vehicular homicide. Only where the jury is given the full opportunity to return a verdict either on the greater or alternatively on the lesser offense does the doctrine of implied acquittal obtain. *United States v. Reed,* 617 F.Supp. 792 (D.Md. 1985).

CONCLUSION.

We conclude that *Grady* is not applicable when the prosecution initially brings all the charges in one prosecution. We do not believe that the "same conduct" test enunciated in *Grady* is triggered when the successive prosecution is the result of a hung jury. This situation does not imply an acquittal of the charge that was not resolved, does not create an incentive for prosecutorial misconduct and, because it is a continuing jeopardy and not two separate jeopardies, does not create an added risk of conviction. Accordingly, we reverse the trial court's granting of defendant's motion to dismiss and remand the matter for retrial on the vehicular homicide charge. Should defendant be convicted on retrial of vehicular homicide while driving while intoxicated, his sentence for the prior conviction of driving while intoxicated must be vacated on the ground that the lesser offense of driving while intoxicated must be viewed as having merged with the greater offense of vehicular homicide. *See State v. Wiberg,* 107 N.M. 152, 157, 754 P.2d 529, 534 (Ct. App.1988). "The sentence to be vacated is that imposed for the lesser offense[.]" *Id.* at 158, 754 P.2d at 535.

IT IS SO ORDERED.

DONNELLY and BIVINS, JJ., concur.

822 P.2d 126

Charles HYDE and Lucia Hyde, and the Espinoza Road Association, Petitioners–Appellees,

v.

TAOS MUNICIPAL–COUNTY ZONING AUTHORITY and its Members, Michael G. Trujillo, Manuel P. Trujillo, Lawrence C. Gallegos, Espil Montoya; Eloy Jeantete, Mayor, Allen Vigil, Code Administrator, Town of Taos; and Sam Lucero, Jr., Real Party in Interest, Respondents–Appellants.

No. 12462.

Court of Appeals of New Mexico.

Sept. 27, 1991.

Certiorari Denied Nov. 26, 1991.

Stephen Natelson, Natelson & Ross, Taos, for petitioners-appellees.

Bruce A. Kelly, Dennis Manzanares, Taos, for respondents-appellants.

Andres S. Vargas, Taos, for real party in interest.

OPINION

BIVINS, Judge.

Respondents, the Taos Municipal–County Zoning Authority (the TMZA) and Sam Lucero appeal from a district court judgment reversing a decision of the TMZA which had approved a zoning amendment application made by Lucero for a mobile home planned unit development (the PUD). They raise three issues: (1) whether petitioners had standing to challenge the decision of the TMZA; (2) whether the district court erred in determining that Lucero's plan did not include a "community park" water and/or sewer system and did not otherwise conform to the relevant requirements; and (3) whether the district court erred in awarding costs to petitioners absent a finding of gross negligence, bad faith or malice. We assume, without deciding, that petitioners have standing and therefore reach the merits of the issue of whether to affirm the TMZA's approval of the zoning amendment. Because we find the TMZA's decision legal, we reverse the district court and affirm the TMZA's decision. We need not reach the issue of costs.

Petitioners claimed in their petition to the district court for a writ of certiorari that the TMZA's decision was illegal because Lucero planned to provide water to the mobile home rental units from an individual domestic well and because he intended to provide sewage disposal service by use of one septic tank to which all of the units would be connected. Thus, petitioners sought reversal of the TMZA's decision on the ground that Lucero's septic system amounts to an "on-site sewage disposal system" and that the PUD would lack the required "park maintained community water and sewer system." On this basis, petitioners argued to the district court that the sewage system failed to comply with the applicable provision of the Land Use Development Code (LUDC), Article III, Section 13.3.7a, which requires "a park maintained community water and sewer system" and prohibits "individual wells or on-site sewage disposal systems" for mobile home parks. Consequently, according to petitioners, the provisions of the LUDC precluded the TMZA from approving the application. The district court agreed, applying the definition of "community water system" from the Regulations Governing Water Supplies, New Mexico Environmental Improvement Board (EIB 1988), to the LUDC and found for petitioners. The sole issue on appeal is the construction of Section 13.3.7a.

■ This appeal is authorized by NMSA 1978, Section 3–21–9 (Repl.Pamp.1985). On appeal, pursuant to Section 3–21–9, an appellate court conducts the same review as the district court. Under the applicable standard of review, this court must determine if the TMZA's decision was legal, that is, whether the TMZA acted within the scope of its authority, whether it acted fraudulently, arbitrarily, or capriciously, and whether its decision was supported by substantial evidence. § 3–21–9(A); *Downtown Neighborhoods Ass'n v. City of Albuquerque,* 109 N.M. 186, 783 P.2d 962 (Ct.App.1989). This court, as well as the district court, must review the actions taken by the TMZA with deference to the interpretation it gives to its own ordinance. *See Klumker v. Van Allred,* 112 N.M. 42, 811 P.2d 75 (1991); *Downtown Neighborhoods Ass'n v. City of Albuquerque.*

■ We first review the TMZA's decision. Lucero had one well and one septic

tank to accommodate the four mobile home units to be built on the property. Lucero intended to rent the units and maintain the water and sewer systems. After public hearing and consideration of documentation, the TMZA found that Lucero had an on-site well and sewer system that the EIB approved, and that his application met all requirements of the LUDC. The TMZA therefore concluded that Lucero had a "park maintained community water and sewer system", and that Lucero's application should be approved.

As we do not find Section 13.3.7a ambiguous, we apply the plain meaning rule to its terms. *See State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 749 P.2d 1111 (1988). We read Section 13.3.7a to prohibit a single well and a single septic tank for each unit in the PUD. We believe the intent of the ordinance was to prohibit multiple wells and septic tanks in small or congested areas. *California ex rel. Dept. of Transp. v. United States,* 561 F.2d 731 (9th Cir.1977) (an administrative construction of a regulation is the best evidence of the agency's intent in adopting that regulation). Thus, section 13.3.7a precludes only individual on-site systems in a PUD. That section does not prohibit a park maintained, on-site, community sewage system which meets the other requirements of LUDC, and which assures a higher level of health and safety than do individual systems, and which meets the other requirements of LUDC. We accord substantial weight to the TMZA's finding that Lucero had a "park maintained community water and sewer system." *See Klumker v. Van Allred; In re Application of Plains Elec. Generation & Transmission Coop., Inc.,* 106 N.M. 775, 750 P.2d 475 (Ct.App.1988) (finding of agency considered strong evidence). The TMZA's determination that the PUD complied with the LUDC was reasonable, supported by substantial evidence, and within the TMZA's authority.

The district court found that for there to be a "community system," the system must meet the definition of "community" as set forth in the EIB regulations. The EIB regulations define "community" as a system serving at least fifteen units. The LUDC neither defines "community" nor refers to the EIB regulations for guidance in interpreting its provisions. The EIB definition of "community" is inapposite as applied to the LUDC. We do not believe this was the intended result of Section 13.3.7a. A contrary reading of Section 13.3.7a could effectively foreclose development of any PUDs with less than fifteen units.

We think it is significant that while the district court looked to EIB regulation Part I, section 101(D) to find the proposed project was not a "community water system," the EIB reviewed and approved the proposed water and sewer plan. Presumably the EIB did not think the project violated its regulations. *California ex rel. Dept. of Transp. v. United States.* Such interpretation is entitled to deference. *Klumker v. Van Allred.* Nor are we persuaded by petitioner's argument that the EIB only approved Lucero's application as an individual liquid waste system. A review of the approval makes it clear that Lucero fully revealed his proposal to allow up to four mobile homes to use the system.

Moreover, the district court's reading fails to give effect to the intent of the legislation. *See State ex rel. Klineline v. Blackhurst.* We presume that the purpose of the adoption of the LUDC was to give the TMZA authority to provide for land use planning within its jurisdiction. Adopting the EIB definition of community to circumscribe the TMZA's authority contravenes that purpose.

We hold the TMZA's decision was within the scope of its authority, was supported by substantial evidence, and was reasonable. As its approval of the application was legal, we affirm its decision and reverse the district court. Respondents shall recover their costs on appeal. Both sides requested oral argument. The court does not deem it necessary. *See* SCRA 1986, 12–214(A).

IT IS SO ORDERED.

MINZNER and BLACK, JJ., concur.

[redacted]

822 P.2d 672

ELDORADO AT SANTA FE, INC., Intervenor–Appellant,

v.

William COOK, Elmer Ferneau, Marie Ferneau, Priscilla Hoback, Rod Hall, Ramona Sholder, and Donlad Woodman, who is also known as Donald Woodman, Petitioners–Appellees,

S.E. Reynolds, State Engineer, Respondent–Appellee.

No. 11218.

Court of Appeals of New Mexico.

Oct. 11, 1991.

Certiorari Denied Nov. 20, 1991.

Peter B. Shoenfeld, P.A., Santa Fe, for intervenor-appellant.

Grove T. Burnett, Steven Sugarman, Glorieta, for petitioners-appellees.

Tom Udall, Atty. Gen., Charlotte Benson Crossland, Special Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

BIVINS, Judge.

The opinion filed September 20, 1991, is withdrawn and the following substituted therefor.

Intervenor, Eldorado at Santa Fe, Inc. (Eldorado) appeals from a district court order which granted petitioners' request for a writ of certiorari and remanded Eldorado's well location change application to the state engineer for reprocessing. Eldorado challenges: (1) the propriety of a writ of certiorari; (2) the standing of petitioners to seek certiorari; (3) the district court's jurisdiction to remand this matter to the state engineer; (4) the district court's determination of error in a published notice based on a defect that was not set forth in the petition; and (5) whether defective publication of notice is a jurisdictional defect. In addition to the foregoing, we also address the question of whether the district court's order was a final judgment, having instructed the parties to brief that issue. We affirm.

Facts

Eldorado owns water well no. RG–18556, which is located near Lamy within the Bishop John Lamy Grant. In 1983, after the well casing failed and could not be removed, Eldorado applied to the state engineer for a permit to drill a replacement well twenty feet away. The application described the initial and move to locations as being within the NW 1/4 SW 1/4 NW 1/4 of Section 4, T14N, R10E N.M.P.M. The state engineer prepared a notice of application for publication and sent it to Eldorado. Because of a word processing error by the state engineer, the notice included the words "as projected within the Canada de Los Alamos Grant."

Eldorado published the notice as prepared by the state engineer. There were no objections, and, on July 21, 1983, the state engineer issued a permit to change

the location of the well. Eldorado spent substantial sums on the well and related facilities.

During construction various parties moved the state engineer to set aside the permit because the published notice included the incorrect land grant description. The state engineer denied the motion for lack of jurisdiction and no appeal was taken. Two years later some of the former movants petitioned for a writ of mandamus, seeking remand to the state engineer so that he could require re-advertisement and reconsider the issuance of the permit. Soon thereafter petitioners filed this action seeking a writ of certiorari against the state engineer. Eldorado subsequently intervened.

The district court attempted to remand both actions to the state engineer. Eldorado obtained an order from the supreme court that ordered the mandamus and certiorari cases to be consolidated and heard on the merits. The district court dismissed the mandamus petition. After a hearing on the merits, the district court granted the certiorari petition and remanded the case to the state engineer.

Finality of the District Court's Order

The pertinent text of the order is as follows:

> [T]his matter is hereby remanded to the State Engineer for appropriate administrative action. Republication of notice will be the first action on which the State Engineer shall proceed. All findings & conclusions filed herein are adopted as part of this order.
>
> Jurisdiction is retained by this court until a final administrative or judicial order is entered. RG–18556 may continue diverting water for functions now being served by the well until such time as a final order is entered in this case.

The bare language of the order suggests that it may not be final because it states that jurisdiction is being retained pending a final order. However, our analysis of the circumstances of this case convinces us that the district court neither contemplated nor was empowered to engage in further action regarding the issues raised in the petition.

The letter ruling of the district court stated that a primary purpose of retaining jurisdiction was to keep the well functioning. *See State ex rel. Reynolds v. Lewis,* 84 N.M. 768, 508 P.2d 577 (1973) (appellate court may look to comments of lower court to clarify ambiguous finding). We do not read the order as contemplating further proceedings in the district court after the administrative proceeding. Moreover, any attempt to retain jurisdiction to hear a subsequent appeal from the state engineer's reconsideration of Eldorado's application would exceed the district court's jurisdiction in view of the statutory requirements for appeal from the decision of the state engineer. *See* NMSA 1978, §§ 72–7–1, 72–12–10 (Repl.Pamp.1985); *In re Application of Angel Fire Corp.,* 96 N.M. 651, 634 P.2d 202 (1981). District courts are authorized to issue writs of certiorari where the order of an inferior tribunal was made in the absence of jurisdiction, not to review the judgment on the merits. *State ex rel. Board of Comm'rs of State Bar v. Kiker,* 33 N.M. 6, 261 P. 816 (1927). Here, where no further judicial action on the part of the court was essential, we conclude that the decree entered by the district court was final. *See Rio Arriba County Bd. of Educ. v. Martinez,* 74 N.M. 674, 678, 397 P.2d 471, 475 (1964) (reviewing court looks to substance, not form, in determining whether decree final); *B.L. Goldberg & Assocs. v. Uptown, Inc.,* 103 N.M. 277, 705 P.2d 683 (1985) (final judgment where trial court actually disposed of all issues of law and fact to the fullest extent possible); F. Ferris, *The Law of Extraordinary Legal Remedies* § 186 at 215 (1926) (judgment of reviewing court is final).

Petitioners' Prima Facie Case for Issuance of the Writ

Petitioners need only make a prima facie showing for issuance of the writ, including lack of an adequate remedy at law and substantial injury to petitioners if the writ does not issue. *Rhea County v. White,* 163 Tenn. 388, 43 S.W.2d 375 (1931);

C. Antieau, *The Practice of Extraordinary Remedies* § 5.13 at 717 (1987).

Generally, a writ of certiorari will not issue where a plain, adequate, and speedy remedy at law exists. *Macabees v. Chavez,* 43 N.M. 329, 93 P.2d 990 (1939). A writ of certiorari is not designed to take the place of appeal or a writ of error. *Id.* However, a writ of certiorari will lie where the right to appeal has been denied or lost otherwise than by a party's own fault. *See Lea County State Bank v. McCaskey Register Co.,* 39 N.M. 454, 49 P.2d 577 (1965) (dicta); *Irvan v. Kizer,* 286 Ark. 105, 689 S.W.2d 548 (1985); C. Antieau, *supra,* § 5.08 at 691; F. Ferris, *supra,* § 163 at 186. In this case, petitioners could have appealed the state engineer's issuance of Eldorado's permit. Due to the error in the publication notice, however, petitioners failed to receive notice of the application for the permit. Since petitioners lost their right of appeal without any fault or negligence on their part, a writ of certiorari will lie, assuming petitioners can make a prima facie showing of injury. *See Lea County State Bank.*

Our decision is additionally mandated by constitutional due process requirements. Petitioners were entitled to notice and an opportunity to be heard. *See Nesbit v. City of Albuquerque,* 91 N.M. 455, 575 P.2d 1340 (1977) (in zoning action, due process requires notice where change in zoning restriction would amount to change in fundamental character of property, and failure to give notice renders void all subsequent acts of zoning authority); *Miller v. City of Albuquerque,* 89 N.M. 503, 554 P.2d 665 (1976) (same). Failure to follow statutory procedures violated petitioners' due process rights, and no subsequent act could correct the defect. *See Miller v. City of Albuquerque; Nesbit v. City of Albuquerque.* Consequently, Eldorado's arguments that petitioners were not a party to the state engineer's proceedings and that they can assert their alleged prior water rights in a separate action for damages and injunction lack merit.

Petitioners have also made a prima facie showing of substantial injury. First they have established a violation of their constitutional due process rights. Second, they have alleged potential impairment of their water rights as a result of that violation.

Eldorado contends that petitioners were required to establish the validity of their water rights before the district court in order to have standing to seek a writ of certiorari and that they failed to do so. We recognize that an adjudication of the petitioners' water rights must be made in the first instance by the district court. *See State ex rel. Reynolds v. Lewis* (only courts are given the power and authority to adjudicate water rights). However, resolution of this question was not necessary to confer standing on petitioners. Since petitioners would not have been required to adjudicate their water rights before they could object to Eldorado's application, it would be illogical to require them to make that showing in order to petition for a writ in this case. We will not require that petitioners make a greater showing to obtain due process than they would have been required to show if they had been afforded that process initially. *Cf. Larson v. Valente,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (allegation of requisite personal stake in outcome was sufficient to confer standing).

In short, petitioners' claim of impairment to their water rights established a prima facie case of substantial injury. If, after reprocessing of Eldorado's well location change application, the state engineer determines that petitioners have valid existing water rights that would be impaired by granting the application, Eldorado may contest the validity of petitioners' water rights on appeal to the district court. *See* § 72–7–1; *State ex rel. Reynolds v. Lewis; In re Application of Carlsbad Irrigation District,* 87 N.M. 149, 530 P.2d 943 (1974) (there are no limitations on power of district courts to find facts, make conclusions of law, and enter judgments and orders as are proper to dispose of the issues).

Propriety of the Remand

Eldorado contends that since there is no statutory or constitutional authority

for a district court to remand a matter to an administrative agency for taking additional evidence, the attempted remand was beyond the district court's jurisdiction. *See State ex rel. Transcontinental Bus Serv., Inc. v. Carmody,* 53 N.M. 367, 208 P.2d 1073 (1949). In *Transcontinental Bus,* the court held that remanding the cause to the corporation commission for a further evidentiary hearing on an issue in the case was inappropriate. The court noted that it was proper to remand proceedings to an agency to the end that valid and essential findings may be made in accordance with the applicable law. *Id.* at 376, 208 P.2d at 1082; *see also* F. Ferris, *supra,* § 185 at 214.

In the case before us, the district court effectively determined that the state engineer lacked jurisdiction to grant Eldorado's application and remanded the case for new rather than additional proceedings. We hold the remand proper; the judge's findings and conclusions do not suggest that he exceeded his authority. *See State ex rel. Transcontinental Bus Serv., Inc. v. Carmody; State ex rel. Board of Comm'rs of State Bar v. Kiker.* Furthermore, if, after voiding the state engineer's decision, remand was inappropriate, Eldorado would have to reapply for permission to change the well location before the state engineer could proceed. Remand, therefore, works to Eldorado's benefit.

The Section Number Error

The petition for certiorari contended that the published legal description of the well location was erroneous because the notice stated that the well was projected onto the Canada de Los Alamos Grant, but that it was actually located on the Bishop John Lamy Grant. Petitioners asserted that the error was substantive and that substantive error in the published notice rendered the state engineer's approval of the application either void or voidable.

On the first day of trial, petitioners announced that they had discovered another error, that the actual location of the well was not on projected Section 4, but rather some six hundred feet further away from the town of Lamy, on Section 5. Both the land grant error and the section number mistake were reflected in the trial court's findings. Eldorado contends that since evidence of the section error was not within the issues framed by the pleadings and the pleadings were not amended to conform to the evidence, the district court erred in basing its conclusion on that defect in the published notice.

Eldorado failed to object to the district court's proposal of a continuance to assess the alleged error or to otherwise argue that a continuance would not cure any prejudice. Consequently, it failed to preserve its claim of prejudice by the late notification of the error. *See Woolwine v. Furr's, Inc.,* 106 N.M. 492, 745 P.2d 717 (Ct.App.1987). Even if Eldorado had preserved error, we would still affirm this issue on the merits.

We hold that even if the finding that the published notice contained a section mistake was erroneous, or if the evidence upon which it was based should not have been admitted at trial, the evidence of an incorrect land grant description was sufficient to support the conclusion that the notice contained a substantive error. *See Wright v. Brem,* 81 N.M. 410, 467 P.2d 736 (Ct.App.1970) (appellate court will not correct errors that do not change the result); *Tapia v. Panhandle Steel Erectors Co.,* 78 N.M. 86, 428 P.2d 625 (1967) (substantial evidence standard of review); *Downs v. Garay,* 106 N.M. 321, 742 P.2d 533 (Ct.App. 1987) (erroneous findings of fact unnecessary to support the judgment are not grounds for reversal).

Effect of Notice Defect on Jurisdiction of State Engineer

Eldorado contends that the defect in notice of an application to the state engineer did not result in an absence of jurisdiction. As discussed, the failure to follow statutory procedures is a due process violation and renders void all subsequent acts of the state engineer. *See Nesbit v. City of Albuquerque; Miller v. City of Albuquerque.* Therefore, the state engineer was without jurisdiction to grant

Eldorado's application for change of location.

In re Application of Brown, 65 N.M. 74, 332 P.2d 475 (1958), cited by Eldorado, is not to the contrary. In that case, the *subsequent* notice, hearing, and determination cured the original lack of procedure.

Timeliness of the Petition for Certiorari

Since this nonjurisdictional issue was not raised in the docketing statement, it may not be asserted for the first time in the brief-in-chief. *See DeTevis v. Aragon,* 104 N.M. 793, 727 P.2d 558 (Ct.App.1986). *Cf. State v. Salgado,* 112 N.M. 537, 817 P.2d 730 (App.1991) (holding that for appeals filed after July 1, 1990, and assigned to the general calendar, amendments to docketing statements are unnecessary). Since this appeal was filed before July 1, 1990, the rule set forth in *DeTevis* applies. Additionally, we note that Eldorado only mentioned timeliness of the petition for certiorari in the conclusion to its brief-in-chief and without any citation of authority. Issues which are unsupported by cited authority will not be reviewed on appeal. *In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984).

We affirm.

IT IS SO ORDERED.

ALARID, C.J., and CHAVEZ, J., concur.

822 P.2d 677

Oriene BROOME, Plaintiff-Appellant,

v.

Charles BYRD, Defendant-Appellee,

Steve Spina and Star D. Spina, Defendants.

No. 11498.

Court of Appeals of New Mexico.

Nov. 8, 1991.

John R. Gerbracht, Socorro, for plaintiff-appellant.

Frank N. Chavez, Campbell, Reeves, Chavez & Acosta, P.A., Las Cruces, for defendant-appellee.

OPINION

APODACA, Judge.

Plaintiff appeals the trial court's summary judgment dismissing defendant Charles Byrd, the owner of a commercial building (defendant), from plaintiff's negligence action. Plaintiff, an employee of defendant's tenant, was injured when she tripped and fell over a painter's drop cloth as she was leaving work. The drop cloth had been placed on the floor of a vestibule area just outside the door of her employer's business by an employee of a painter hired by defendant to paint the exterior of the building. The trial court entered summary judgment on the basis that the painter was an independent contractor and that defendant was thus insulated from liability as a matter of law. The parties agree that the painter was an independent contractor and that the injury occurred in an area of the building over which defendant had control.

The sole issue presented by this appeal is whether defendant, as the owner of the building, can be held liable for injuries resulting from a condition created by the alleged negligence of an independent contractor hired by defendant to make repairs in that part of the building over which defendant retained control. We hold that, under the facts of this appeal, notwithstanding the general rule that an employer of an independent contractor is not liable for the contractor's negligence, defendant can be held vicariously liable for any negligence of the independent contractor. Therefore a jury question is presented and the summary judgment is reversed.

DISCUSSION

In New Mexico, the owner of a building owes business visitors the duty to use ordinary care to keep the premises safe. SCRA 1986, 13-1309 (Repl.1991). Plaintiff, as an employee of defendant's tenant, was a business visitor to whom defendant, as owner of the building, owed such a duty. *See* SCRA 1986, 13-1303 (Repl.1991); *Latham v. Aronov Realty Co.*, 435 So.2d 209 (Ala.1983). Defendant seeks to avoid liability for plaintiff's injuries by resorting to the general rule that an employer is not vicariously liable for the negligence of an independent contractor. SCRA 1986, 13-404; Restatement (Second) of Torts § 409 (1965) (Restatement). Plaintiff, on the other hand, contends that various exceptions to this general rule apply, making defendant liable. Indeed, our supreme court has noted that this rule of nonliability has numerous exceptions. *Budagher v. Amrep Corp.*, 97 N.M. 116, 637 P.2d 547 (1981) (citing Restatement §§ 409-429 (1965)). Generally New Mexico law does not allow a landowner to escape liability by delegating repair and maintenance

functions to third parties. *See, e.g., Mitchell v. C & H Transp. Co.*, 90 N.M. 471, 565 P.2d 342 (1977); *Edwards v. Ross*, 72 N.M. 38, 380 P.2d 188 (1963). However, no New Mexico case has discussed the potential liability of an employer for the negligence of an independent contractor in the context of the facts in this appeal.

Our review of cases from other jurisdictions indicates that, generally, the owner of a building has a nondelegable duty to maintain safely those areas over which he has retained control and that this duty cannot be avoided by hiring an independent contractor to make repairs. *See Koepke v. Carter Hawley Hale Stores, Inc.*, 140 Ariz. 420, 682 P.2d 425 (Ct.App. 1984) (owner of department store held vicariously liable for injury to customer who tripped over a chalk line stretched across an aisle by employees of independent contractor hired to remodel the store, if contractor's acts constituted negligence); *Misiulis v. Milbrand Maintenance Corp.*, 52 Mich.App. 494, 218 N.W.2d 68 (1974) (lessor of a shopping center held vicariously liable for injuries to a tenant's business invitee who struck a pile of gravel and debris left in the parking lot by independent contractor hired to repair the roof); *Mayer v. Fairlawn Jewish Center*, 38 N.J. 549, 186 A.2d 274 (1962) (owner of building held vicariously liable for injury to invitee who fell into an unguarded stairwell under construction by independent contractor hired to remodel the building); *Lipman Wolfe & Co. v. Teeples & Thatcher, Inc.*, 268 Or. 578, 522 P.2d 467 (1974) (en banc) (owner of retail department store held vicariously liable for injury to a customer who slipped on a slippery substance left on floor by independent contractor hired to lay tile); *Damron v. C.R. Anthony Co.*, 586 S.W.2d 907 (Tex.Ct.Civ.App.1979) (owner of a commercial building held liable for damage to tenant's property when independent contractor hired to repair the roof left it inadequately covered during a rainstorm); *see also* Thomas E. Miller, Annotation, *Storekeeper's Liability for Personal Injury to Customer Caused by Independent Contractor's Negligence in Performing Alterations or Repair Work*, 96 A.L.R.3d 1213 (1979 & Supp.1991). In holding the owner liable, these courts relied on the Restatement exceptions to the general rule of employer nonliability, as well as public policy reasons.

Two of these cases are particularly persuasive. In *Misiulis*, the Michigan Court of Appeals held that a commercial landlord has a nondelegable duty to his tenants and others rightfully on the premises with respect to repairs undertaken by him and that the landlord cannot avoid this duty by hiring an independent contractor. *See Misiulis v. Milbrand Maintenance Corp.*, 218 N.W.2d at 74. The court relied on Restatement Section 420, which states:

> A lessor of land who employs an independent contractor to make repairs which the lessor is under no duty to make, is subject to the same liability to the lessee, and to others upon the land with the consent of the lessee, for physical harm caused by the contractor's negligence in making or purporting to make the repairs as though the contractor's conduct were that of the lessor.

The Michigan court also noted that, " '[w]hen the lessor "entrusts the repairs" to an independent contractor, the general weight of authority is that his duty of care in making them cannot be delegated, and he will be liable for the contractor's negligence.' " *Id.* at 71 (quoting William L. Prosser, *The Law of Torts* § 63, at 410–12 (4th ed. 1971)). *See generally* 49 Am. Jur.2d *Landlord and Tenant* § 875 (1970 & Supp.1991).

As with the plaintiff in *Misiulis*, plaintiff in this case is accused of contributory negligence. A disputed factual issue concerning whether the contractor placed warning signs alerting building occupants or passersby to the fact that the work was being performed by the independent contractor and indicating other means of access exist. Whether plaintiff contributed to her injuries through her own negligence and, if so, the resulting apportionment of the percentage of fault under our system of comparative negligence are factual determinations to be made by the fact finder. *See City of Albuquerque v. Redding*, 93

N.M. 757, 605 P.2d 1156 (1980); *Sheraden v. Black,* 107 N.M. 76, 752 P.2d 791 (Ct. App.1988).

In *Koepke,* the Arizona court adopted Restatement Section 422 as an exception to the general rule of employer nonliability for the negligence of independent contractors. *See Koepke v. Carter Hawley Hale Stores,* 682 P.2d at 428. Section 422 of the section of the Restatement provides:

> A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure
>
> (a) while the possessor has retained possession of the land during the progress of the work....

After observing that cases from other jurisdictions have imposed such liability under the theory that the employer has a nondelegable duty to business invitees, *Koepke* identified three policy reasons for subjecting the owners to such liability. First, the owner obtains both the benefit of the contractor's work and the economic benefits of letting business invitees continue conducting business in the building. Second, an owner can insure against risks and incorporate these expenses into its overhead. Third, the owner is in a position to decrease costs and prevent or minimize risks. For example, the owner can hire an independent contractor that is financially responsible, insist that the contractor indemnify the owner for any loss due to the contractor's negligence, and require the contractor to follow safety procedures and remedy dangerous conditions. *Id.* at 428–29.

We consider the reasoning of the Arizona and Michigan courts to be sound and adopt their analysis in this appeal. In so doing, we conclusively apply those exceptions to the general rule of employer nonliability articulated in Sections 420 and 422 of the Restatement. *But see Fettig v. Whitman,* 285 N.W.2d 517, 522–23 (N.D.1979) (refusing to hold a general contractor vicariously liable for injury to property owner who fell through an open stairwell left uncovered by an independent contractor, despite acknowledging significant policy reasons for holding employer liable), *overruled on different issue by Shark v. Thompson,* 373 N.W.2d 859 (N.D.1985). Notably, Restatement Sections 420 and 422 are consistent with the law of New Mexico. *See Mitchell v. C & H Transp. Co.; Bober v. New Mexico State Fair,* 111 N.M. 644, 808 P.2d 614 (1991). We have not uncovered any precedent to the contrary.

Defendant benefitted economically from the continued operation of the commercial building throughout the repairs and could most easily distribute the loss occasioned by plaintiff's injury. Had the drop cloth been negligently placed by an employee of defendant while making similar repairs, defendant undoubtedly could be held liable. The only basis for avoiding liability is that defendant happened to hire an independent contractor to do the work. We see no principled basis for letting an owner of a building avoid the duty merely because of the manner in which he chose to have repairs done. We thus hold that an owner of a commercial building can be held vicariously liable for an independent contractor's negligence where the negligence created a dangerous condition causing injury to a business visitor in those areas of the building over which the owner retains control.

Our inquiry does not stop here, however. Defendant next argues that, even if he could normally be held liable for the negligence of the independent contractor, such negligence was "collateral" negligence only, for which he should not be held liable. Specifically, defendant relies on Restatement Section 426, which states:

> [A]n employer of an independent contractor, unless he is himself negligent, is not liable for physical harm caused by any negligence of the contractor if
>
> (a) the contractor's negligence consists solely in the improper manner in which he does the work, and

(b) it creates a risk of such harm which is not inherent in or normal to the work, and

(c) the employer had no reason to contemplate the contractor's negligence when the contract was made.

Comment a to Section 426 defines "collateral" negligence as "negligence which is unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence which creates only the normal or contemplated risk." Comment b sets forth the scope of the employer's liability:

> The employer is required to contemplate, and to be responsible for, the negligence of the contractor with respect to all risks which are inherent in the normal and usual manner of doing the work under the particular circumstances.... He is not required to contemplate or anticipate abnormal or unusual kinds of negligence on the part of the contractor, or negligence in the performance of operative details of the work which ordinarily may be expected to be carried out with proper care, unless the circumstances under which the work is done give him warning of some special reason to take precautions, or some special risk of harm to others inherent in the work.

Defendant has not cited any cases in support of his contention. The establishment of the duty noted above is within the purview of this court as a matter of law. *E.g., Calkins v. Cox Estates,* 110 N.M. 59, 792 P.2d 36 (1990). Whether this duty was breached, resulting in negligence, is a question of fact. *See Cross v. City of Clovis,* 107 N.M. 251, 755 P.2d 589 (1988). It is generally true that an employer of an independent contractor is not liable for the collateral or casual negligence of a contractor. *Aceves v. Regal Pale Brewing Co.,* 24 Cal.3d 502, 156 Cal.Rptr. 41, 45, 595 P.2d 619, 623 (1979) (en banc). The distinction between collateral negligence and that which will render the employer liable has been termed, "a shadowy one at best." *Van Arsdale v. Hollinger,* 68 Cal.2d 245, 66 Cal.Rptr. 20, 25, 437 P.2d 508, 513 (1968) (en banc). Based on this legal foundation, "[t]his question, like the broader issue of whether there was a peculiar risk inherent in the work being performed, is a question of fact to be resolved by the trier of fact." *Caudel v. East Bay Mun. Util. Dist.,* 165 Cal.App.3d 1, 211 Cal.Rptr. 222, 227 (1985). *Cf. Edwards v. Ross,* 72 N.M. at 41, 380 P.2d at 190 (whether store proprietor was liable for plaintiff's slipping on floor that had been stripped by independent contractor the night before presented jury question).

Under the facts of this appeal, the drop cloth may have been placed negligently on the floor, thus creating a dangerous condition that prevented that portion of the building over which defendant retained control from being kept reasonably safe. Under such circumstances, defendant's failure to rectify the dangerous condition would make him liable for plaintiff's injury because the independent contractor's negligence fell within the bases for normally holding defendant liable. Whether the use and the possibly negligent placement of a drop cloth by the independent contractor was a normal risk that should have been contemplated by defendant when the work was contracted is a question of fact. *See Lockowitz v. Melnyk,* 1 A.D.2d 138, 148 N.Y.S.2d 232, 233 (1956) (issue of whether the danger is inherent in the independent contractor's work and should be reasonably anticipated depends on the facts of each case). We thus hold that, whether any negligence in leaving the drop cloth on the floor in such a manner as to cause injury to a plaintiff is "collateral" negligence presents a question of material fact that cannot be resolved by summary judgment.

CONCLUSION

Based on the record before us, we hold that defendant was not free from vicarious liability as a matter of law merely because he hired an independent contractor to paint the building that remained open and over which defendant retained ultimate control. In these circumstances, defendant may be found liable for the negligence of the independent contractor. Whether the placement of the drop cloth and warnings relating to the painting project were "peculiar"

or "collateral", however, presents a question of material fact.

Before this issue can be resolved, however, the threshold question of whether the independent contractor was negligent in his placement of the drop cloth must first be addressed. If this question is answered affirmatively, the fact finder next must consider whether defendant, in light of the duty discussed in this opinion, was vicariously liable. The final factual issue to be determined is the amount, if any, of comparative fault to be assessed against plaintiff. These outstanding factual issues negate the viability of the order of summary judgment in this case.

We therefore reverse the trial court's summary judgment in defendant's favor, order that plaintiff's claim against defendant be reinstated, and remand for further proceedings not inconsistent with this opinion. Plaintiff is awarded her costs on appeal.

IT IS SO ORDERED.

DONNELLY and BLACK, JJ., concur.

822 P.2d 1128

Richard BAXTER, Plaintiff-Appellant,

v.

Laura GANNAWAY, David Gannaway, and Cene Gannaway, Defendants-Appellees.

No. 11238.

Court of Appeals of New Mexico.

Oct. 24, 1991.

Certiorari Denied Nov. 26, 1991.

Timothy J. Cusack, Cusack, Jaramillo & Associates, Roswell, for plaintiff-appellant.

Daniel J. O'Brien and Christopher W. Nickels, Pelton & O'Brien, Albuquerque, for defendants-appellees.

OPINION

BLACK, Judge.

Plaintiff appeals from a judgment entered pursuant to a jury verdict. In challenging the damages awarded, plaintiff raises the following issues: 1) the proper standard of review; 2) whether the jury verdict is supported by substantial evidence, or by its very amount proves passion, prejudice, or a mistaken measure of damages; and 3) whether closing statements made by defense counsel constitute judicial admissions which themselves require a larger verdict. Based on the record before us, we cannot agree with plaintiff and affirm the judgment.

FACTS

On Friday, January 6, 1984, defendant Laura Gannaway rear-ended plaintiff in his 1982 Pontiac Bonneville. At the accident scene plaintiff advised the police that he had some pain and stiffness in his shoulders and neck but generally felt all right. The next morning, plaintiff experienced pain in his lower back with radiation down his right leg. That Monday, he returned to his work as an FBI agent but experienced enough pain that he went to the emergency room at the local hospital. He was examined, given some medication, instructed to rest, and told to return if his condition did not improve. When plaintiff's condition did not improve he sought treatment from Dr. Veitch, a local orthopaedic surgeon. Plaintiff told Dr. Veitch that he had been treated for low back pain approximately five years earlier. Dr. Veitch hospitalized plaintiff for nine days and employed conservative treatment modalities. After his release from the hospital, plaintiff rested at home and eventually his symptoms decreased. Approximately seven weeks after the accident, plaintiff returned to work on a part-time basis. He returned to full-time work after another five weeks. As a result of this auto accident, plaintiff incurred lost wages and medical expenses totaling $12,917.

Upon returning to work, plaintiff was required to undergo a physical examination for his employment with the FBI. Since no significant findings were uncovered during the physical, he was approved to perform full and strenuous duties. Plaintiff also resumed his other normal activities, including rather extensive hunting trips. While he did continue to experience some discomfort, it was not enough to require further visits to Dr. Veitch.

In September 1985, plaintiff was involved in a second automobile accident. During the pursuit of a criminal suspect, the automobile in which he was a passenger collided with the suspect's vehicle. Both vehicles were travelling at a fairly high rate of speed. Several days after the accident, plaintiff experienced severe back pain at a level higher than the pain resulting from the first accident. For the first time in almost eighteen months, plaintiff went back to Dr. Veitch. Dr. Veitch again treated plaintiff with therapy, medication, and time off from work.

In November of the same year, plaintiff was dressing to go to work and experienced excruciating pain in the middle of his back as he was pulling on his boot. He went numb from the waist down. He was hospitalized and was again treated conservatively, but this time it was not sufficient. Plaintiff was referred to Dr. Bywaters in Dallas. Dr. Bywaters diagnosed plaintiff as having a ruptured disc at the L–5, S–1 region of his back. Plaintiff subsequently underwent surgery to remove the disc. Due to the surgery, plaintiff missed significant periods of work and incurred substantial medical expense.

Seeking damages for the personal injuries he sustained in the initial car accident of January 6, 1984, plaintiff filed a complaint against Laura Gannaway, a minor, and her parents. The district court granted plaintiff summary judgment on the issue of defendants' liability. A one-day jury trial was held on the issue of damages. The jury awarded plaintiff the sum of $13,000. Plaintiff moved for additur or alternatively for a new trial on the issue of damages. The district court denied the motion and plaintiff appeals.

STANDARD OF REVIEW

Initially, we deal with plaintiff's argument concerning the proper standard of review to be applied when a plaintiff alleges that the damages awarded by a jury are inadequate. The issue is whether, where inadequacy of damages is claimed, the evidence on appeal is to be viewed in the light most favorable to the plaintiff or to the defendant. Plaintiff argues that since he is the prevailing party, albeit in an allegedly inadequate amount, the evidence should be viewed in the light most favorable to him. Plaintiff relies on *Phillips v. Smith,* 87 N.M. 19, 528 P.2d 663 (Ct.App. 1974). Relying on *Lamphere v. Agnew,* 94 N.M. 146, 607 P.2d 1164 (Ct.App.1979), defendants claim that the evidence should be viewed in the light most favorable to sustain the verdict.

The *Phillips* opinion does indeed state that reversal for inadequate damages will result only if the evidence, viewed in the light most favorable to plaintiff, does not substantially support the award. However, *Phillips* was authored by Judge Hernandez, with Judge Hendley concurring in the result only. The third member of the panel, Judge Lopez, dissented. In light of this we must determine whether the statement regarding the proper standard of review in an inadequate damage case has any precedential value and, if so, whether it is legally correct. NMSA 1978, Section 34–5–11 (Repl.Pamp.1990), provides that decisions of the court of appeals shall be in writing and the result shall be concurred in by at least two judges. However, Section 34–5–11 does not distinguish between those decisions in which a panel member concurs in the result only and those in which the panel member also concurs in the opinion.

Plaintiff relies on language from *Silva v. City of Albuquerque,* 94 N.M. 332, 610 P.2d 219 (Ct.App.1980), to argue that despite the division of the panel in *Phillips,* the case has precedential value. The portion of *Silva* relied on by plaintiff is the discussion of *Strickland v. Roosevelt County Rural Electric Cooperative,* 94

N.M. 459, 612 P.2d 689 (Ct.App.1980). A careful analysis of this language, however, indicates that, while the *Silva* court considered *Strickland* a valid judgment and a decision, it was not considered precedent:

> *Strickland,* an opinion with which one judge of this court concurred in the result and another judge dissented, constitutes a "judgment" according to Art. VI, § 28 of the New Mexico Constitution, and a "decision" under § 34-5-11, N.M.S.A.1978. But it is not an opinion expressing the views of a majority of this court as now constituted; and, because one of the participating judges concurred only in the result reached, we may reasonably conclude that the rationale of the opinion does not even express the view of a majority of the panel which considered that case.

Silva, 94 N.M. at 333, 610 P.2d at 220.

Rather than supporting plaintiff's contention that "one judge opinions" are precedent, we read *Silva* as, at the least, raising serious questions regarding that proposition. Such a reading is also consistent with our subsequent decisions refusing to recognize one judge opinions as precedential. *See, e.g., Sewell v. Wilson,* 101 N.M. 486, 684 P.2d 1151 (Ct.App.1984); *Casias v. Zia Co.,* 94 N.M. 723, 616 P.2d 436 (Ct.App. 1980), *aff'g* 93 N.M. 78, 596 P.2d 521 (Ct. App.1979).

Moreover, the standard enunciated in *Phillips* is legally incorrect. In order to safeguard a litigant's constitutional right to a jury trial, appellate reversal of jury verdicts must be done cautiously and only under a strict standard of review. *Gonzales v. Sansoy,* 102 N.M. 136, 692 P.2d 522 (1984). Viewing inadequate damages in the light most favorable to plaintiff would be contrary to the more general principle that the appellate court should strive to uphold the decisions of the fact finder. *See Barnes v. Sadler Assocs.,* 95 N.M. 334, 622 P.2d 239 (1981) (appellate court will not reverse unless after viewing evidence in the light most favorable to support the verdict, it is convinced the verdict cannot be sustained either by evidence or permissible inference); *Doe v. City of Albuquerque,* 96 N.M. 433, 631 P.2d 728 (Ct. App.1981) (reviewing court will not disturb award supported by evidence which is taken in its most favorable light). In light of the above, whether it is the plaintiff or the defendant who challenges the decision of the trial court, the evidence on damages is viewed in the light most favorable to upholding that judgment. *See Rutledge v. Johnson,* 81 N.M. 217, 465 P.2d 274 (1970); *Pedigo v. Valley Mobile Homes, Inc.,* 97 N.M. 795, 643 P.2d 1247 (Ct.App.1982). To the extent that the standard of review is stated otherwise in *Phillips,* it is hereby expressly disapproved.

MEASURE OF DAMAGE

Plaintiff argues the jury verdict is not supported by the evidence, but rather is the result of passion or prejudice. The reviewing court does not lightly overturn a judgment of the trial court and will search the record on appeal for substantial evidence to support the trial court verdict. *Rutledge,* 81 N.M. at 221, 465 P.2d at 278.

In the absence of an unmistakable indication of passion or prejudice, a reviewing court will not set aside a jury's award of damages unless the amount of the verdict in light of the evidence indicates the jury was influenced by prejudice, passion, or other improper considerations. *Hammond v. Blackwell,* 77 N.M. 209, 421 P.2d 124 (1966). As this court observed in *Doe,* 96 N.M. at 436, 631 P.2d at 731:

> There is no touchstone beyond the instructions given for measuring the damage amounts which juries, in the exercise of their judgments, award. *Baca v. Baca,* 81 N.M. 734, 472 P.2d 997 (Ct.App. 1970). Reviewing courts do not disturb awards supported by evidence which is taken in its most favorable light, and which awards are not shown to be the result of passion, prejudice, sympathy, undue influence, or a mistaken measure of damages. *Samedan Oil Corp. v. Neeld,* 91 N.M. 599, 577 P.2d 1245 (1978).

We review the evidence with this in mind. After he returned to work following the Gannaway accident, plaintiff did not seek medical treatment for a year and a

half. He passed the FBI physical and was cleared for strenuous duty. During the year following the first accident, he spent up to thirty days hunting elk, antelope, and deer. There was also evidence that plaintiff sought medical care for back ailments some years prior to the accident at issue. Medical testimony indicated that plaintiff had a congenital spinal stenosis and that as a result of this condition, relatively minor movements in the disc could cause him a problem. Based on these objective factors, the jury may have heavily discounted plaintiff's testimony of pain and suffering. Since the medical testimony was ambivalent, the jury might have concluded the second more serious auto accident or even the strain in putting on the boot, combined with his physical anomaly, caused all of plaintiff's permanent injury. *See Shephard v. Graham Bell Aviation Serv. Co.*, 56 N.M. 293, 243 P.2d 603 (1952) (independent intervening cause). Based on this evidence and the above-stated legal principles, we cannot substitute our judgment for that of the jury. *See Tapia v. Panhandle Steel Erectors, Inc.*, 78 N.M. 86, 428 P.2d 625 (1967).

To determine whether the jury may have followed a mistaken measure of damage, we turn to the analysis of the award in this case. The adequacy of monetary awards in negligence cases is particularly within the province of the trier of fact, and its decision will not be disturbed except in extreme cases. *Westbrook v. Lea Gen. Hosp.*, 85 N.M. 191, 510 P.2d 515 (Ct.App.1973). There is no standard fixed by law for measuring the value of pain and suffering; rather, the amount is left to the fact finder's judgment. *Lujan v. Reed*, 78 N.M. 556, 434 P.2d 378 (1967); *Sheraden v. Black*, 107 N.M. 76, 752 P.2d 791 (Ct.App. 1988). As the supreme court stated in *Powers v. Campbell*, 79 N.M. 302, 304, 442 P.2d 792, 794 (1968):

> It has long been recognized that in awarding damages for pain and suffering or permanent injury to health there cannot be any fixed measure of compensation. The amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and, in the final analysis, each case must be decided on its own facts and circumstances.

The present jury was properly instructed pursuant to SCRA 1986, 13-1807, which provides "[t]he guide for you to follow in determining compensation for pain and suffering, if any, is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the plaintiffs with fairness to all parties to this action."

The jury award covers the medical expenses and lost wages totaling $12,917 which were directly attributable to the accident with Laura Gannaway. Plaintiff argues that the remaining damage figure of $83 for pain and suffering is so miserly that, on its face, it proves legal error. Even if the evidence would have sustained a greater award the fact the verdict was for a lesser amount does not show the jury failed to follow the instruction. *Dickenson v. Regent of Albuquerque*, 112 N.M. 362, 815 P.2d 658 (Ct.App.1991).

Although $83 for plaintiff's pain and suffering appears quite miserly, and writing on a clean slate this court may well have awarded substantially more, it is not the duty of the appellate court to evaluate the value of pain and suffering. *See Grammer v. Kohlhaas Tank & Equip. Co.*, 93 N.M. 685, 604 P.2d 823 (Ct.App. 1979). Nor can we say $83 is so unrelated to the evidence as to shock the conscience of the court. *See Bowman v. Incorporated County of Los Alamos*, 102 N.M. 660, 699 P.2d 133 (Ct.App.1985) (award of $30,000 for dislocation and multiple fracture of ankle and injuries to chest, elbow, and shoulder, affirmed). In this regard we would also note that the district court was apparently not sufficiently "shocked" to grant a new trial. *See Lujan v. Reed*, 78 N.M. at 564, 434 P.2d at 386. When a jury makes an award which covers each element of damages, an appellate court cannot say as a matter of law the jury verdict is founded upon a mistaken measure of damages. *Cf. Hammond v. Blackwell*, 77 N.M. 209, 421 P.2d 124 (1966) (where trial court determined plaintiff suffered a loss of earning capacity but failed to award any damages for such loss, new trial required).

As we understand plaintiff's brief he also argues that the verdict is contrary to the law given in the jury instructions because the jury was not instructed on the proper weight to be given to expert testimony. Our review of the transcript reveals that plaintiff did not object to the trial court's failure to give SCRA 1986, 13–213, dealing with the rejection of expert witness testimony. Therefore, we need not review this issue. *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 745 P.2d 717 (Ct.App. 1987).

JUDICIAL ADMISSIONS

Plaintiff next argues that defense counsel, in his closing argument, not only conceded that defendants were responsible for the pain and suffering attributable to the Gannaway accident, but also the pain and suffering resulting from plaintiff's second on-the-job accident and even the surgery following the boot incident.

For the rule on judicial admissions to apply, the admission must be unequivocal and it must relate to facts and not personal opinion. *Hedge v. Bryan*, 425 S.W.2d 866 (Tex.Ct.App.1968). The scope of judicial admissions is limited to matters of fact which would otherwise require evidentiary proof and does not include statements by counsel of their legal theory of the case. *Childs v. Franco*, 563 F.Supp. 290 (E.D.Pa.1983). The context of statements alleged to be judicial admissions must also be considered. *Lowe v. Kang*, 167 Ill.App.3d 772, 118 Ill.Dec. 552, 521 N.E.2d 1245 (1988). Where there is ambiguity or doubt it is presumed an attorney did not intend to make a judicial admission during argument. *Lystarczyk v. Smits*, 435 N.E.2d 1011 (Ind.Ct.App.1982); *cf. Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (10th Cir.1986) (reversing trial court's finding of "stipulation" by counsel), *modified*, 793 F.2d 1171 (10th Cir. 1986), *cert. denied*, 479 U.S. 970, 107 S.Ct. 471, 93 L.Ed.2d 416 (1986).

With the above principles in mind, a review of defense counsel's closing argument reveals that his statements do not constitute judicial admissions concerning the amount of damages. There is no question defense counsel repeatedly told the jury that defendants were responsible for plaintiff's pain resulting from the first accident and stated "[y]ou decide what that should be." This is clearly consistent with SCRA 1986, 13–1807.

Defense counsel also stated that there was medical evidence of 5% impairment "or less" and concluded "whatever you put the value of the impairment, we owe that." Defense counsel's suggestions to the jury during closing as to what he thought defendant owed should not be viewed as judicial admissions. *See Bunch v. Rose*, 10 Ill.App.3d 198, 293 N.E.2d 8 (1973); *State ex rel. Missouri Highway & Transp. Comm'n v. Union Terminal Ry.*, 633 S.W.2d 429 (Mo.Ct.App.1982).

With respect to the damages for the second accident, defense counsel clearly stated that defendants did not have anything to do with that accident and, therefore, they should not have to pay the damages. Regarding the boot incident and the resulting surgery, defense counsel merely offered the jury what he felt would be a "fair" way to calculate damages based on plaintiff's total impairment after all three events. *See Hayes v. Xerox Corp.*, 718 P.2d 929 (Alaska 1986) (defense attorney's statement in closing argument in a negligence case which conceded plaintiff's injuries and sought to estimate the amount the jury should award was an expression of an opinion and not a judicial admission). Defense counsel's statements in closing argument, therefore, cannot be properly characterized as judicial admissions relating to defendants' liability for damages.

Based on the above, we affirm the damage award. We see no need for oral argument in this appeal and, therefore, plaintiff's request is denied. Costs on appeal are awarded to defendants. *See* SCRA 1986, 12–403.

IT IS SO ORDERED.

ALARID, C.J., and DONNELLY, J., concur.

822 P.2d 1134

Maria DUTTON, Plaintiff–Appellant,

v.

McKINLEY COUNTY BOARD OF COMMISSIONERS; McKinley County Sheriff's Department; Jennifer Weisbacher, individually and as an employee of the McKinley County Sheriff's Department; Clayton Garcia, individually and as an employee of the McKinley County Sheriff's Department; the City Council of the City of Gallup; the Gallup Police Department; and Frank Gonzales, individually and as Chief of the Gallup Police Department, Defendants–Appellees.

No. 11571.

Court of Appeals of New Mexico.

Nov. 15, 1991.

Rudolph B. Chavez, Daniel R. Swiss, Chavez and Montes, Albuquerque, for plaintiff-appellant.

Lynn Isaacson, Mason, Rosebrough & Isaacson, P.A., Gallup, for defendants-appellees.

OPINION

BLACK, Judge.

Plaintiff appeals the trial court's order of dismissal granted to defendants in a suit filed under the Tort Claims Act, NMSA 1978, §§ 41–4–1 to –27 (Repl.1986). Plaintiff presented three arguments in her docketing statement: (1) defendants did not meet their burden of establishing a lack of notice under Section 41–4–16; (2) the trial court erred in applying the statute of limitations; and (3) since the trial court did not rule on defendants' summary judgment motion for over one year, it was deemed denied pursuant to SCRA 1986, 1–054(B). Since plaintiff did not argue the third issue in her brief-in-chief, that issue is deemed abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985).

We affirm the judgment in favor of the McKinley County Board of Commissioners (Commissioners) and the McKinley County Sheriff's Department (Department) on the ground that plaintiff failed to comply with the ninety-day notice requirement of Section 41–4–16. We reverse the judgment as to defendant Garcia.

FACTS

Plaintiff was employed by the City of Gallup as a corrections officer. On February 20, 1986, she was injured during a training exercise in the course of her employment. She filed a workmen's compensation claim against the City of Gallup and was awarded compensation.

Plaintiff then filed the present suit against defendants on February 22, 1988. Defendants Gallup City Council, Gallup Police Department, and Gonzales were dismissed from this suit on the ground that workers' compensation was the exclusive remedy as to them. (From the record it appears that Jennifer Weisbacher was not properly served and was therefore never in the case.)

The remaining defendants filed a motion for summary judgment on April 14, 1988. The trial court granted judgment in favor of defendants on two theories: (1) plaintiff failed to comply with the ninety-day notice requirement of Section 41–4–16; and (2) plaintiff failed to file suit within two years as required by Section 41–4–15.

ISSUE I. THE NOTICE PROVISIONS OF SECTION 41–1–16

Defendants' first ground for summary judgment was plaintiff's failure to comply with the notice provisions of the Tort Claims Act. *See* § 41–4–16(A), (B). The Tort Claims Act requires that every person who claims damages from the state or any local public body must present a written notice stating the time, place and circumstances of the loss or injury to the public entity involved. § 41–4–16(A). No action may be maintained under the Tort Claims Act "unless notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence." § 41–4–16(B).

Plaintiff correctly notes that under the Tort Claims Act defendants have the burden of proving that the notice requirement was not met. *Ferguson v. New Mexico State Highway Comm'n,* 98 N.M. 718, 652 P.2d 740 (Ct.App.1981), *rev'd on other grounds,* 98 N.M. 680, 652 P.2d 230 (1982). She is also correct that whether notice has been given is generally a question of fact. *Smith v. State ex rel. N.M. Dep't of Parks & Recreation,* 106 N.M. 368, 743 P.2d 124 (Ct.App.1987). It is, however, incorrect to assume these principles logically require plaintiff's conclusion that summary judgment is therefore not appropriate on whether notice was sufficient under Section 41–4–16 in this case. Once the

movant has made a prima facie showing that he is entitled to summary judgment on the issue of notice, it is incumbent on the party opposing the motion to demonstrate the existence of a triable issue. *Frappier v. Mergler*, 107 N.M. 61, 752 P.2d 253 (Ct. App.1988). Plaintiff herein failed to meet this obligation.

In support of their motion for summary judgment, defendants filed an affidavit of the McKinley County attorney, Forrest Buffington. Buffington stated his duties included forwarding notice of tort claims against the county to the appropriate insurance carrier. He stated the first notice the Commissioners had of a potential claim was contained in a letter from plaintiff's original attorney dated December 9, 1986. This is well past the ninety days within which notice must be given pursuant to Section 41–4–16.

Plaintiff responds by arguing that, since virtually every employee in the McKinley County building was actually aware of the occurrence, defendants have failed to carry their burden to demonstrate the absence of a factual issue on notice, citing *Beckwith v. Cactus Drilling Corp.*, 84 N.M. 565, 505 P.2d 1241 (Ct.App.1972). Although the statute could be read to require only notice of the occurrence, *City of Las Cruces v. Garcia*, 102 N.M. 25, 690 P.2d 1019 (1984) (Walters J., dissenting), the law is now firmly established that the notice required "is not simply actual notice of the occurrence of an accident or injury but rather, actual notice that there exists a 'likelihood' that litigation may ensue." *Frappier*, 107 N.M. at 64, 752 P.2d at 256; *accord City of Las Cruces*, 102 N.M. at 27, 690 P.2d at 1021. Even if county employees did have actual knowledge of plaintiff's injury, therefore, it is insufficient to comply with Section 41–4–16.

Plaintiff further argues that these defendants were provided adequate notice by the workmen's compensation claim she filed against the City of Gallup and its insurer. Since, however, none of the present defendants were parties to the workmen's compensation action, that litigation could hardly put these defendants on notice of the likelihood that litigation might ensue against them. *Cf. City of Las Cruces*, 102 N.M. at 27, 690 P.2d at 1021 (nothing in police report to inform traffic department it may be subject to a lawsuit).

Since plaintiff presented no evidence indicating the county had actual notice of the likelihood of litigation, the Buffington affidavit met defendants' burden. *Blount v. T D Publishing Corp.*, 77 N.M. 384, 423 P.2d 421 (1966) (when defendant distributor filed affidavit denying notice that magazine article invaded plaintiff's privacy, burden shifted to plaintiff). Plaintiff failed to respond. The summary judgment as to the Commissioners and the Department is therefore affirmed.

ISSUE II. COMPLIANCE WITH THE STATUTE OF LIMITATIONS

In addition to the Commissioners and Department, however, plaintiff sued Clayton Garcia, both individually and as a County employee. The written notice requirements of Section 41–4–16 do not apply to claims against public employees. *Martinez v. City of Clovis*, 95 N.M. 654, 625 P.2d 583 (Ct.App.1980). As to Garcia, then, we must consider the second ground on which the trial court granted summary judgment, the statute of limitations.

Plaintiff was injured on February 20, 1986. February 20, 1988 fell on a Saturday. Plaintiff filed the present suit on Monday, February 22, 1988. Section 41–4–15 requires that a suit seeking relief under the Tort Claims Act be filed within two years of the occurrence. *Cozart v. Town of Bernalillo*, 99 N.M. 737, 663 P.2d 713 (Ct.App.1983).

The trial court determined that NMSA 1978, Section 12–2–2(G) (Repl.Pamp.1988), applied for purposes of calculating whether the complaint was timely. This statute, enacted in 1880, provides rules of statutory construction. Subsection G provides "in computing time, the first day shall be excluded and the last included *unless the last falls on Sunday*, in which case, the time prescribed shall be extended to include the whole of the following Monday." (Emphasis added.) SCRA 1986, 1–006(A) ("Rule

6(A)"), provides the following means of computing time: "[t]he last day of the period so computed shall be included, *unless it is a Saturday, a Sunday or a legal holiday,* in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday." (Emphasis added.) If Rule 6(A) applies, the complaint was timely filed since February 20, 1988, fell on a Saturday. Since Saturday is not excluded under the statute, plaintiff's action was untimely if Section 12–2–2(G) is used to compute the time for filing. *See Keilman v. Dar Tile Co.,* 74 N.M. 305, 393 P.2d 332 (1964) (no conflict between statute and rule since deadline fell on Sunday).

Rule 6(A) provides the means of computing time prescribed under the "rules, or by order of court or by any applicable statute." Defendants contend that the Tort Claims Act is not an "applicable statute" subject to Rule 6(A). We disagree.

Defendants argue the Tort Claims Act evidences a legislative intent that waivers of sovereign immunity be exclusively within the control of the legislature. *See* NMSA 1978, § 41–4–2(A) (Cum.Supp.1988). Defendants maintain that it follows that this court should look to Section 12–2–2(G), a legislative enactment, rather than Rule 6(A), a court-created rule of procedure, for computing time. We can discern no intent from the Tort Claims Act indicating that computations of time should be governed by the statute. In addition, a determination that plaintiff's last day to file was a day the clerks' offices were closed would run afoul of our duty to interpret statutes in accord with sound reasoning and common sense. *See McDonald v. Lambert,* 43 N.M. 27, 32, 85 P.2d 78, 81 (1938); *Bowling v. Webb Gas Co.,* 505 S.W.2d 39, 41–42 (Mo.1974). Moreover, the law generally favors the right of action rather than the right of limitation. *Gaston v. Hartzell,* 89 N.M. 217, 549 P.2d 632 (Ct.App.1976).

While the legislature may certainly determine what actions may be brought under the Tort Claims Act, and the limitation period for filing them, the procedure for determining the period in which such actions shall be filed is a procedural question to be calculated by court rules. *Maples v. State,* 110 N.M. 34, 791 P.2d 788 (1990) (on procedural matters, such as time limitations for filing judicial proceedings, a rule adopted by the supreme court governs over an inconsistent statute); *Irvine v. St. Joseph Hosp.,* 102 N.M. 572, 698 P.2d 442 (Ct.App.1984) (limitation statute is to be given effect until it conflicts with supreme court rule).

In *Saiz v. Barham,* 100 N.M. 596, 673 P.2d 1329 (Ct.App.1983), we considered a very similar factual situation under the limitation period of the Medical Malpractice Act, NMSA 1978, § 41–5–13 (Repl.Pamp. 1982). In that case, two of the limitation deadlines expired on Saturday and we relied on Rule 6 to extend the deadlines until Monday. Defendants attempt to distinguish *Saiz* on the ground it involved the Medical Malpractice Act rather than the Tort Claims Act. They contend that, since governmental immunity must be strictly construed, *Saiz* should not be applied to this case. As previously stated, we glean no intent from the Tort Claims Act that unique rules of construction should control the computation of time for filing the complaint.

The Arizona Court of Appeals also resolved a very similar situation in favor of the rule of procedure in *Salzman v. Morentin,* 116 Ariz. 79, 567 P.2d 1208 (Ct.App. 1977). Plaintiffs therein filed a malpractice action. The statute of limitation for such action was two years. Arizona, like New Mexico, had both a statutory scheme and a rule of civil procedure prescribing how time should be calculated. As in the case before us, the timeworn Arizona statutes involved, A.R.S. Sections 1–243 and 1–301, extended the filing time only when the due date fell on Sunday, not Saturday. The Arizona rule of civil procedure, like New Mexico's, was patterned after Rule 6 of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 6. Like our Rule 6, it provided the last day was to "be included, unless it is a Saturday, a Sunday, or a legal holiday." A.R.S., R.Civ.P., Rule 6(a). After noting the ma-

jority of both federal and state decisions had interpreted Rule 6 to calculate the period of limitation to include the first business day after a weekend or holiday, the Arizona court confronted the inconsistency between its statute and the rule of procedure, concluding:

> However, in none of the foregoing cases was there involved a statute similar to our A.R.S. § 1–243 which states how time shall be computed. The question then is—which governs, the statute or Rule 6(a) of the Rules of Civil Procedure? Art. 6, § 5 of the Arizona Constitution gives exclusive power to the Supreme Court to make rules relative to all procedural matters in any court. A.R.S. § 1–243 is a procedural statute and insofar as it purports to govern procedure in the courts has been superseded by Rule 6(a) of the Rules of Civil Procedure. The application of Rule 6(a) here does not result in the modification of the prescribed statutory period. It is merely a judicial interpretation of how an action is to be brought after the legislature has specified "what" actions may be brought.

Salzman, 567 P.2d at 1209.

The analysis in *Salzman* is persuasive and applicable to the present facts.

We hold that pursuant to SCRA 1986, 1–006, the complaint was timely filed. The summary judgment as to defendant Garcia is therefore reversed and the cause remanded for further proceedings consistent with this opinion. Each side shall bear its own costs on appeal.

IT IS SO ORDERED.

MINZNER and PICKARD, JJ., concur.

823 P.2d 298

In the Matter of Richard E. NORTON An Attorney Suspended from Practice Before the Courts of the State of New Mexico.

No. 18972.

Supreme Court of New Mexico.

Dec. 16, 1991.

Charles A. Wyman, Deputy Chief Disciplinary Counsel, Albuquerque, for Disciplinary Bd.

Charles H. Reid, Albuquerque, for respondent.

OPINION

PER CURIAM.

This matter is before the Court on an application for leave to resign filed by Richard E. Norton pursuant to Rule 17–209 of the Rules Governing Discipline. SCRA 1986, 17–101 to –316 (Repl.Pamp.1991). For reasons set forth below, we grant the application to resign.

Norton is presently suspended from the practice of law for violating the terms and conditions of a previously imposed probation. *See In re Norton,* 112 N.M. 75, 811 P.2d 573 (1991); *In re Norton,* 109 N.M. 616, 788 P.2d 372 (1990). On May 13, 1991, prior to Norton's suspension, a specification of charges was filed against Norton alleging acts of professional misconduct in addition to those for which he was placed on probation. Norton's actions were alleged to be in violation of Rules 16–104(A), 16–105(A), 16–115(A), 16–115(B), 16–803(D), 16–804(C), and 16–804(H) of the Rules of Professional Conduct, SCRA 1986, 16–101 to –805 (Rep.Pamp.1991). Pursuant to the requirements of Rule 17–209(B), Norton submitted with his application for leave to resign a sworn, written statement admitting to the truth of these charges. In his application, which was approved by disciplinary counsel, Norton agreed that he would reimburse his former client Glenna Hartwell the amount of $5,000 plus interest and pay all costs incurred by the disciplinary board in the pending disciplinary matter. He also acknowledged that this Court might impose upon him any other conditions and terms which might be deemed necessary to insure the protection of the public, including but not limited to making the terms of his resignation a matter of public record.

This Court previously has held that disbarment rather than resignation is the appropriate sanction where the attorney has engaged in intentional misconduct involving misrepresentation and moral turpitude in the misappropriation of client funds. *In re Duffy,* 102 N.M. 524, 526, 697 P.2d 943, 945 (1985). The instant case is distinguishable from *Duffy* in two respects. First, while Norton admittedly failed to segregate and properly account for client funds, neither the allegations nor Norton's admissions establish conclusively that Norton converted any of the funds in question

to his own use. Secondly, and unlike the attorney in *Duffy*, Norton spared the disciplinary agency much time and expense by requesting permission to resign and acknowledging his wrongdoing prior to the conclusion of a hearing and the entry of findings of misconduct. *See* SCRA 1986, 17–209(A) (an attorney who is "the subject of an investigation" may resign).

We also note that Rule 17–209(E) requires that Norton may not apply for readmission to the bar of this state except with leave of this Court. In this respect, the resignation by an attorney in lieu of a full disciplinary proceeding is akin to disbarment and thus provides ample protection to the public. *See* SCRA 1986, 17–214(A) (disbarred attorney must obtain approval of this Court prior to applying for reinstatement).

THEREFORE, IT IS ORDERED that Richard E. Norton be permitted to resign from the practice of law pursuant to Rule 17–209 effective September 30, 1991, and that he may apply for readmission to practice only with the leave of this Court. Should such permission be granted, any application for readmission will be referred to the disciplinary board for proceedings under Rules 17–214(A) and 17–214(D).

IT IS FURTHER ORDERED that on or before September 30, 1992, Norton shall reimburse client Glenna Hartwell the amount of $5,000 plus interest from May 6, 1988, computed at fifteen per cent per annum.

IT IS FURTHER ORDERED that Norton will reimburse the disciplinary board its costs in the amount of $56.93 on or before September 30, 1992.

IT IS FURTHER ORDERED pursuant to Rule 17–206(D) that this opinion shall be published in the State Bar of New Mexico *Bar Bulletin* and the *New Mexico Reports*.

IT IS SO ORDERED.

823 P.2d 299

Kim Marie JARAMILLO, Petitioner,

v.

Francisco Filimon JARAMILLO, Respondent.

No. 19324.

Supreme Court of New Mexico.

Dec. 24, 1991.

Rehearing Denied Jan. 16, 1992.

Reeves, Chavez, Greenfield, Acosta & Walker, Charlotte Greenfield, Las Cruces, for petitioner.

Hubert & Hernandez, Beverly Singleman, Las Cruces, for respondent.

OPINION

MONTGOMERY, Justice.

We granted certiorari to review the following question arising under the Constitution of the United States and involving an issue of substantial public interest:[1] Does placing the burden of proof upon a joint custodial parent to show that a proposed relocation is in the child's best interest impose unconstitutional restrictions upon the relocating parent's right to travel? Al-

1. As contemplated by NMSA 1978, Subsections 34-5-14(B)(3) & (4) (Repl.Pamp.1990).

though our answer to this question is generally favorable to the petitioner's contentions, we decline to go as far as have some courts by creating a presumption in favor of the relocating parent's right to remove the child from the local jurisdiction and imposing a burden on the resisting parent to show that the proposed relocation will be *contrary to* the child's best interests. Nor, however, do we recognize a presumption in favor of the resisting parent, placing a burden on the relocating parent to show that the move will be *in* the child's best interests.

The court of appeals, in the decision here under review, *Murphy v. Jaramillo,* 110 N.M. 336, 795 P.2d 1028 (Ct.App.1990), stated that in joint custody cases the burden is on the party seeking to relocate to show that the relocation is in the best interests of the child. *Id.* at 340, 795 P.2d at 1032. We disagree with this statement, although we agree generally with other statements in the court's opinion, reviewed below, to the effect that the nonrelocating parent should not be placed at a disadvantage by having to show that a proposed move will be inimical to the child's best interests. Because we conclude that the trial court properly determined where the best interests of the child lay under the facts of this case and the court of appeals incorrectly set aside that determination, we reverse the court of appeals and remand to the district court with instructions to reinstate its order revising the parties' parenting plan and permitting the mother to move with the child to another state.

I. FACTS AND ISSUES

We refer to the parties as did the court of appeals in its opinion. Mother, Kim Marie Jaramillo, and Father, Francisco Filimon Jaramillo, were divorced in September 1987 by a decree of the District Court of Dona Ana County, New Mexico. In connection with their divorce, the parties entered into a stipulation, approved by the court as part of its decree, relating to the custody of their minor child Monica, then age three, and providing that they would share joint legal custody of their daughter. The stipulation also set out the details of a parenting plan providing for Monica's "physical custody" after the divorce and containing other provisions regarding her religious upbringing, schooling, medical care, and financial support. In general, the parenting plan provided that Monica was to reside with Mother each week, except during periods when she resided with Father, which periods basically consisted of alternate weekends, Wednesday of each week, certain specified holidays (including Father's birthday) each year, and several weeks during each summer. As the trial court found in the present proceeding, Monica did well under this joint custody arrangement, with Mother having "primary physical custody" and Father exercising frequent and extensive visitation.[2]

The trial court also found that Monica was a well-adjusted, normally developing, bright, happy four-year-old child, who was bonded to both parents and who had been psychologically, emotionally, and physically nurtured by both parents. The court found that Mother was the primary psychological, emotional, and nurturing parent for Monica.

The proceeding in which the court made these findings had been initiated in September 1988, after Mother informed Father that she planned to move with Monica from the city in which all three of them then lived, Las Cruces, New Mexico, to the state of New Hampshire, where her parents lived and where she believed she could find steadier and more remunerative employment. Upon being so advised, Father petitioned the court to prevent Mother from moving Monica. Several months later, Father made plans to move from Las Cruces to his home town, Socorro, New Mexico, about 150 miles from Las Cruces. He

2. The term "visitation" is something of a misnomer in joint custody situations, because under the joint custody statute it really applies only to the "period of time available to a *noncustodial* parent, *under a sole custody arrangement,* during which a child resides with or is under the care and control of the noncustodial parent." NMSA 1978, § 40-4-9.1(L)(8) (Repl.Pamp.1989) (emphasis added).

thereupon requested the court to modify the earlier custody decree to award primary physical custody of Monica to him, so that he could live with his extended family in Socorro and obtain new employment there. The court treated the case as presenting cross-motions for change of custody and heard evidence at two hearings in May and June of 1989.

At trial, the psychologist who had evaluated Monica and her parents testified that Monica identified with her mother as her primary caretaker and that it was in Monica's best interest that her primary residence remain with Mother, whether that residence was in New Hampshire or New Mexico. He also testified that an altered schedule of visitation for Father, including an extended summer visit plus holiday visits during the school year, would allow Monica to maintain and develop a relationship with him.

In its July 27, 1989 order, which contained findings of fact and conclusions of law, the court continued joint legal custody in both parents. With respect to Monica's "physical custody"—*i.e.*, her residence—the court ordered that physical custody with Mother should continue. The court found that there would be real economic advantages and potential educational advantages for Mother and for Monica from Mother's moving to and accepting a job in New Hampshire, where her parents lived. The court found that Mother's motives for moving to New Hampshire were legitimate and acceptable and made the all-important finding that it was in the best interest of Monica that Mother remain as her primary custodial parent. The court also found that there was no evidence that a move by Monica to Socorro with Father would be better for her than a move to New Hampshire and that no evidence had been presented to show adverse effects upon Monica if she accompanied Mother to New Hampshire.

The court also made certain findings in favor of Father—namely, that he had remained current in his support obligations; had exercised visitation with Monica on every possible occasion; had remarried, completed his educational goals, and desired to return to his family home in Socorro to be close to his family; that his desire to move to Socorro was part of a well-thought-out plan which began when he moved to Las Cruces to begin his education, but with the ultimate goal of returning to Socorro; that he had taken Monica to Socorro on numerous occasions, enabling her to become familiar with the Socorro area and close to his extended family; that Monica had no substantial contacts with New Hampshire and that her move to that state would change her way of life from that of a close-knit Hispanic family to a nuclear eastern family and would amount to a major difference in the way Monica would be raised in future years; and that New Mexico was Monica's home state and she had never lived anywhere else.

In its conclusions of law, the court, while continuing "primary physical custody" of Monica in Mother, awarded Father "liberal visitation rights," including but not limited to all reasonable times when he was in New Hampshire, ten consecutive weeks in the summer, and every other Christmas during the time Monica was on Christmas vacation.

Father appealed this order to the court of appeals, contending primarily that the trial court had erred by favoring mother with the same presumption that a sole custodian enjoys in terms of such a custodian's right to relocate and take the child with her. *See Newhouse v. Chavez,* 108 N.M. 319, 322–23, 772 P.2d 353, 356–57 (Ct.App. 1988), *cert. denied,* 108 N.M. 197, 769 P.2d 731 (1989). Father thus maintained that the trial court had improperly shifted the burden of proof to him to show a substantial change of circumstances and what was in the child's best interest. The court of appeals agreed, reversed the trial court's order, and remanded for a new determination of what was in the child's best interest. *Murphy,* 110 N.M. at 339–40, 795 P.2d at 1031–32.

On certiorari, Mother contends that the court of appeals' decision unconstitutionally burdens her right to travel and impermissibly frustrates the statutory presump-

tion in favor of joint custody by increasing the likelihood that divorcing parents will avoid joint custody arrangements and strive instead for sole custody in each parent. Father defends the court's decision, contending that it encourages, rather than discourages, divorcing parents to enter into joint custody arrangements, and arguing that conferring on Mother a presumption in favor of relocation unfairly burdens him with the requirement of showing that a proposed move will be contrary to the child's best interests. We agree in part with each party's contentions but conclude that this record provides no reason to upset the trial court's determination as to where Monica's best interests lay. Accordingly, we remand to the district court for reinstatement of its order.

II. THE GOVERNING LEGAL PRINCIPLES

A. *Joint Custody*

We begin our analysis by distinguishing the present case, which involves the issue of relocation in a joint custody situation, from previous New Mexico decisions, which involved the same issue but in situations in which one parent had sole custody of the child. In the latter context, a sole custodian seeking to relocate with a child is entitled to a presumption under, *inter alia, Newhouse v. Chavez* that the move is in the best interests of the child, and the burden is on the noncustodial parent to show that the move is against those interests or motivated by bad faith on the part of the custodial parent. *Newhouse,* 108 N.M. at 322–23, 772 P.2d at 356–57. Here, the trial court determined that in cases of joint legal custody the parent having primary physical custody is treated as the custodial parent for purposes of relocating and therefore receives the benefit of the *Newhouse* presumption. *Murphy,* 110 N.M. at 338, 795 P.2d at 1030. Although this presumption may apply in sole custody arrangements—a question not before us [3]—we think the court of appeals was correct in stating that the trial court's use of this analogy in joint custody situations was inappropriate.

New Mexico law presumes that joint custody is in the best interest of a child in an initial custody determination. NMSA 1978, § 40–4–9.1(A) (Repl.Pamp.1989). Once joint custody has been decreed, it is not to be terminated unless there has been a substantial and material change in circumstances affecting the welfare of the child, such that joint custody is no longer in the child's best interests. *Id.* The "best interests" criterion, of course, is the lodestar for determining a custody award, under both statute and case law in New Mexico, and probably in all other jurisdictions in this country. *See, e.g.,* § 40–4–9(A) (custody of minor under age fourteen to be determined in accordance with child's best interests); *Garcia v. Garcia,* 81 N.M. 277, 279, 466 P.2d 554, 556 (1970) (referring to "the universal rule that the best interests of the child are paramount"); *Urzua v. Urzua,* 67 N.M. 304, 305, 355 P.2d 123, 124 (1960) ("the welfare of the child is the primary consideration"). *See also, e.g., Fingert v. Fingert,* 221 Cal.App.3d 1575, 1580, 271 Cal.Rptr. 389, 391 (1990) ("The primary concern in a custody dispute is the best interests of the child."); *Pikula v. Pikula,* 374 N.W.2d 705, 711 (Minn.1985) ("The guiding principle in all custody cases is the best interests of the child."); *Hartman v. Hartman,* 328 Pa.Super. 154, 157, 476 A.2d 938, 939 (1984) ("It is well-established that the sole criterion in child custody decisions is the best interests and welfare of the child.").

Our statutes define "joint custody" as an order of the court awarding custody of a child to two parents. Subsection 40–4–9.1(L)(3). "Custody" is defined

3. Under the principles discussed in this opinion, the *Newhouse* presumption may be open to some question, involving as it does a preference in favor of a relocating parent and a disadvantage burdening the noncustodial parent who remains behind. However, this case does not present an issue of the continued vitality of the *Newhouse* presumption, and we express no opinion thereon. There will be time enough to review that issue if and when it arises in a case properly presenting it. Our opinion is limited to the procedures to be followed in terminating or revising a joint custody arrangement.

by Subsection 40–4–9.1(L)(2) as the authority and responsibility to make major decisions in a child's best interests in the areas of residence, medical and dental treatment, education or child care, religion, and recreation. Thus, under the statute, *both* parents have custody of the child and both participate equally in making decisions affecting the child's interests. However, joint custody does not imply an equal division of the child's time between the parents or an equal division of financial responsibility for the child. Subsection 40–4–9.1(L)(3). We believe that the designation of one parent as "primary physical custodian" under a court-approved parenting plan in a joint custody situation simply means that the child resides with that parent more than half the time.[4] In other respects, the voice of each parent with respect to the child's "custody"—his or her residence, medical and dental treatment, education, etc.—is equal to the other's. Consequently, one parent's status as primary physical custodian has no particular significance and should not entitle that parent to the benefit of the *Newhouse* presumption.

Therefore, we agree with the court of appeals that the trial court erred in its conclusion of law that in cases of joint legal custody the parent having primary physical custody is treated as the custodial parent for purposes of relocation. This does not mean, however, that the court of appeals was correct in reversing the trial court. Although the latter court may have used, in part, an incorrect legal standard in assessing the presumption favoring Mother and the corresponding burden on Father, it does not follow that the trial court's decision continuing joint legal custody in both parents, continuing primary physical custody in Mother, and permitting Mother to move to New Hampshire with her daughter, was necessarily incorrect. A lower court's decision will be affirmed on review if that decision was correct, even though the court may have used an incorrect rationale in arriving at its result. *Scott v. Murphy Corp.*, 79 N.M. 697, 700, 448 P.2d 803, 806 (1968). We shall return below to the question whether, notwithstanding this erroneous conclusion of law, the trial court's decision should nonetheless be affirmed.

B. *Constitutional Considerations*

After dealing with the issue just discussed—Mother's status as "primary physical custodian" and the inappropriateness of favoring her with the procedural advantages afforded a sole custodian—the court of appeals discussed the presumptions and burdens of proof that should apply in joint custody cases in which one of the parents seeks to relocate and take the child with him or her. *Murphy*, 110 N.M. at 339–40, 795 P.2d at 1031–32. Before embarking on this discussion, the court approved the holding in *Sydnes v. Sydnes*, 388 N.W.2d 3 (Minn.Ct.App.1986) (presumption favoring a parent with sole custody does not extend to cases in which parents have joint legal and physical custody and are equally involved with the child's care), and adopted the principle enunciated in that

4. The term "primary physical custody" is not contained in Section 40–4–9.1, although the phrase "physical custody" appears in two of the subsections in the section. *See* § 40–4–9.1(H) (access to records and information shall not be denied to parent who is not child's physical custodial parent); § 40–4–9.1(J)(4)(e) (child's recreational activities during parents' marriage should continue thereafter, regardless of which parent has physical custody). *See also* § 40–4–11.1(D)(2) ("basic visitation" for purposes of computing support means custody arrangement whereby one parent has physical custody and other parent has visitation less than thirty percent of time); § 40–4–11.1(D)(5) ("split responsibility" means custody arrangement whereby each parent has physical custody of at least one of parties' children); § 40–4–11.1(F) (adjustments for physical custody in computing support to be made as specified in subsection).

In our view, the term "physical custody" is synonymous with other terms used in Section 40–4–9.1, including the term "residence," Section 40–4–9.1(L)(2), and, importantly, the term "period of responsibility." *See* § 40–4–9.1(F) (parenting plan is to include division of child's time and care into periods of responsibility for each parent); § 40–4–9.1(J)(1) (under joint custody award, each parent is to have significant, well-defined periods of responsibility for child); § 40–4–9.1(L)(6) ("period of responsibility" means a specified period of time during which parent is responsible for providing for child's physical, developmental, and emotional needs, including decision making required in daily living).

case as the law in New Mexico. 110 N.M. at 339, 795 P.2d at 1031.

The court's syllabus in *Sydnes* reads as follows: "When parents have been granted joint legal and physical custody and neither is the primary caretaker, the parent petitioning for permission to remove the children to another country has the burden of establishing that such a move would be in the children's best interests." *Sydnes,* 388 N.W.2d at 5. We disagree with the court of appeals that this should be the rule in New Mexico. If the word "state" is substituted for "country" and we ignore the fact that in this case the trial court found that Mother was Monica's primary caretaker, what emerges from the *Sydnes* syllabus is the proposition that a parent who wishes to relocate to another state has the burden of establishing that such a move will be in the child's or children's best interests. As we shall now discuss, we believe that allocating burdens and presumptions in this context does violence to *both* parents' rights, jeopardizes the true goal of determining what in fact *is* in the child's best interests, and substitutes procedural formalism for the admittedly difficult task of determining, on the *facts,* how best to accommodate the interests of all parties before the court, both parents and children.

Citing *Sydnes,* the court of appeals articulated this statement as the law generally applicable in relocation cases involving joint custody: "[O]rdinarily, in joint custody cases, the burden is on the party seeking to relocate to show that the relocation is in the best interests of the child." 110 N.M. at 340, 795 P.2d at 1032. We agree with Mother that placing this burden on the relocating parent and favoring the resisting parent with a corresponding presumption that relocation is not in the child's best interest unconstitutionally impairs the relocating parent's right to travel. This right is so deeply ingrained in American constitutional law that it certainly needs no elaboration by this Court. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618, 629–31, 89 S.Ct. 1322, 1328–29, 22 L.Ed.2d 600 (1969) ("[A]ll citizens [have the right to] be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."); *Jones v. Helms,* 452 U.S. 412, 418–19, 101 S.Ct. 2434, 2439–40, 69 L.Ed.2d 118 (1981); *United States v. Guest,* 383 U.S. 745, 757–59, 86 S.Ct. 1170, 1177–79, 16 L.Ed.2d 239 (1966); *Edwards v. California,* 314 U.S. 160, 177–81, 62 S.Ct. 164, 168–70, 86 L.Ed. 119 (1941) (Douglas, J., concurring). Commentators have widely discussed the implications of this right with respect to a relocating parent's right to move from one state to another without the constraints imposed by the risk that he or she will lose custody of his or her child. *See generally, e.g.,* P. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications,* 24 J.Fam.L. 625 (1985–86); A. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, the Constitution and the Courts,* 1985 Ariz.St.L.J. 1; Note, *A Proposed "Best Interests" Test for Removing a Child From the Jurisdiction of the Noncustodial Parent,* 51 Fordham L.Rev. 489 (1982); Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel,* 12 Rutgers L.J. 341 (1981); Note, *Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions,* 6 U.C.Davis L.Rev. 181 (1973).

In New Mexico, the protection afforded the right to travel in the child-custody context has been explicitly recognized by both this Court and the court of appeals. *See Garcia v. Garcia,* 81 N.M. at 279, 466 P.2d at 556 ("[W]e do not agree that the fact the parent with custody is a non-resident or about to become one, for whatever reason, alters the universal rule that the best interests of the child are paramount; that if those interests are best served by being with the mother, even though outside this jurisdiction, removal should be permitted."); *Newhouse v. Chavez,* 108 N.M. at 323, 772 P.2d at 357 ("[A]s a general rule, the non-custodial parent's right to visitation should not prevent the custodial parent from moving when the reasons for the move are legitimate and the best interests of the children will be served by accompanying the custodial parent."); *Alfieri v.*

Alfieri, 105 N.M. 373, 376, 733 P.2d 4, 7 (Ct.App.1987) ("In *Garcia*, the New Mexico Supreme Court confirmed the 'best interests of the child' rule, but recognized that the right of a custodial parent to relocate should not be interfered with except where the move would clearly be contrary to the child's welfare.") (dictum). As Father points out, these New Mexico cases all involved sole custody situations, but we perceive no reason why the principle that a parent's right to relocate should not be burdened by an adverse presumption should be any different in the joint custody situation. And, of course, it makes no difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether. *See Shapiro*, 394 U.S. at 631, 89 S.Ct. at 1329 ("If a law has 'no other purpose ... than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.'" (quoting *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968) (omission and brackets in original)).

By the same token, we believe that the other parent's right to maintain his or her close association and frequent contact with the child should be equally free from any unfavorable presumption that would place him or her under the burden of showing that the proposed removal of the child would be contrary to the child's best interests. "[F]reedom of personal choice in matters of family life is a fundamental liberty interest." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982) (requiring stringent standards for termination of parental rights). This freedom of personal choice includes "the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship." *Franz v. United States*, 707 F.2d 582, 595 (D.C.Cir.1983) (requiring showing of a compelling state interest when divorced parent's access to child was to be terminated pursuant to Federal Witness Protection Program).[5] One commentator, after an extensive review of the psychological literature, apparently prefers the right of the noncustodial parent to maintain his or her contact with the child over the right of the other parent to relocate. She concludes:

> It is rarely in the child's best interest to change geographical locations subsequent to a divorce, regardless of the fact that the parent with whom the child is primarily residing may feel more self-satisfied after the move. The child suffers not only the loss of the remaining parent but also significant environmental changes * * *. The remaining parent suffers the loss of day-to-day contact with her child and, very probably, the loss of personal self-esteem * * *.
>
> * * * [P]arents should not be allowed to remove the children from the marital jurisdiction unless it is clear that such a move is in the children's best interest * * *. [S]uch moves should seldom be granted since the psychological detriment to the children and the remaining parent caused by such a move is rarely justified.

Raines, supra at 656. In other words, according to Professor Raines, there should be a presumption that the move will be contrary to the child's best interest, and the burden should be on the relocating parent to prove that the move will promote that interest.[6]

5. *See also Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (holding that Due Process Clause does not protect an unwed father's interest in personal contact with child when father fails to develop a relationship with child); *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) (Georgia statute requiring only mother's consent for adoption of illegitimate child did not violate father's due process rights when father had not sought custody of child and proposed adoption kept child in existing family unit); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (requiring that unwed father be given hearing on his fitness as parent before state could take custody of his children upon mother's death).

6. Some courts have adopted this presumption and apply it with varying degrees of stringency. *E.g., In re Marriage of Burgham*, 86 Ill.App.3d 341, 345–46, 41 Ill.Dec. 691, 694, 408 N.E.2d 37,

We think that such a presumption is potentially just as inimical to the child's best interests as the opposite presumption favoring the relocating parent and burdening the resisting parent with the requirement that he or she prove that the move would be contrary to the child's best interests. Neither presumption, except by happenstance, serves the statutory goal in Section 40–4–9 of determining and implementing the best interests of the child. Professor Raines's presumption prefers the interest of the remaining parent to that of the relocating parent; the opposite presumption reverses the preferences assigned to these interests. Both presumptions are subject to the following criticism leveled by the United States Supreme Court several years ago at "procedure by presumption":

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Stanley, 405 U.S. at 656–57, 92 S.Ct. at 1215 (citations omitted).

C. *Presumptions and Burdens*

Under our Rules of Evidence, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but it does not shift to that party the burden of proof in the sense of the risk of nonpersuasion, which remains upon the party on whom it was originally cast. SCRA 1986, 11–301; *see Mortgage Inv. Co. v. Griego,* 108 N.M. 240, 243–44, 771 P.2d 173, 176–77 (1989) (discussing effect of presumption in light of revised Rule 301). When parents are operating under a joint custody arrangement and one of them seeks to alter the arrangement, it makes perfectly good sense to impose a presumption in favor of the parent who wishes to continue to operate under the joint custody decree and to place on the party wishing to change the decree the burden to produce evidence that the arrangement is no longer workable and needs to be changed. *See Newhouse,* 108 N.M. at 324, 772 P.2d at 358 (burden is on party seeking modification to overcome presumption in favor of reasonableness of original decree). Considerations of *res judicata* and our statutory presumption in favor of joint custody militate against altering the decree absent a substantial and material change in circumstances affecting the welfare of the child since entry of the joint custody order. *See* § 40–4–9.1(A). But beyond this presumption in favor of an existing joint custody arrangement, further presumptions for or against the relocating parent and the one who remains behind only frustrate achievement of the ultimate goal of determining the arrangement that will best serve the child's interests.

In the typical bipolar model of adversary litigation—in which one party's interests are pitted against those of the opposing party—the use of presumptions and the assignment of burdens of proof probably effectuate, in most instances, the relevant policy goals involved in determining who wins and who loses. When, however, the interests of a third party (or parties—the children) are not only significantly affected by the outcome of the litigation but indeed are paramount in determining that outcome, placing on one party the burden of establishing that his or her interests are the ones that should be vindicated can subordinate the interests of the third party—

40 (1980) (only "superficial showing" need be made that move is consistent with child's best interests); *D'Onofrio v. D'Onofrio,* 144 N.J.Super. 200, 206, 365 A.2d 27, 30 (Ch.Div.) ("real advantage" to custodial parent and child must be shown to justify removal), *aff'd per curiam,* 144 N.J.Super. 352, 365 A.2d 716 (App.Div.1976); *Weiss v. Weiss,* 52 N.Y.2d 170, 175–76, 418 N.E.2d 377, 380–81, 436 N.Y.S.2d 862, 865–66 (1981) ("exceptional circumstances" must be shown to justify child's removal from jurisdiction). Other courts have adopted a presumption favoring the relocating parent's decision to move. *E.g., Bernick v. Bernick,* 31 Colo.App. 485, 487–88, 505 P.2d 14, 15–16 (1972) (in absence of clear showing to contrary, custodial parent's decision to move should be presumed to have been made in children's best interests); *Auge v. Auge,* 334 N.W.2d 393, 399 (Minn.1983) (adopting presumption favoring removal).

who may be absent and may not even be represented—in the clash over the other two parties' competing hopes and desires. Accepting for purposes of discussion the court of appeals' formulation of the applicable burden in litigation over a custody arrangement (burden on the relocating party to show that the relocation is in the child's best interests), suppose the relocating party fails to carry that burden? Should the court's decision, by something akin to default, favor the resisting party? The result of this will be that the resisting party will be awarded custody or will prevail in his or her proposed modification of the joint custody arrangement. Can the court, or anyone else, say with any confidence that this result will be in the child's best interest?

The "risk of nonpersuasion" referred to in Rule 301 is exactly that—the risk that, if the court is not persuaded by the evidence adduced by the party against whom a presumption is directed (assuming that party bears the burden of proof), that party will lose and the other party will prevail. It is a familiar rule in New Mexico that the refusal of a trial court to adopt a finding requested by the party who has the burden of proof on an issue operates as a finding against the party with the burden and in favor of the opposing party. *E.g., Gallegos v. Wilkerson,* 79 N.M. 549, 551, 445 P.2d 970, 972 (1968). Thus, if the court of appeals' presumption is the law, the trial court's failure to be persuaded, and consequent refusal to find, that relocation will be in the child's best interest means that the resisting party wins the lawsuit and, again by default, acquires custody of the child or adoption of the parenting plan he or she proposes, even though that result may be inconsistent with the child's best interests.

D. *Equal Footing*

The parties in this case were subject to a decree of joint custody. When Mother decided to move to New Hampshire and take Monica with her, she notified Father of this proposed change, as she was required to do by Subsection 40–4–9.1(J)(4)(a). The parties thereafter were free to attempt to resolve any disagreement over the proposed move by employing any of the methods specified in Subsection 40–4–9.1(J)(5) (agreement; counseling, conciliation, or mediation; binding arbitration; reference to a third party such as a special master; etc.). If none of these methods was successful, either party could invoke a decision by the district court—the ultimate resort specified in Subsection 40–4–9.1(J)(5)(g). At that point, after a hearing, the court—perhaps with the assistance of professional evaluation under SCRA 1986, 11–706 (providing for court-appointed experts), or a special master appointed under SCRA 1986, 1–053 (Cum.Supp.1991) (providing for such appointments),[7] or a guardian ad litem appointed under Section 40–4–8—had to decide whether to terminate joint custody and award sole custody to one parent or the other or to continue joint custody and adopt a revised parenting plan. *See* §§ 40–4–9.1(A), (F), & (J). If the court chose the latter alternative and necessary aspects of the parenting plan were contested, it was mandated either to accept the plan proposed by one of the parties or to combine and revise those plans as it might deem necessary in the child's best interests. Subsection 40–4–9.1(F).

In the same or analogous circumstances, courts in other jurisdictions have adopted the rule that neither party is under a burden to prove which arrangement will best promote the child's interests; both parents share equally the burden of demonstrating how the child's best interests will be served. *See Hartman v. Hartman,* 328 Pa.Super. 154, 158, 476 A.2d 938, 940 (1984) (" '[O]nce a substantial change has been established [(the party seeking modification having the burden of proof)], both natural parents share equally the burden of demonstrating with which parent the child's best interests will be served.' " (quoting *Daniel K.D. v. Jan M.H.,* 301 Pa.Super. 36, 40–42, 446 A.2d 1323, 1324–25 (1982) (brackets in original)); *Commonwealth ex rel. Michael R. v. Robert R.R.,* 293 Pa.Super. 18, 24, 437 A.2d 969, 972

7. As to both options, see Subsection 40–4–9.1(G).

(1981) ("The point is simply that two parents bear an equal burden."); *id.* at 28, 437 A.2d at 974 ("The litigants should simply be put on an equal footing at the outset, and then the entire realm of facts and circumstances which are relevant to determining who is the best custodial parent should be considered." (Cercone, J., concurring)); E. Bertin & V. Klein, *Pennsylvania's Developing Child Custody Law,* 25 Vill.L.Rev. 752, 782 (1979–80) ("Evidentiary rules are changing to accommodate the best interests standard. The burden of proof in custody cases is now shared by both contesting parents.").[8] *See also Presutti v. Presutti,* 181 Conn. 622, 627–28, 436 A.2d 299, 303 (1980) (declining to impose presumption for or against nonresident parent); *Pamperin v. Pamperin,* 112 Wis.2d 70, 74–75, 331 N.W.2d 648, 650–51 (Ct.App.1983) (each party bears equal burden to show that award of custody to that party is in child's best interests); *cf. In re S.D., Jr.,* 549 P.2d 1190, 1200 (Alaska 1976) (in dispositive phase of dependency-and-neglect proceeding to award custody of minors to state agency, placing burden of proof either on parent or on agency is inappropriate).

We adopt this procedure for relocation disputes in New Mexico. As noted above, either party can initiate a proceeding to alter an existing custody arrangement on the ground that a substantial and material change in circumstances affecting the welfare of the child has occurred or is about to occur, and the party seeking such change has the burden to show that the existing arrangement is no longer workable. In almost every case in which the change in circumstances is occasioned by one parent's proposed relocation, the proposed move will establish the substantiality and materiality of the change.[9] It then becomes incumbent on the trial court to consider as much information as the parties choose to submit, or to elicit further information on its own motion from the sources mentioned above or such other sources as the court may have available, and to decide what new arrangement will serve the child's best interests. In such a proceeding, neither parent will have the burden to show that relocation of the child with the removing parent will be in or contrary to the child's best interests. Each party will have the burden to persuade the court that the new custody arrangement or parenting plan proposed by him or her should be adopted by the court, but that party's failure to carry this burden will only mean that the court remains free to adopt the arrangement or plan that it determines best promotes the child's interests.[10]

III. OUR DISPOSITION

In light of the foregoing principles, we think that reversal of the district court's order was not called for. While the court relied in part on an erroneous conclusion of law—that Mother's status as primary physical custodian under the joint custody decree entitled her to the presumption available to a sole custodian in choosing her and the child's place of residence—we see no indication that the trial court

8. *But see Gruber v. Gruber,* 400 Pa.Super. 174, 186, 583 A.2d 434, 440 (1990) (custodial parent has initial burden of showing that move is likely to significantly improve quality of life for that parent and children).

9. We do not hold that a proposed relocation constitutes a substantial and material change in circumstances as a matter of law, but it is difficult to imagine an instance in which a proposed relocation will not render an existing parenting plan or custody-and-visitation arrangement unworkable. As the court of appeals noted, "a distant relocation by one parent will inevitably trigger a change of circumstances—the inability of the parties to implement their parenting agreement." *Murphy,* 110 N.M. at 339–40, 795 P.2d at 1031–32.

10. We do not mean to suggest that the child's best interest is the *only* factor that the court should consider. While some jurisdictions do appear to adopt the child's best interest as the *sole* consideration in custody matters, *e.g., Griffin v. Griffin,* 424 So.2d 1228, 1230 (La.Ct.App. 1982), in New Mexico the best interest of the child is the *primary* or *predominant* consideration. *Urzua,* 67 N.M. at 305, 355 P.2d at 124; *Garcia,* 81 N.M. at 279, 466 P.2d at 556. The respective interests of the parents are relevant, for reasons we have already outlined in this opinion, and should be considered by the court; but the interests of the child take precedence over any conflicting interest of either parent.

applied this erroneous conclusion in a manner prejudicial to Father's rights. The court did find that no evidence had been presented to show that Monica's moving to Socorro with Father would be better for her than moving to New Hampshire with Mother or that there would be any adverse effects upon Monica from accompanying Mother to New Hampshire. To that extent, the court can be said to have ruled that Father failed to meet his burden to produce evidence to rebut a presumption favoring Mother's proposed relocation. However, nothing appears in the court's decision to indicate that placing this burden on Father influenced the court's determination that Monica's best interests would be served by accompanying her mother to New Hampshire.[11] There is no indication that the court relied upon a presumption favoring Mother's move in finding, as it did, based upon competent and substantial evidence, that there would be real economic advantages and potential educational advantages for Monica (as well as for Mother) in moving to New Hampshire, where Mother's parents lived and where Mother had an available job in her parents' doughnut shop. For all practical purposes, the parties were placed on an "equal footing," [12] with neither party having the burden to prove where Monica's best interests lay. The court received evidence from both parties and from other witnesses and found that Mother was the primary psychological, emotional, and nurturing parent for Monica and that it was in Monica's best interests to remain with Mother as the primary custodial parent (which we interpret to mean the parent with whom Monica would reside the majority of the time and who would have periods of responsibility greater in length than those allocated to Father under the court's revised parenting plan).

In all of this we can find no error. Accordingly, the court of appeals' decision is reversed and the cause is remanded to the district court with instructions to reinstate its order of July 27, 1989.

IT IS SO ORDERED.

RANSOM, C.J., and FRANCHINI and FROST, JJ., concur.

BACA, J., dissents.

BACA, Justice (dissenting).

I write separately for several reasons and respectfully dissent. The effect of the majority opinion is to negate the presumption of joint custody that our legislature has expressed as public policy in New Mexico. In addition, the majority incorrectly determines that requiring a custodial parent to remain in the state unconstitutionally burdens her right to travel. Further, even under the majority's reasoning, this case should be remanded to the trial court for a further determination of the minor child's best interest.

I agree with the majority that custody determinations should be based on the best interest of the minor child. NMSA 1978, § 40–4–9 (1989 Repl.Pamp.); *Garcia v. Garcia*, 81 N.M. 277, 279, 466 P.2d 554, 556 (1970); *Urzua v. Urzua*, 67 N.M. 304, 305, 355 P.2d 123, 124 (1960). The New Mexico Legislature has established a presumption that, at least initially, joint custody is in the

11. We acknowledge the theoretical possibility, suggested in the dissent, that the court might have regarded the evidence as evenly balanced in favor of and against the impact of the move on Monica's best interests, and that the court's erroneous presumption in Mother's favor tipped the scales in her direction. However, our review of the evidence convinces us that the court was primarily influenced by the substantial evidence as to where Monica's best interests lay. We think it would disserve the interest of judicial economy and Monica's interest in resolution of this protracted custody dispute to remand this matter for reassessment of the evidence in light of the principles set out in this opinion.

12. In the particular circumstances of this case, the court of appeals held that, because Father intended to move to Socorro while Mother intended to move to New Hampshire, the parties on remand would stand on an equal footing when the court redetermined the best interests of the child. *Murphy*, 110 N.M. at 340, 795 P.2d at 1032. As we have indicated, however, this "equal footing" stance—the absence of a burden to prove that a proposed move will be in the child's best interests and the similar absence of a burden to prove the opposite—obtains, even though only one of the parents may be intending to relocate.

best interest of a child. NMSA 1978, § 40–4–9.1 (1989 Repl.Pamp.). The presumption that joint custody is in the best interest of the child continues unless "there has been a substantial and material change in circumstances affecting the welfare of the child, since the entry of the joint custody order." *Id.* This presumption in favor of joint custody reflects the public policy that a child's best interests will best be served by active involvement of both parents. The presumption also seeks to preserve the parental rights of both parents without favoring one parent to the other parent's detriment.

The court's prior decisions have placed the burden of showing a change in circumstances sufficient to modify an existing decree on the party seeking modification. *Smith v. Smith,* 98 N.M. 468, 470, 649 P.2d 1381, 1383 (1982) (modification of child support); *Specter v. Specter,* 85 N.M. 112, 113–14, 509 P.2d 879, 880–81 (1973) (modification of custody decree); *Davis v. Davis,* 83 N.M. 787, 788, 498 P.2d 674, 675 (1972) (modification of custody decree); *Edington v. Edington,* 50 N.M. 349, 351, 176 P.2d 915, 917 (1947) (modification of custody decree). Implicit in these decisions and our statutory scheme is the idea that the original custody arrangement was, and continues to be, in the child's best interest. NMSA 1978, § 40–4–9.1(A). The presumption then requires the moving party to prove that the modified custody arrangement is in the child's best interests. *Schuermann v. Schuermann,* 94 N.M. 81, 607 P.2d 619 (1980). The majority today retreats from this rule and substitutes a rule that places an equal burden on both parties to show that the best interests of the child would be served by their respective parenting plan after one party has decided to abrogate an existing, successful joint custody decree.[1] The majority opinion rationalizes this result by stating that the equal burdens approach places each party on "equal footing" in the custody determination.

The effect of the majority opinion on the facts of this case is to abolish the legislative preference for joint custody and replace this preference with a scheme of joint legal custody and split physical custody. This custody arrangement is joint custody in name only and fails to retain many of the characteristics of joint custody as described by the statute. I believe that a parent remaining in New Mexico will have difficulty in carrying out his or her statutory responsibilities and exercising his or her statutory rights, NMSA 1978, § 40–4–9.1, when the child resides in New Hampshire or any similarly distant location. Moreover, the terms used to define the father's rights in the instant case are not consistent with joint custody; rather, the terms used by the trial court indicate that it viewed the custody arrangement more as a sole custody arrangement with "visitation" granted to the father. While joint custody does not require an equal division of physical custody, NMSA 1978, § 40–4–9.1(L), it contemplates a sharing of physical custody in which each parent has a defined "period of responsibility" when he or she is responsible for providing for the child's physical, emotional, and developmental needs. *Id.* This "period of responsibility" differs substantially in duration and quality from "visitation," a term reserved for sole custody arrangements. *Id.* Moreover, as the majority recognizes, the term "primary physical custody" is not defined by the statute, Majority Opinion at 62 n. 4, 823 P.2d at 304 n. 4, and is inconsistent with a grant of joint custody. I believe that a joint custody arrangement that allows one parent to move the child a significant distance from the other parent's location may

1. The majority states that "[w]hen parents are operating under a joint custody arrangement and one of them seeks to alter the arrangement, it makes perfectly good sense to impose a presumption in favor of the parent who wishes to continue to operate under the joint custody decree and to place on the party wishing to change the decree the burden to *produce evidence* that the arrangement is no longer workable and needs to be changed." Majority Opinion at 65, 823 P.2d at 307 (emphasis added). This is not the correct standard. As discussed in the text of this dissent, the correct standard requires the moving party to prove a change of circumstances, not merely to produce evidence that a change has in fact occurred.

no longer be a true joint custody arrangement.

In addition, I cannot agree with the majority that placing the burden of proof on the party seeking the modification would require a court to grant custody that would not be in the best interests of the child. The majority implies that if the burden is placed on the relocating party and that party fails to carry the burden, the result is akin to a default favoring the resisting party. This result, contends the majority, means that the resisting party gains custody even though the move is not in the best interest of the child. Majority Opinion at 65–66, 823 P.2d at 307–308.

Even if a relocating party is able to prove that an impending move is a sufficient change of circumstances to justify considering a modification of the custody arrangement, this does not imply, as the majority opinion suggests, that the move is in the child's best interests, without more. An award of joint custody means that the trial court was satisfied (1) that both parents are fit; (2) that each parent has established a relationship with the child that is beneficial to the child; (3) that both parents desire continued involvement with the child; and (4) that the parents are able to communicate and cooperate in promoting the child's best interest. *Sanchez v. Sanchez,* 107 N.M. 159, 162–63, 754 P.2d 536, 539–40 (Ct.App.1988). In addition, as the court below recognized in the instant case,

> [o]ne factor to be considered in deciding whether to modify custody is the child's adjustment to his home, school, and community. *See* § 40–4–9. Factors stressing stability and continuity of care and environment are of particular importance to younger children. *See Schuermann v. Schuermann; Sydnes v. Sydnes* [, 388 N.W.2d 3, 6 (Minn.App.1986)]. Thus, ordinarily, in joint custody cases, the burden is on the party seeking to relocate to show that the relocation is in the best interests of the child.

Murphy v. Jaramillo, 110 N.M. 336, 340, 795 P.2d 1028, 1032 (Ct.App.1990). Consideration of these factors leads me to believe that the party attempting to relocate should retain the burden of proof that the move is in the child's best interest. *Sydnes v. Sydnes,* 388 N.W.2d 3, 6 (Minn.App. 1986); *Christopher–Frederickson v. Christopher,* 223 N.J.Super. 303, 538 A.2d 830 (App.Div.1988); *Seessel v. Seessel,* 748 S.W.2d 422, 423 (Tenn.1988). As the majority recognizes, this burden need not be an onerous one. Majority Opinion at 64 n. 6, 823 P.2d at 306 n. 6 and cases cited therein.

Nor am I persuaded in this case that the mother's right to travel would be unconstitutionally abridged by enforcing the initial joint custody arrangement and requiring her to either remain in New Mexico or leave her child with the child's father. As the majority recognizes, if the state has a sufficient interest it may limit the right of a person to travel. Majority Opinion at 64, 823 P.2d at 306 (citing *Shapiro v. Thompson,* 394 U.S. 618, 631, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600 (1969)). Here, there are at least two compelling state interests that justify a limitation on the mother's right to travel. First, the state has a compelling interest in insuring that a custody determination be based on the best interests of the child. This best interest is served by a true joint custody arrangement as presumed by the legislature. Second, the state has a compelling interest in protecting the parental rights of both parents. Because the state has compelling and continuing interests in custody arrangements, I see no constitutional prohibition against requiring the mother to meet her burden of proof as it pertains to the child's best interests. If the burden is not met then the mother must either continue to reside in New Mexico or grant sole custody of the child to the father.

In light of the legislatively created presumption that joint custody is in the child's best interests and the foregoing discussion, I would remand with instructions to the court to consider the presumption in favor of the original custody arrangement and to reweigh the evidence in light of that presumption and/or to take further testimony.

Even if I agreed with the majority's adoption of an "equal burden" on each

party, I would find it necessary to remand this case to the trial court for a further determination of the best interest of the child. The trial court incorrectly applied the presumption from *Newhouse v. Chavez,* 108 N.M. 319, 322–23, 772 P.2d 353, 356–57 (Ct.App.1988), *cert. denied,* 108 N.M. 197, 769 P.2d 731 (1989), and, in effect, required the father, as the "noncustodial" parent, to prove that the move was not in the child's best interest.[2] When the father failed to meet this burden, the trial court granted custody to the mother.

In this case, the record is equally balanced in favor of each party. For instance, the trial court found that Monica is "nurtured, psychologically, emotionally, and physically by *both* parents." Further, the trial court found that "*[b]oth* parents have contributed equally to the physical raising of Monica and she is bonded to *both.*" In addition, the trial court found that Monica "has no substantial contacts with New Hampshire" and that "a move ... to New Hampshire would be a change in her way of life ... that will amount to a major difference in the way that Monica will be raised in future years." Finally, the trial court found that Monica was familiar with the Socorro area and "is close to the [father's] extended family and has made numerous friends in the Socorro area." [3] The record contains substantial evidence to support these findings. I believe that the trial court awarded custody of Monica to her mother, at least in part, because of its erroneous reliance on the *Newhouse* presumption. I do not believe that the "interest of judicial economy," Majority Opinion at 68 n. 11, 823 P.2d at 310 n. 11, is sufficient to override the father's interest in being placed on an "equal footing" with the mother in this custody determination. *Id.* at 68, 823 P.2d at 310. Thus, even under the majority's formulation, this case should be remanded to the trial court for further findings and a final determination of Monica's best interest.

For the above reasons, I respectfully dissent.

823 P.2d 313

Joan A. LOWERY, Plaintiff–Appellant,

v.

Boudinot P. ATTERBURY, June A. Jenney, a/k/a Judy Jenney, Lucinda K. Jenney, Ralph A. Jenney, Charles P. Jenney, Hope H. Atterbury, Boudinot T. Atterbury, Talcott R. Atterbury, and the Palovista Company, a New Mexico corporation, Defendants–Appellees.

No. 19694.

Supreme Court of New Mexico.

Jan. 6, 1992.

2. As discussed above, a term such as "noncustodial parent" has no place where joint custody is granted because, under a true joint custody arrangement, each parent is a "custodial" parent during his or her respective "period of responsibility."

3. Other findings also support the father's position. For example, the trial court found that the father was current in his financial, medical, and educational obligations to Monica. He had exercised visitation on "every possible occasion ... including times when he had to take off from work or change his plans to enable him to care for [Monica]. He "has re-married, has completed his educational goals, and desires to return to [his] family home in Socorro." This move was "part of a well thought out plan."

Keleher & McLeod and Elizabeth E. Whitefield, Albuquerque, for plaintiff-appellant.

Duff H. Westbrook, Albuquerque, for defendants-appellees.

OPINION

BACA, Justice.

Plaintiff-appellant Lowery appeals the district court's dismissal of her action under SCRA 1986, 1–041(B) for want of prosecution. Lowery bases her appeal on two points. First, she contends that the trial court abused its discretion by dismissing her action sua sponte. Second, she contends that she was denied her due process rights because the trial court dismissed her action without any prior warning. Because we find that the trial court abused its discretion in dismissing Lowery's action, we reverse and remand for a trial on the merits.

I. PROCEDURAL BACKGROUND

This lawsuit, filed by plaintiff-appellant Lowery on December 19, 1988, is a dispute over the alleged mishandling of two trusts. Appellee Boudinot Atterbury, as trustee, and others were named as defendants. The complaint sought an accounting of trust assets, declaratory and injunctive relief, removal of the trustee, and damages for breach of fiduciary duty.

The matter was set for trial on July 30, 1990. On July 23, the trial court was advised that certain issues had been settled and that the liability and damage issues were being referred to an independent expert for evaluation. Based on this information, the trial court vacated the July 30 trial date and set the matter for a docket call on November 5.

During August through October, the parties engaged in settlement negotiations. At the November 5 docket call, Mr. Westbrook, counsel for all defendants except Charles Jenney, requested that the court place the matter at the end of the docket because the parties were close to settlement. The trial was set for November 26, 27, and 28.

During the negotiations, Lowery was presented with numerous drafts of a proposed settlement agreement. On November 20, she saw the final draft which restricted her right to a trust accounting and limited her possession of the trust assets. At this time, Lowery informed her counsel, Mr. Looney, that she would not accept the settlement agreement until she could obtain a second opinion. She instructed Looney to seek a continuance and not to pre-

pare for trial. Looney attempted to notify the trial court and all defendants that (1) settlement negotiations were at an impasse, (2) Lowery was seeking a continuance, and (3) Lowery had discharged him. Looney was unable to reach Westbrook who was on vacation.

On November 26, Looney and Westbrook appeared before the trial court. Looney requested a continuance to allow Lowery to obtain a second opinion. Looney and Westbrook advised the court that, despite diligent efforts, the matter had not been settled. Neither Westbrook nor Looney was prepared for trial. At the conclusion of the hearing, the trial court ruled sua sponte that because Lowery was unprepared for trial, the complaint would be dismissed for want of prosecution. On December 19, at a hearing on the presentment of the order of dismissal, the trial court heard argument regarding whether the dismissal should be with or without prejudice. At the close of this hearing, the trial court ruled that the dismissal would be with prejudice. This appeal followed.

II. DUE PROCESS ANALYSIS

Turning first to Lowery's due process argument, we find no merit in her contention that dismissal under Rule 41(B) violated her due process rights. Lowery argues that had she realized that the district court would dismiss her action with prejudice rather than grant a continuance, she would have proceeded to trial. Lowery argues that because a dismissal under Rule 41(B) is an adjudication on the merits, she is entitled to notice and a hearing prior to dismissal. Because the district court failed to warn her of the imminent dismissal, Lowery argues that she was denied her right to due process.

In so arguing, Lowery overlooks established authority to the contrary. We have held that Rule 41(B) does not require notice and a hearing prior to dismissal. *Newsome v. Farer*, 103 N.M. 415, 420, 708 P.2d 327, 332 (1985). In any event, Lowery was provided with notice and a hearing after dismissal but prior to the district court's determination of whether the dismissal would be with or without prejudice. Thus, Lowery was not denied her right to due process by the trial court's dismissal of her action.

III. ABUSE OF DISCRETION ANALYSIS

Lowery's main argument is that dismissal of her action under Rule 41(B) was an abuse of discretion by the trial court. Lowery argues that we should adopt the analysis used in the majority of federal courts for dismissal with prejudice under the parallel Fed.R.Civ.P. Rule 41(b).[1] Lowery acknowledges that the trial court has the inherent power to dismiss an action sua sponte under Rule 41(b). *Link v. Wabash R.R.*, 370 U.S. 626, 630–31, 82 S.Ct. 1386, 1388–89, 8 L.Ed.2d 734 (1962). According to Lowery, dismissal under Rule 41(b) may be used as a last resort when (1) the record shows a clear record of delay or contumacious conduct by the plaintiff, and (2) lesser sanctions have been explored without success by the trial court. *See, e.g., Enlace Mercantil Internacional v. Senior Indus.*, 848 F.2d 315, 317 (1st Cir.1988); *McNeal v. Papasan*, 842 F.2d 787, 790 (5th Cir.1988); *Trakas v. Quality Brands, Inc.*, 759 F.2d 185, 186–87 (D.C.Cir.1985). Lowery also contends that the trial court is obligated to warn a plaintiff that dismissal is imminent. *Hamilton v. Neptune Orient Lines, Ltd.*, 811 F.2d 498, 500 (9th Cir.1987). *Cf.* 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2370 (1971) (plaintiff's inactivity more likely to justify dismissal if coupled with prior warning from court). Federal courts will not disturb a dismissal entered pursuant to Fed. R.Civ.P. 41(b) unless the trial court abused its discretion. *Enlace*, 848 F.2d at 317; *McNeal*, 842 F.2d at 792; *Hamilton*, 811 F.2d at 499; *Trakas*, 759 F.2d at 186.

Under the above analysis, Lowery argues that her actions do not show a record of delay or contumacious conduct sufficient to warrant dismissal. She also contends that the trial court failed to consider lesser sanctions before imposing the ultimate sanction of dismissal. Further, she argues

1. SCRA 1986, 1–041(B) and Fed.R.Civ.P. 41(b) are nearly identically worded.

that the trial court failed to give her a warning that dismissal was imminent. For these reasons, Lowery concludes that the trial court abused its discretion.

Dismissal with prejudice is an extreme measure that should be used sparingly. *Newsome v. Farer,* 103 N.M. 415, 420, 708 P.2d 327, 332 (1985); *Beverly v. Conquistadores, Inc.,* 88 N.M. 119, 121, 537 P.2d 1015, 1017 (Ct.App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975). Dismissals under Rule 41(B) are limited to instances where the plaintiff's conduct warranting dismissal is extreme. *Newsome,* 103 N.M. at 421, 708 P.2d at 333 (willful disregard of court order); *Beverly,* 88 N.M. at 121–22, 537 P.2d at 1017–18 (same). In addition, the trial court must consider lesser sanctions prior to dismissal. *Newsome,* 103 N.M. at 421, 708 P.2d at 333. We will not disturb an order of dismissal under Rule 41(B) absent a showing that the trial court abused its discretion. *Id.* at 420, 708 P.2d at 332. A district court abuses its discretion if the dismissal is "without logic or reason," or if it is "clearly unable to be defended." *Id.*

Under the above test, we must first determine if Lowery's failure to be prepared on the date set for trial was extreme. Prior New Mexico decisions have not explicitly outlined a method for determining whether a plaintiffs actions are extreme; however, federal courts have developed a flexible analysis that looks to the totality of the circumstances. *See Enlace,* 848 F.2d at 317; *McNeal,* 842 F.2d at 790.[2] Under this analysis, federal courts consider "aggravating factors" including: (1) whether the plaintiff personally contributed to the delay; (2) whether the delay caused the defendant actual prejudice; and (3) whether the delay can be characterized as intentional. *McNeal,* 842 F.2d at 790. We believe that this flexible approach will enable the trial court to effectively and expeditiously manage its case load, *Miller v. City of Albuquerque,* 88 N.M. 324, 329, 540 P.2d 254, 259 (Ct.App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975), while encouraging the trial court to decide cases on their merits. *Albuquerque Prod. Credit Ass'n v. Martinez,* 91 N.M. 317, 319, 573 P.2d 672, 674 (1978). We adopt this flexible approach to dismissal under Rule 41(B) and, thus, we must examine Lowery's conduct under the totality of the circumstances.

In *Newsome,* we distinguished between willful conduct that would warrant dismissal and merely negligent or accidental behavior that would not warrant dismissal. *Newsome,* 103 N.M. at 420–21, 708 P.2d at 332–33. We found that the plaintiff in *Newsome* acted willfully when he failed to appear for document production after he had been notified by the court of the time and place to appear. *Id.* In the instant case, Lowery was aware of the trial date and failed to prepare for trial. Thus, Lowery's conduct was willful.

While Lowery's conduct was willful, we are not convinced that, under the totality of the circumstances, it was so extreme as to justify dismissal. Prior New Mexico decisions have found extreme conduct warranting dismissal when a plaintiff arrogantly refused to obey a court order, *Beverly,* 88 N.M. at 122, 537 P.2d at 1018, and when the plaintiff's conduct prevented progress in the litigation and the plaintiff failed to explain this conduct. *Newsome,* 103 N.M. at 421, 708 P.2d at 333. While no New Mexico cases have addressed whether dismissal of a plaintiff's action under Rule 41(B) for failure to prosecute is proper when the plaintiff has failed to prepare but has offered a reasonable explanation for the lack of preparation, numerous federal cases under Fed.R.Civ.P. 41(b) have reversed under similar circumstances. *See McNeal,* 842 F.2d at 789–93 (plaintiff unprepared for trial after discharging attorney prior to trial because attorney failed to keep plaintiff informed regarding progress

2. We cite federal cases only to the extent that we find them instructive and not as binding precedent. *See Smith v. FDC Corp.,* 109 N.M. 514, 517, 787 P.2d 433, 436 (1990) ("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 * * * * [B]y this opinion, we are not binding New Mexico law to interpretations made by federal courts of the federal statute.").

of litigation); *Grochal v. Aeration Processes, Inc.*, 797 F.2d 1093, 1096–97 (D.C.Cir.1986) (plaintiff failed to subpoena essential expert witness who became unavailable on date of trial), *vacated as moot*, 812 F.2d 745 (1987); *Trakas*, 759 F.2d at 187–88 (plaintiff unable to travel to Washington for trial due to financial difficulties); *Richman v. General Motors Corp.*, 437 F.2d 196, 199–200 (1st Cir.1971) (plaintiff unable to proceed because of unavailability of expert witnesses).

In the instant case, Lowery offered a reasonable explanation for her failure to be prepared for trial. She had been involved in settlement negotiations for an extended period of time prior to the trial date. Less than one week prior to the trial date, she was presented with a settlement agreement. She contacted the two attorneys who previously had represented her in this matter and they advised her that she should not accept the agreement. Both attorneys voiced concern that her current counsel was advising her to accept the settlement. Based on these circumstances, Lowery rejected the settlement agreement and instructed her counsel to seek a continuance so that she could obtain a second opinion.

In addition, the trial court relied heavily on the fact that Lowery had three different lawyers representing her at different times during this action. Based on Lowery's dismissal of her third attorney on the eve of trial, the trial court concluded that Lowery was acting deliberately to stall prosecution of her action. We believe that the facts do not support this conclusion. Lowery did indeed have three different attorneys during the pendency of this action, but the attorneys were from the same firm. More importantly, Lowery was not responsible for this change in representation. Her first attorney left the law firm to join the district attorney's office and her second attorney was appointed to the bench. Further, the changes in counsel prior to the date of trial did not delay the prosecution of the action. Finally, the record does not indicate that Lowery had previously acted to stall the litigation. Under the totality of the circumstances, we cannot characterize Lowery's actions as extreme.

Even if Lowery's conduct was extreme, dismissal with prejudice is appropriate only if the trial court considered alternative sanctions short of dismissal. *Newsome*, 103 N.M. at 421, 708 P.2d at 333. As we stated in *Newsome*,

> [t]here are of course a wide variety of other sanctions short of dismissal * * *. The [trial court], however, need not exhaust them all before finally dismissing a case. The exercise of his discretion to dismiss requires only that possible and meaningful alternatives be reasonably explored.

Id. (quoting *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1053–54 (9th Cir.1971), *cert. denied*, 404 U.S. 1039, 92 S.Ct. 715, 30 L.Ed.2d 731 (1972)).

In the instant case, we are not convinced that the trial court considered any alternative sanctions to that of dismissal. At the time that he dismissed the action, the trial judge stated "[t]oday was the day set for either the tendering of the [settlement] agreement of the parties or the trial of the matter. I'm prepared for one or the other. But that's all I'm prepared for." The trial judge did not consider Lowery's explanation for being unprepared, nor did he inquire into the amount of time that Lowery would need to prepare for trial. In addition, he did not consider that the parties made diligent efforts to settle this matter. Further, he did not consider that the dismissal would be a windfall for the defendants, who also were unprepared for trial.

The actions by Lowery can be contrasted with those of the plaintiff in *Newsome*. In that case, we upheld the trial court's dismissal because the court resorted to dismissal only after the plaintiff deliberately ignored a court order, refused to attend an ordered document production, and offered an inadequate explanation for his actions. *Newsome*, 103 N.M. at 421, 708 P.2d at 333. In *Newsome*, we concluded

> [i]t is difficult to imagine a lesser sanction, in the face of petitioner's obdurate position, that would sustain the trial

> court's authority to control the course of litigation * * *. [I]n an age of burgeoning protracted litigation, the court need not shrink from harsh sanctions when warranted by a party's disregard of the "basic tenet * * * that a party is required to obey a Court order."

Id. (quoting *Perry v. Golub,* 74 F.R.D. 360, 365 (N.D.Ala.1976)) (citations omitted). In Lowery's case, we believe that lesser sanctions should have been considered.

In reviewing a dismissal with prejudice under Rule 41(B), we are mindful of two competing policies. First, the district courts must have the power to manage the "orderly and expeditious disposition of cases." *Miller,* 88 N.M. at 329, 540 P.2d at 259. Competing with the "orderly and expeditious disposition of cases" is our strong preference to decide cases on their merits. *Albuquerque Prod. Credit Ass'n,* 91 N.M. at 319, 573 P.2d at 674. In the instant case, the trial court in weighing these important competing policies tilted the balance unduly toward the "orderly and expeditious disposition of cases" to the detriment of the stated preference to decide cases on their merits. Thus, we find that the trial court abused its discretion and we remand the action for a trial on the merits.

IT IS SO ORDERED.

RANSOM, C.J., and FRANCHINI, J., concur.

823 P.2d 318

Iva GREEN, Petitioner,

v.

Honorable Edmund H. KASE, District Judge, Respondent.

No. 20111.

Supreme Court of New Mexico.

Jan. 7, 1992.

Jeff Romero, Albuquerque, for petitioner.

John P. Viebranz, Santa Fe, for real party in interest, The City of Socorro.

OPINION

RANSOM, Chief Justice.

Iva Green seeks by extraordinary writ to overturn a district court pretrial order concerning the presentation of proof at a trial de novo on appeal from an order of the Human Rights Commission. The nature of and procedures for appeal from an order of the commission are described in NMSA 1978, Section 28-1-13 (Repl.Pamp.1991). The pertinent provisions provide:

> (A) Any person aggrieved by an order of the commission may obtain a trial de novo in the district court * * * by filing a notice of appeal within thirty days from the date of service of the commission's order * * * *
>
> (B) If testimony at the hearing was transcribed, the division shall, upon receipt of

the notice of appeal, file so much of the transcript of the record as the parties requesting the transcript designate as necessary for the appeal with the district court.

(C) Upon appeal, either party may request a jury. The jurisdiction of the district court is exclusive and its judgment is final, subject to further appeal to the supreme court.

NMSA 1978, § 28–1–13.

The district court ruled that the jury must listen to the entire taped transcript of the commission hearing prior to the introduction of additional relevant evidence. The court apparently relied on our decision in *Keller v. City of Albuquerque,* 85 N.M. 134, 509 P.2d 1329 (1973).[1] Because we find no statutory requirement that on trial de novo the jury or the judge must hear the transcript of the proceedings before the commission, we overrule any suggestion in *Keller* to the contrary and grant the relief Green has requested.

In *Keller,* this Court first construed the role of the district court under NMSA 1953, Section 4–33–12 (Supp.1971) (recompiled as NMSA 1978, Section 28–1–13). The appellants contended the district court erred in rejecting their conclusion of law that would have limited the court's standard of review to whether the commission acted arbitrarily, capriciously, or fraudulently. We considered the import of the term "trial de novo" used together with the statutory right to a jury trial.

In construing the term "trial de novo" the *Keller* Court canvassed the various New Mexico statutory formulations concerning judicial review of agency decisions. Although no New Mexico statute contained language identical to Section 28–1–13, the Court observed that the many variations had been interpreted by the courts of this state not to alter the traditional standard of review of agency decisions. Only when read in conjunction with the language creating the right to a jury trial could the Statute be said to contemplate more than review under the arbitrary and capricious standard.

After defining a trial by jury to include a "full and fair hearing upon all relevant issues where all questions of fact presented by the testimony are decided by the jury in accordance with the principles of law," *Keller,* 85 N.M. at 137, 509 P.2d at 1332 (quoting *New England Novelty Co. v. Sandberg,* 315 Mass. 739, 54 N.E.2d 915, 919 (1944)), the Court concluded that "the district court has the right to make an independent determination of the facts from the record in the case and such additional relevant evidence as may be presented, and that the general rule * * * [that agency decisions are to be reviewed under the arbitrary and capricious standard] is not applicable." *Keller,* 85 N.M. at 138, 509 P.2d at 1333. In addition, the Court opined that "the statute *requires* an independent review of the facts by the jury upon the record made in the hearing before the Commission, and such additional relevant evidence as may be presented by the parties." *Id.* at 137, 509 P.2d at 1332 (emphasis added).

We disagree with the *Keller* Court's view of the role of the record in the trial de novo contemplated by Section 28–1–13. In reviewing the operative statutory language, we fail to perceive any limitation on the scope of the trial to the record from the proceedings below. Indeed, the import of Subsection (A) that provides for a "trial de novo," [2] construed in conjunction with Sub-

1. The ruling by the trial court does not clearly state the reasons why the court required the jury to hear the taped transcript, but the briefs of both parties make clear that the dispute below concerned language in *Keller* that purported to require review of the transcript at the trial de novo. Such requirement is the issue we address today.

2. Review of other New Mexico statutes that employ the term "trial de novo," reveals that the legislature construes that term to mean "trial anew." Section 39–3–1 which prescribes the process for appeal to the district court from inferior tribunals is entitled "Appeals to district court; trial de novo." NMSA 1978, § 39–3–1 (Repl.Pamp.1991). The text of that Section states that such action shall be "tried anew in said courts on their merits, as if no trial had been had below." *Id.*

The distinction between trial de novo and a trial on, or review of, the record is implicitly recognized in NMSA 1978, Section 40–4B–8

section (C) which makes available a jury trial, is that the legislature intended to grant the aggrieved party a full evidentiary hearing, not limited to or constrained by the transcript of the commission hearing.

Limiting the proceedings to the transcript in many cases would eviscerate a critical component of the jury's truth finding function—the jury's ability to determine the credibility of witnesses from live testimony. On the other hand, requiring the jury first to review the entire transcript before hearing the same testimony from witnesses, a procedure perhaps contemplated by *Keller*, is duplicative and burdensome.

True, Subsection (B) requires the division to file with the district court such portions of the transcript of the record as the parties shall designate. That Subsection merely describes the procedure for submitting a transcript deemed by the parties to be necessary for an appeal. It cannot be read to require the district court to review the transcript.[3] To hold that the legislature intended anything less than a full evidentiary hearing—a trial anew—would read unwarranted limitations into the otherwise clear command of Section 28-1-13. Accordingly, we grant the relief Green has requested and remand to the trial court for proceedings consistent with this opinion.

IT IS SO ORDERED.

MONTGOMERY and FRANCHINI, JJ., concur.

(Repl.Pamp.1989), which describes the procedures for obtaining judicial review of a decision of the child support hearing officer. Subsection (C) makes a distinction between review "de novo" and review "on the record." Under review on the record, Subsection (D) permits reversal of the decision of the hearing officer only if the decision is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence; or not otherwise in accordance with the law. *See also* NMSA 1978, § 72-7-1(E) (Repl.Pamp.1985) (proceeding on appeal from state engineer "shall be de novo as cases originally docketed in the district court").

3. The transcript, of course, is not without purpose. It may be used to impeach testimony at trial or for any other evidentiary purpose.

[redacted]

823 P.2d 322

STATE of New Mexico, Plaintiff-Appellant,

v.

JODY C., a Child, Respondent-Appellee.

No. 12711.

Court of Appeals of New Mexico.

July 30, 1991.

Certiorari Quashed Dec. 24, 1991.

Tom Udall, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jacquelyn Robins, Chief Public Defender, Hollis Ann Whitson, Appellate Defender, Santa Fe, Robert O. Beck, Trial and Asst. Appellate Counsel, Clayton, for respondent-appellee.

OPINION

DONNELLY, Judge.

The state appeals from an order of the children's court dismissing a delinquency petition with prejudice. The sole issue raised on appeal is whether the children's court erred in dismissing the petition against the child based upon the state's failure to accord the child an adjudicatory hearing within the ninety-day period prescribed by SCRA 1986, 10-226(B). We reverse.

FACTS

The petition alleging Jody C. (the child) to be delinquent was based on an incident that occurred on June 14, 1990. The child was taken into custody by the police and placed in detention that same day. A detention hearing was conducted the next day. The child and his parents appeared at the detention hearing and were represented by appointed counsel. At the conclusion of the detention hearing, the children's court referee ordered the child to be released from detention and placed in the custody of his attorney. On June 15, 1990, after the detention hearing, the children's court attorney filed a petition with the children's court alleging that the child was delinquent. Summons was not issued at the time the petition was filed. The petition was hand delivered to the counsel for the child, who discussed the allegations contained therein with the child.

On June 18, 1990, the child, through his attorney, filed a demand for trial by jury. On July 5, 1990, the children's court issued summonses in the case, and on the following day summonses and copies of the petition were personally served on the child and his parents by a deputy sheriff.

The children's court set the case for a jury trial to begin on Monday, September 24, 1990, within ninety days of the date of service of the summons and petition on the child. On September 17, 1990, the child filed a demand for dismissal with prejudice.

After a hearing on this issue, the children's court dismissed the petition with prejudice, finding that the child was not accorded an adjudicatory hearing within the ninety-day period required by Children's Court Rule 10–226. The court concluded, among other things, that the ninety-day time period began to run on June 15, 1990, when the child's attorney was served with a petition in this case, or alternatively that the child waived service of the summons and petition in this case on June 18, 1990, when a notice of demand for jury trial was filed by the child's attorney. The court also concluded that under the Children's Code and the children's court rules, a child may waive service of the summons and petition.

DISCUSSION

The state argues on appeal that the ninety-day time requirement for conducting an adjudicatory hearing was not triggered until July 6, 1990, when the child was served with a copy of the summons and petition. It contends that the children's court erred in dismissing the petition for failure to commence the hearing within the time bar provided by Rule 10–226(B), because the trial date scheduled by the court was within the time requirements of the rule.

The Children's Code, NMSA 1978, Section 32–1–28 (Repl.Pamp.1989), provides that the time limit for commencing an adjudicatory hearing in a delinquency proceeding is governed by the Rules of Procedure promulgated by our supreme court for the children's court. *See also State v. Doe,* 90 N.M. 568, 566 P.2d 117 (Ct.App.1977). Where the child is not held in custody, Children's Court Rule 10–226(B), applicable to delinquency proceedings, provides in part:

> If the respondent is not in detention or has been released from detention prior to the expiration of the time limits set forth in Paragraph A of this rule, *the adjudicatory hearing shall be commenced within ninety (90) days from whichever of the following events occurs latest:*
>
> (1) *the date the petition is served on the respondent* * * *. [Emphasis added.]

Rule 10–226 does not describe the method to be used to serve an alleged delinquent child; however, SCRA 1986, Children's Court Rule 10–105(A) provides that "[u]pon the docketing of any petition, the court shall issue a summons[.]" Rule 10–105(C) specifies that the "summons and a copy of the petition shall be served upon issuance of the summons." Additionally, Rule 10–105(D) states that "[t]he summons and [a] copy of the petition shall be served on [the child] alleged to be delinquent * * * in accordance with Rule 1–004 of the Rules of Civil Procedure for the District Courts unless the court directs service by mail."

SCRA 1986, 1–004(F)(7) (Cum.Supp.1990), referred to in Children's Court Rule 10–105(D), provides how a minor shall be served:

> [W]henever there shall be a conservator of the estate or guardian of the person of such minor, by delivering a copy of the summons and of the complaint to the conservator or guardian. Service of process so made shall be considered as service upon the minor. *In all other cases process shall be served by delivering a copy of the summons and of the complaint to the minor, and if the minor is living with an adult a copy of the summons and of the complaint shall also be delivered to the adult residing in the same household.* In all cases where a guardian ad litem has been appointed, a copy of the summons and of the complaint shall be delivered to such representative, in addition to serving the minor as herein provided[.] [Emphasis added.]

As shown by the record, the child was not personally served with a copy of the petition and summons as contemplated in Rule 10–226 until July 6, although a copy of the petition was given to his attorney on June 15, 1990. Both Rules 10–105(D) and 1–004(F)(7) indicate that service of a copy of the summons and petition "shall" be made upon the child. Additionally, the Children's Code, NMSA 1978, Section 32–1–20(A) (Repl.Pamp.1989), relating to the issuance of summonses states, "After a petition has been filed, summonses *shall be*

issued directed to the child if the child is 14 or more years of age, or is alleged in the petition to be delinquent * * * whether or not fourteen years of age * * *." (Emphasis added.) The word "shall" as used in a statute or supreme court rule is generally construed to be mandatory. *See Jaramillo v. O'Toole,* 97 N.M. 345, 639 P.2d 1199 (1982); *State v. Davis,* 97 N.M. 745, 643 P.2d 614 (Ct.App.1982).

The children's court concluded that a child may waive service of summons and petition. This is correct where the waiver is made in court with the child present with his attorney, and his parent, guardian or custodian consents. This was not the situation here. Section 32-1-20(E) provides: "A party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing. If the child is present at the hearing, his counsel, with the consent of the parent, guardian or custodian, may waive service of summons in his behalf."

Therefore, in the absence of a waiver as prescribed by this section, we conclude that issuance and service of a summons and a copy of the petition on the child are mandatory under the Children's Code and children's court rule. A child may not waive service of the summons and petition in the manner attempted here.

Based upon the foregoing, we conclude that the children's court erred in dismissing the petition, since the date set for the jury trial, September 24, 1990, was within ninety days from the date the petition was actually served on the child as required by Rule 10-226(B). Although we do not countenance the twenty-one-day delay in effecting service of the summons and petition upon the child, there is no showing that the delay in this case was intentional or that such delay prejudiced the due process rights of the child.

CONCLUSION

For the foregoing reasons, we reverse the order of the children's court. The cause is remanded for further proceedings consistent herewith.

IT IS SO ORDERED.

BIVINS and MINZNER, JJ., concur.

823 P.2d 324

STATE of New Mexico, Plaintiff-Appellant,

v.

Moises ALVAREZ, Defendant-Appellee.

No. 12643.

Court of Appeals of New Mexico.

Oct. 4, 1991.

Certiorari Denied Dec. 4, 1991.

Tom Udall, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jacquelyn Robins, Chief Public Defender, Hugh W. Dangler, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

FLORES, Judge.

On August 30, 1990, the trial court entered an order suppressing evidence law enforcement officers seized pursuant to a search warrant. On September 13, 1990, the state filed a notice of appeal. The state argues that the affidavit supporting the warrant contained sufficient information to establish probable cause. During the calendaring process, this court raised the issue of whether we should dismiss the state's appeal for failure to timely file a notice of appeal. *See* NMSA 1978, § 39–3–3(B) (Repl.Pamp.1991); *Rice v. Gonzales,* 79 N.M. 377, 444 P.2d 288 (1968) (court will sua sponte consider whether it properly has jurisdiction). The parties have briefed both issues. The state's position rests on the premise that an appeal from a suppression order is a constitutional appeal as of right. Defendant's rejoinder is that there is no constitutional appeal as of right from a suppression order. We agree with defendant. We dismiss the appeal as non-timely and do not reach the question of whether probable cause supported the search warrant.

Relevant Statutes and Rules

This case requires we construe a constitutional provision, a statute and a supreme court rule. Section 39–3–3(B)(2) allows the state ten days within which to file a notice of appeal of a suppression order. SCRA 1986, 12–201(A) (Cum.Supp. 1991) allows the state thirty days within which to file a notice of "[a]n appeal permitted by law as of right * * *." SCRA 1986, 12–202(A). In this case, the state filed its notice of appeal in the district court on the fourteenth day after entry of the suppression order. If the ten-day limitation in Section 39–3–3(B)(2) controls, then the state's notice of appeal is late. A timely notice of appeal is a "mandatory" requirement. *Govich v. North Am. Sys.,* 112 N.M. 226, 230, 814 P.2d 94, 98 (1991). When the state has filed an untimely notice of appeal in the past, our supreme court has refused to consider the merits of the appeal. *See State v. Arnold,* 51 N.M. 311, 183 P.2d 845 (1947) (appeal properly dismissed for failure to comply with procedural rules; failure to procedurally perfect appeal deprives court of jurisdiction); *but see Govich v. North Am. Sys.* (failure to comply with mandatory appeal requirements of time and place of filing notice of appeal is an improper attempt to invoke jurisdiction but is not jurisdictional defect; court may properly exercise its discretion and invoke jurisdiction if substantive rights of the parties are not negatively affected thereby).

The State's Argument

To demonstrate the applicability of Rule 12–201(A), the state makes the following arguments: It has a constitutional appeal as of right. *See* N.M. Const. art. VI, § 2. An appeal of a suppression order is not an appeal of a final order, and is thus interlocutory. *Cf. State v. Hernandez,* 95 N.M. 125, 619 P.2d 570 (Ct.App.1980) (court of appeals has discretion to refuse to consider interlocutory appeals). The state further asserts that because the court of appeals must consider a Section 39–3–3(B) appeal, it is an interlocutory appeal as of right. The state contends its appeal in the instant case is more than a statutory ap-

peal as of right because Section 39–3–3(B) is not a grant of appellate jurisdiction but a mere codification of a constitutional right to appeal. *See State v. Santillanes,* 96 N.M. 482, 632 P.2d 359 (Ct.App.1980), *rev'd on other grounds,* 96 N.M. 477, 632 P.2d 354 (1981). Consistent with this notion is the state's reading of Rule 12–202 together with Section 39–3–3(B). In sum, the state argues that since an appeal from a suppression order is a constitutional right, rather than a statutory right, it follows that only the supreme court may regulate the time within which the state must exercise that right. *See State v. Arnold.* Thus this court is bound by this supreme court regulation of time, even if it conflicts with the statute. *See Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973).

We have two difficulties with the arguments that the state makes to suggest that it has a constitutional appeal as of right from suppression orders. First, as the state admits, an appeal of a suppression order is fundamentally an interlocutory appeal. It generally occurs at the beginning or middle of litigation. We can foresee in many criminal cases there may be contemplation of further action in the case, such as where the evidence suppressed relates to one of many charges. *Cf. Texas Pac. Oil Co. v. A.D. Jones Estate, Inc.,* 78 N.M. 348, 431 P.2d 490 (1967) (appeal of preliminary injunction interlocutory in nature because court contemplated further action in case). Yet the state's characterization of a suppression order appeal as an exception to our usual discretion in considering interlocutory appeals does not transform the appeal into one of constitutional dimension. The mandatory nature of suppression order appeals is rooted in Section 39–3–3(B), not the constitution.

In *Santillanes,* the state's key authority in this case, the district court dismissed an enhancement proceeding with prejudice. The state's appeal of this disposition was not one that Section 39–3–3(B) expressly included. This court had to determine if the appeal was still viable by determining whether the state had a constitutional right to the appeal. The constitution allows appeals as of right only when " '[t]he state is aggrieved by a disposition contrary to law * * *.' " *State v. Santillanes,* 96 N.M. at 485, 632 P.2d at 362, (quoting *State v. Doe,* 95 N.M. 90, 92, 619 P.2d 194, 196 (Ct.App.1980)). Because the "disposition" at hand in *Santillanes* was a dismissal with prejudice, we read the case to only proclaim a constitutional appeal as of right from the dismissal with prejudice.

The state misreads the import of the *Santillanes* allusion to Section 39–3–3 as being a codification of the constitutional appeal as of right. We stated that Section 39–3–3 "recognizes the State's constitutional right to appeal, and identifies circumstances permitting ordinary and interlocutory appeals * * *." *State v. Santillanes,* 96 N.M. at 486, 632 P.2d at 363. By these words we meant that Section 39–3–3 recognizes the constitutional right. In addition to and apart from that recognition, the statute "identifies" particular types of appeals. The statute does not subsume interlocutory appeals with constitutional appeals as of right. We did not read the statute as doing so. The fact remains that the state does not always have a constitutional right to appeal. *See State v. Aguilar,* 95 N.M. 578, 624 P.2d 520 (1981).

Furthermore, the fact that the prosecutor must certify that a Section 39–3–3(B) appeal is not for delay and is about material evidence is a positive indication that such appeals are not constitutional appeals as of right. *See* § 39–3–3(B)(2). If the prosecutor cannot make this certification, then there is no statutory right to appeal. The certification is the legislature's way of assuring the prudence of our consideration of what is essentially an interlocutory appeal. The state does not persuade us that even if the prosecutor cannot make the proper certification there still exists a constitutional right to appeal an interlocutory order for the purposes of delay or about immaterial evidence. This court could exercise its discretion and refuse to consider such an appeal because it would be interlocutory and of isolated gravity. *See State v. Aguilar.*

Santillanes does not assist the state's position. Section 39–3–3(B) excepts sup-

pression order appeals from our usual discretionary consideration. N.M. Const. art. VI, Section 2 does not. We find no merit in the statement that the appeal in this case is a constitutional appeal as of right because we must consider it.

The second difficulty we have with the state's suggested arguments is that we cannot agree with the state's reading of Rule 12–202. This rule, the state points out, applies to appeals as of right and specifically refers to a certificate that the prosecutor must file with the notice of appeal. *See* § 39–3–3(B)(2). Because of this reference, the state suggests that the supreme court must have considered suppression order appeals to be appeals of right. Rule 12–202, however, does not limit its applicability to only constitutional appeals as of right. We will not say that the supreme court left such a limitation to attenuated conjecture, but would have expressly limited Rule 12–202 to that which the state argues. *Cf. Burroughs v. Board of County Comm'rs of Bernalillo County,* 88 N.M. 303, 540 P.2d 233 (1975) (courts should not read language into codified law when it makes sense as written). We find no merit in the state's reading of Rule 12–202.

This appeal is not one of constitutional right. Absent a constitutional right, the state must look to a statutory grant of appellate jurisdiction. *See* § 39–3–3(B). The statutory grant of ten days within which the state must follow mandatory notice of appeal requirements is within the legislative power. *See Ammerman v. Hubbard Broadcasting, Inc.,* 89 N.M. 307, 551 P.2d 1354 (1976), *cert. denied,* 436 U.S. 906, 98 S.Ct. 2237, 56 L.Ed.2d 404 (1978). The supreme court cannot create its own appellate jurisdiction for an extra twenty days by virtue of Rule 12–201(A). To interpret the rule in this fashion would be to assume the supreme court adopted a rule inconsistent with controlling statutory law. We will not do so. *Cf. Quintana v. New Mexico Dep't. of Corrections,* 100 N.M. 224, 668 P.2d 1101 (1983) (when interpreting statutes, courts should assume legislature did not intend to enact law inconsistent with existing law). The state had to file its notice of appeal within ten days.

The state provides us with no reason to exercise our discretion in favor of hearing the merits of this appeal. Accordingly, we deny to hear this appeal on its merits. *Cf. Govich v. North Am. Sys.* (exercising discretion to consider merits when appellant failed to follow mandatory requirement of proper record designation); *State v. Duran,* 105 N.M. 231, 731 P.2d 374 (Ct.App. 1986) (exercising discretion to consider merits when appellant failed to follow mandatory requirement of timely notice of appeal).

For the reasons stated above, the state's appeal is dismissed.

IT IS SO ORDERED.

ALARID, C.J., and DONNELLY, J., concur.

823 P.2d 327

The ESTATE OF Fred Larry MITCHUM, Deceased, Claimant–Appellant,

v.

TRIPLE S TRUCKING and United States Fidelity and Guaranty, Respondents–Appellees.

No. 12639.

Court of Appeals of New Mexico.

Oct. 18, 1991.

Certiorari Denied Nov. 25, 1991.

Victor A. Titus, Farmington, Bruce P. Moore, Albuquerque, for claimant-appellant.

Nancy Augustus, Seth V. Bingham, Miller, Stratvert, Torgerson & Schlenker, P.A., Albuquerque, for respondents-appellees.

OPINION

DONNELLY, Judge.

Worker's estate appeals from a judgment and order dismissing his claim for workers' compensation benefits based upon a finding by the workers' compensation judge (WCJ) that the accidental injury sustained by worker was caused by his intoxication. We discuss: (1) whether employer was required to establish its affirmative defense

of intoxication by the testimony of a qualified health care provider; (2) whether the WCJ's findings that intoxication was the proximate cause of worker's injury are supported by substantial evidence in the record as a whole; and (3) whether the WCJ erred in admitting evidence of worker's blood-alcohol test. We also address the effect of worker's death during the pendency of this appeal. We affirm.

FACTS

Worker was employed as a water truck driver for Triple S Trucking (employer). His supervisor, Jackie Hales, testified that he telephoned worker on July 29, 1989, and requested that he report to work on the night shift. Hales stated that worker admitted he was intoxicated and was not able to come to work.

The following morning, worker reported for work at approximately 11:45 a.m. and was told to clean out the tank on a water truck. A co-worker, Edward Heald, testified that worker came into the office looking tired and glassy-eyed, and asking if Heald knew of any bars that were open. Heald stated that worker then drove his truck into a wash bay of the service area and turned on the spray pump. Approximately fifteen minutes later, Heald went outside and found worker lying on the ground on the right side of the truck, unconscious, and bleeding from a head injury.

Worker was taken immediately to the hospital by ambulance. Dr. Welch, who administered emergency treatment, noted that upon his arrival, worker had the "smell of alcohol on his breath." At the time of the accident, employer had established a policy forbidding the possession or use of illegal drugs by employees on company property and requiring employees to submit to searches for such substances as a condition of continued employment.

During the time worker remained unconscious and was being treated at the hospital, Jerry Lacey, employer's safety supervisor, informed emergency-room doctors that alcohol might have been involved in the accident and suggested that a blood-alcohol test be performed. A blood sample was withdrawn from worker and several tests, including a blood-alcohol test, were performed. As shown by worker's answers to requests for admissions, the blood-alcohol test results indicated that he had a blood-alcohol level of 0.141 or 140.7 milligrams of alcohol per deciliter of blood.

Examination of the accident scene immediately after the accident revealed that the water truck worker had been cleaning had muddy footprints on top of the tank leading from the ladder to the rear of the truck. From these footprints, extending down the right side of the tank, were streaks of mud and skid marks. A scuff mark appeared on the catwalk area which surrounds the base of the tank. Blood from worker's head was found immediately beneath the muddy skid marks on the side of the tank and on the catwalk. At the time of the accident, worker was wearing boots which were muddy and slick.

At the hearing before the WCJ, worker testified that on the morning of the accident he arrived at work shortly before noon and was instructed to clean out the tank of his truck so that clean water could be hauled to a well site. He stated that he drove his truck into the shop and took off the dome of the tank in order to get inside. He also stated that when he climbed into the tank to fix a gauge his leather-soled cowboy boots became slippery from the paraffin and oil which covered the tank's interior walls. Worker testified that thereafter he drove his truck into the wash bay in order to clean out the tank. He further stated that he believed he had climbed up the ladder to the tank and stood on its top, when he slipped and fell. Worker admitted that he had consumed a half-quart bottle of vodka the evening prior to the accident, but he denied that he was intoxicated at the time of the accident and stated that he thought that the blood-alcohol test results which were attributed to him had been mixed up with someone else's.

Following a hearing, the WCJ denied worker's claim for benefits and entered a judgment reciting that it "finds and concludes that the Claim of [worker] is barred by § 52-1-11, NMSA (1978 Comp.) [be-

cause] his injury was occasioned by his intoxication * * *."

PROCEDURAL POSTURE

We address as a threshold matter the procedural posture of this case following worker's death on June 25, 1991, during the pendency of this appeal. After worker's death, his counsel filed a motion to substitute his estate to prosecute this appeal on the ground that the "cause of action for benefits and medicals incurred prior to death are items of the estate." Employer has not disputed this and, therefore, worker's estate is entitled to be substituted for worker pursuant to SCRA 1986, 12-301(B) for the purpose of prosecuting the appeal as it relates to the benefits incurred prior to death. *See Holliday v. Talk of the Town, Inc.*, 102 N.M. 540, 697 P.2d 959 (Ct.App.1985).

PROOF OF INTOXICATION

Under its first and second issues raised on appeal, worker's estate challenges both the admissibility of the evidence of worker's alleged intoxication and the sufficiency of the evidence to support the finding adopted below determining that his injury was occasioned by his intoxication. We discuss both issues jointly.

The estate argues that in order to bar a worker's claim for compensation benefits based upon the defense of intoxication, evidence must be presented establishing that worker was intoxicated and that the intoxication was a proximate cause of the injury. The estate also contends that, because ingestion of alcohol affects individuals differently, under NMSA 1978, Section 52-1-11 (Repl.Pamp.1991), expert medical testimony is necessary to prove that worker's alleged intoxication proximately caused his accident. Section 52-1-11 provides in applicable part: "No compensation shall become due or payable from any employer under the terms of the Workers' Compensation Act ... in event such injury was occasioned by the intoxication of such worker * * *."

As observed in 1A A. Larson, *The Law of Workmen's Compensation*, Section 34.31 (1990), the various state legislatures, in enacting provisions recognizing intoxication as a bar to a worker's claim of disability, have generally followed one of three different approaches regarding the degree of causation required to establish such an affirmative defense. Some states have adopted statutes providing that intoxication is a defense without requiring proof that intoxication was in fact a cause of the injury. A majority of the states recognize the defense when proof of a causal relation is established between the injury and the worker's intoxication, three of which, including New Mexico, provide that intoxication is an affirmative defense to a worker's compensation claim where the employer proves that the worker's injury was " 'occasioned by' " intoxication. *Id.* at 6-102 to -103. A third group of states require that, in order to establish such defense, proof of the worker's intoxication must be shown to constitute the "sole," "primary," or "direct cause" of his injury. *Id.* at 6-103 to -104.

Scrutiny of Section 52-1-11 indicates that our legislature, in enacting legislation establishing the affirmative defense of intoxication, followed the approach taken by a majority of states requiring proof that the worker's intoxication constituted a proximate cause of his or her injury. *Parr v. New Mexico State Highway Dep't*, 54 N.M. 126, 215 P.2d 602 (1950). Under our statute, proof of the worker's intoxication need not be shown to be the sole cause of the injury, but only a contributing cause. *See Martinez v. First Nat'l Bank of Santa Fe*, 107 N.M. 268, 755 P.2d 606 (Ct.App. 1987); *see also* SCRA 1986, 13-305 (Repl. 1991); *Smith v. Workers' Comp. Appeals Bd.*, 123 Cal.App.3d 763, 176 Cal.Rptr. 843 (1981) (absent any language in the applicable statutes indicating otherwise, legislatures must have intended the ordinary tort formula of causation to apply to the employer's burden of establishing that the worker's injury was caused by his intoxication). Thus, in order to establish the affirmative defense of intoxication, an employer must present evidence satisfying a dual requirement indicating (1) that the worker was intoxicated at the time of his or her accident, and (2) that such intoxi-

cation was a proximate cause of the resulting injury. *Parr v. New Mexico State Highway Dep't; Salazar v. City of Santa Fe,* 102 N.M. 172, 692 P.2d 1321 (Ct.App. 1983); *Schell v. Buell ECD Co.,* 102 N.M. 44, 690 P.2d 1038 (Ct.App.1983).

Examination of the language of Section 52–1–11 also disposes of the estate's argument that such statute must be read in conjunction with NMSA 1978, Section 52–1–28 (Repl.Pamp.1991), necessitating that the employer establish through the testimony of an approved health care provider that worker's injury was causally related to his alleged intoxication. In adopting Section 52–1–11, the legislature omitted any requirement that the defense of intoxication be established only through the testimony of an approved medical health care provider. The estate argues, however, that Section 52–1–28 specifies that where an employer denies that a worker's alleged disability is a natural and direct result of an accident, "the worker must establish that causal connection as a probability by expert [medical] testimony * * *." It seeks to extend this language so as to impose a similar burden upon respondents when asserting the affirmative defense of intoxication. We find this argument unpersuasive. We discern no legislative intent to condition proof that a worker's accident was caused by his or her intoxication upon expert medical testimony. Absent language or evidence of legislative intent to the contrary, we read the statute as permitting proof of worker's intoxication and the causal relation between his intoxication and accident by other evidence. *See Carter v. Mountain Bell,* 105 N.M. 17, 727 P.2d 956 (Ct.App.1986).

Our interpretation is consistent with the general rule that proof of an individual's intoxication may be established by circumstantial evidence. *See Cantrell v. W & C Contracting Co.,* 112 N.M. 609, 817 P.2d 1251 (Ct.App.1991) (substantial evidence based on admissions of the worker, circumstances surrounding accident, the investigating officer's investigation, and evidence found at scene of accident existed supporting finding of workers' compensation judge that the worker was intoxicated at time of accident and that his intoxication was the proximate cause of his injuries); *see also City of Portales v. Shiplett,* 67 N.M. 308, 355 P.2d 126 (1960) (investigating officer's observations of the defendant's driving the wrong way on a one-way street and the officer's testimony that the defendant's breath smelled of alcohol, that he staggered when walking, that he talked and used the phone with difficulty, and that he was intoxicated held to constitute substantial evidence to support conviction for DWI); *State v. Greyeyes,* 105 N.M. 549, 734 P.2d 789 (Ct.App.1987) (circumstantial evidence sufficient to sustain the defendant's conviction for DWI). Except as required by Section 52–1–28, evidence essential to establish a claim of a party is not required to be established by direct evidence, but may be established by reasonable inferences arising from proven facts. *See Ensley v. Grace,* 76 N.M. 691, 417 P.2d 885 (1966). The estate cites to other evidence in the record tending to show that other factors could have caused or contributed to worker's accident rather than his alleged intoxication. This argument seeks to reargue the estate's version of the facts and to disregard the evidence corroborating respondents' contention that worker's intoxication was a contributory factor causing his accident.

The estate also argues that the evidence was insufficient to support the WCJ's finding that worker was intoxicated and that his intoxication occasioned his accident. In reviewing challenges to the sufficiency of the evidence in appeals from administrative decisions of a WCJ, we apply the whole record standard of review. *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct.App.1988). Under the whole record standard of review, the reviewing court examines all of the evidence, both favorable and unfavorable, bearing upon the key findings adopted below in order to determine whether there is substantial evidence to support the administrative decision; this court, however, cannot substitute its judgment for that of the fact-finder or reweigh the evidence. We

review the whole record to determine whether it contains sufficient credible evidence which a reasonable mind might accept as adequate to support the conclusion reached. *See id.; see also Sosa v. Empire Roofing Co.,* 110 N.M. 614, 798 P.2d 215 (Ct.App.1990). This court's function in reviewing a decision of a WCJ is not to determine whether evidence contained in the record would support a contrary finding; rather, it is whether scrutiny of the whole record indicates the requisite evidence to support the decision entered below. *Tallman v. ABF (Arkansas Best Freight).*

Applying the above standard to the evidence herein, we conclude that the WCJ's finding that worker was intoxicated at the time of his accident and that his intoxication contributed to his accident is supported by requisite evidence. Evidence contained in the record indicates that muddy footprints were found on top of the tank on the water truck and muddy skid marks appeared on the side of the tank directly above the location where worker was found lying on the ground. The soles of worker's boots were muddy and slick. Worker's own testimony indicated that he had climbed up on top of the water tank just prior to his accident. Worker admitted that there was no need to walk on top of the tank in order to clean it out. Witnesses testified that the routine procedure for cleaning tanks did not involve walking on top of the tank and that the hose used for cleaning could be inserted into the tank opening used for cleaning from a position on the ladder. The footprints and skid marks found on top of the tank were not located near the ladder used to access the opening in the tank used for cleaning, but instead appeared toward the rear of the tank. Testimony of worker's supervisor and the company safety director indicated it was unnecessary to stand on top of the truck to clean the water tank; one need only open the drain at the bottom of the tank and then flush the contents by inserting the pressure nozzle of the water hose into the opening of the tank located next to the ladder.

Worker admitted that on the night before the accident he consumed a half-quart bottle of vodka which caused him to report to his supervisor that he was too intoxicated to work. The evidence also indicated that a number of empty beer cans were found in his truck on the morning of the accident, that worker's breath smelled of alcohol when he was examined in the medical center emergency room, that he had a record of prior alcohol abuse, and that a blood-alcohol test taken shortly after he arrived at the hospital indicated that worker had a blood-alcohol level of 0.141. Dr. Jimmy C. Standefer, a forensic toxicologist, testified that worker's degree of intoxication would have contributed to his falling from the truck.

After a reply brief was filed on behalf of worker, his counsel also submitted a supplemental brief seeking to argue issues not raised in his docketing statement or his brief-in-chief. His supplemental brief argued that Section 52–1–11 (defense of intoxication) has been superseded by NMSA 1978, Section 52–1–12 (Repl. Pamp.1991), permitting an affirmative defense to be asserted where an employer establishes that worker's accident " 'was *occasioned solely*' " by his use of a " 'depressant, stimulant or hallucinogenic drug as defined in the New Mexico Drug[, Device] and Cosmetic Act [Chapter 26, Article I NMSA 1978] * * *.' " (Emphasis in original.) Examination of these statutes, we conclude, indicates that Section 52–1–11 was not modified by the provisions of Section 52–1–12 so as to preclude respondents' reliance upon the defense of intoxication. Moreover, this issue was not argued below and was raised for the first time in the supplemental brief. A reviewing court will decline to consider nonjurisdictional issues raised for the first time on appeal and which were not argued or presented to the trial judge. *See Jaramillo v. Fisher Controls Co.,* 102 N.M. 614, 698 P.2d 887 (Ct. App.1985).

ADMISSIBILITY OF TEST RESULTS

Worker's final argument asserts that the WCJ erred in admitting evi-

dence of his blood-alcohol test results, because the test sample was drawn while he was unconscious and respondents failed to present evidence that the test was necessary in order to diagnose or treat worker for his injuries. Worker also argues that a prior written consent given by him to his employer authorizing employer to conduct searches for illegal drugs was unlawful, and that the taking of the blood sample while he was unconscious amounted to a battery and an unlawful search and seizure requiring suppression of the test results. Our review of the record fails to disclose any error on the part of the WCJ in the admission of the results of the blood-alcohol test. Because the exclusionary rule does not apply in civil cases, the method by which the blood sample was obtained, if illegal, should be addressed in a separate action. *Sweenhart v. Co-Con, Inc.,* 95 N.M. 773, 626 P.2d 310 (Ct.App.1981). In any event, there was conflicting evidence on the desirability of the blood sample for medical purposes and the written consent on which worker relies applies to illegal drugs and not alcohol. We find no error in the admission of this evidence.

The estate also challenges Dr. Standefer's qualifications to testify concerning the causal effect between the quantity of alcohol found in worker's system and his resulting accident. Worker failed to object to Dr. Standefer's qualifications either at the time his deposition was taken or at trial. Absent a timely objection properly alerting the WCJ to this issue at trial, it cannot be asserted for the first time on appeal. SCRA 1986, 11-103; *see also Poorbaugh v. Mullen,* 99 N.M. 11, 653 P.2d 511 (Ct.App.1982).

Lastly, the estate argues that the results of worker's blood test were inadmissible because respondents failed to establish a proper chain of custody from the time the sample was taken to the point when it was admitted into evidence. We disagree. The admission or rejection of evidence is a matter within the sound discretion of the WCJ. *Sanchez v. Molycorp, Inc.,* 103 N.M. 148, 703 P.2d 925 (Ct.App. 1985). Here, the record indicates that after the test sample was drawn it was marked with worker's name and subsequently tested by a laboratory technician. Dr. Standefer testified that he reviewed the deposition of Frank Funk, a medical technologist, who drew the blood sample from worker. He stated that the manner in which the blood sample was taken and the blood-alcohol test performed was proper and confirmed that the sample tested had been in fact taken from worker. Under these circumstances, we find no error in the admission of test results. It is the role of the WCJ to resolve conflicts in the evidence to determine whether a proper foundation has been established and to resolve questions of admissibility. *See Baum v. Orosco,* 106 N.M. 265, 742 P.2d 1 (Ct.App.1987).

CONCLUSION

The decision of the WCJ is affirmed.

IT IS SO ORDERED.

MINZNER and PICKARD, JJ., concur.

823 P.2d 334

Patricia FEESE, Claimant-Appellant/Cross-Appellant,

v.

U.S. WEST SERVICE LINK, INC., Self-Insured, Respondent-Appellant/Cross-Appellee.

No. 12546.

Court of Appeals of New Mexico.

Oct. 28, 1991.

David Duhigg, Duhigg, Cronin & Spring, P.A., Bruce P. Moore, Albuquerque, for claimant-appellee cross-appellant.

Ieva L. Karklins, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, for respondent-appellant cross-appellee.

OPINION

ALARID, Chief Judge.

Employer appeals a workers' compensation administration disposition order granting disability benefits to claimant. Employer raises three issues on appeal: 1) whether claimant is entitled to temporary total disability benefits from August 11, 1989, to April 1, 1990; 2) whether there was sufficient evidence to support the finding of causal connection; and 3) whether the award of $12,000 in attorney fees was

excessive in this case. Claimant cross-appeals raising issues regarding the constitutionality of the $12,500 cap on attorney fee awards in workers' compensation cases. We affirm.

FACTS

Claimant was sixty years old at the time of her accident and had been working for the telephone company as an operator since 1948. In March of 1989, she suffered an accidental injury when she tripped and fell over some construction work while entering the building where she worked. She injured both her knees at that time. She was treated and remained off work until April 26, 1989. During that time, a new contract was being negotiated between the telecommunications workers and the telephone company. Because of concern about pension benefits, claimant elected to retire under the terms of the existing contract. Her retirement was set for August 11, 1989. However, over the years claimant had accumulated a significant amount of unused vacation and compensatory time and she elected to take that time beginning on June 22, 1989.

While at home on July 10, 1989, claimant fell when her right knee gave out. She broke her shoulder. After the injury on July 10, 1989, claimant was removed from pre-retirement vacation status and placed on sick benefits. Claimant retired from the telephone company effective August 12, 1989. Thereafter, she continued treatment for her broken shoulder and reached maximum medical improvement on May 3, 1990.

TEMPORARY TOTAL DISABILITY

Claimant was awarded temporary total disability benefits from August 11, 1989, to April 1, 1990. Employer argues that because claimant had taken voluntary retirement, she could not receive temporary total disability benefits for that time. In support of this argument, employer cites out-of-state authority holding that a person who has retired from the work force has no lost wages and is, therefore, not entitled to disability benefits. *See, e.g., Karr v. State Accident Ins. Fund Corp.*, 79 Or.App. 250, 719 P.2d 35, 36, *review denied*, 301 Or. 765, 726 P.2d 377 (1986). These cases, however, rely on workers' compensation statutes that define disability in terms of lost wages.

In New Mexico, disability is defined as "an impairment to a worker resulting by reason of an accidental injury * * * which prevents the worker from engaging, for remuneration or profit, in any occupation for which he is or becomes fitted by age, training or experience." NMSA 1978, § 52-1-25(A) (Repl.Pamp.1987). We are concerned with claimant's capacity to perform work, not with whether or not she lost wages from her accident. She may be entitled to disability benefits even if she is working for some wage. *See Amos v. Gilbert W. Corp.*, 103 N.M. 631, 634, 711 P.2d 908, 911 (Ct.App.1985).

The determination of disability is a fact question and if there is substantial evidence in the record to support a finding of disability, this court must uphold it. *Adams v. Loffland Bros. Drilling Co.*, 82 N.M. 72, 74, 475 P.2d 466, 468 (Ct.App. 1970). Whether or not an employee has removed herself from the labor market is a question of fact. *See Schroeder v. Highway Servs.*, 403 N.W.2d 237 (Minn.1987).

In New Mexico, disability benefits are denied if a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market. *Aranda v. Mississippi Chem. Corp.*, 93 N.M. 412, 414, 600 P.2d 1202, 1204 (Ct.App.1979), *cert. denied*, 93 N.M. 683, 604 P.2d 821 (1979). The fact that claimant retired from the telephone company does not alone establish that she took herself out of the labor market. Many people take early retirement from one job to move on to another completely different job. Therefore, retirement does not establish that claimant voluntarily took herself out of the labor market, thereby making her unqualified for disability benefits. *See Franco v. Industrial Comm'n*, 130 Ariz. 37, 633 P.2d 446, 450 (Ct.App.1981).

The issue before us is to determine whether the evidence presented supports

the judge's determination that claimant had not removed herself from the labor market and was, therefore, entitled to disability benefits. *See Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 127, 767 P.2d 363, 366 (Ct.App.) (discussing whole record standard of review for workers' compensation cases), *cert. denied,* 109 N.M. 33, 781 P.2d 305 (1988). There is evidence in the record that claimant retired from the telephone company with the intention of seeking other employment. Claimant testified that she intended to remain in the work force and continue to work. She testified that she could not immediately look for work after retirement because of her injury. She testified that as of April 1, 1990, she could possibly return to work and she had begun searching for a job. While there was some evidence that claimant was going to travel with her husband after her retirement and before starting another job, there was also evidence that those plans changed before her injury.

From August 11, 1989, when she retired, to April 1, 1990, when she was able to return to work, claimant was totally disabled. She was totally disabled because she was unable to perform any work due to an accidental injury. Her ability to work had nothing to do with the fact that she had retired. There was sufficient evidence on the record as a whole to support the decision by the judge that from August 11, 1989, until April 1, 1990, claimant was temporarily totally disabled.

CAUSAL CONNECTION

Employer also argued that there was insufficient evidence to support the causal connection between the disability which arose in July and the accidental injury of March 1989. When the employer contests the causal connection between the accidental injury and the disability, worker must present medical testimony that shows the causal connection to a medical probability. NMSA 1978, § 52-1-28(B) (Repl. Pamp.1987); *Medrano v. Ray Willis Constr. Co.,* 96 N.M. 643, 646, 633 P.2d 1241, 1244 (Ct.App.1981). Employer claims that the testimony here only established that any one of several factors could have been the legal cause of claimant's disability. *Renfro v. San Juan Hosp., Inc.,* 75 N.M. 235, 238, 403 P.2d 681, 684 (1965) (burden not met where several factors could have caused the disability).

We do not agree. Three doctors testified by deposition. Dr. Chestnut, claimant's treating physician, testified that claimant had been placed at risk of having problems because of the weakness of her legs as a result of her initial fall. He testified that the fall on July 10 was a consequence of the problems with her legs and knees, disabilities resulting from the original injury. He testified that the shoulder injury was, to a medical probability, secondary to the injury of her knee on March 1. *See Gutierrez v. Amity Leather Prods. Co.,* 107 N.M. 26, 29, 751 P.2d 710, 713 (Ct.App.1988).

Dr. Daugherty, claimant's family physician, testified that there was a direct connection between claimant's knee injury and her fall when she broke her shoulder. Where the second injury is directly and proximately attributable to the original work-related injury, compensation benefits are payable.

Dr. Jones, employer's physician, testified that claimant had other problems that could make her susceptible to falls. He testified that it would be speculation to blame the July fall on the March injury. It is for the finder of fact to weigh the testimony and determine where the truth lies. *Hernandez v. Mead Foods, Inc.,* 104 N.M. 67, 71-72, 716 P.2d 645, 649-50 (Ct.App. 1986). Here there is sufficient medical evidence that, to a medical probability, the July fall was caused by the injury and disability resulting from the March fall.

ATTORNEY FEES

Employer argues that the award of $12,000 in attorney fees is excessive in this case. The amount of the award is within the discretion of the judge. However, certain factors must be taken into consideration. *Fryar v. Johnsen,* 93 N.M. 485, 488, 601 P.2d 718, 721 (1979). In addition to the statutory requirements, the following

factors are subject to consideration: the chilling effect of miserly fees upon the ability of an injured workman to obtain adequate representation; the time and effort expended by the attorney; the extent to which the issues were contested; the novelty and complexity of the issues involved; the fees normally charged in the locality for similar legal services; the ability, experience, skill and reputation of the attorney; the relative success of the workman in the court proceeding; the amount involved; and the rate of inflation. Claimant's attorney testified that he spent sixty hours on this case, including consultation with the claimant and writing a detailed brief on certain issues. Counsel testified that his practice is limited to workers' compensation and personal injury cases and that he has practiced in New Mexico since 1977. He testified that no offers were made prior to trial and that the present value of the award was $66,611. He further testified that claimant prevailed on all issues but the safety device. Based on this testimony, the judge found that claimant was entitled to $12,000 in attorney fees.

Employer argues that because the judge did not make findings with regard to the evidence on the *Fryar* factors, the award must be reversed. *See Woodson v. Phillips Petroleum Co.,* 102 N.M. 333, 339, 695 P.2d 483, 489 (1985) (requires trial court to make findings on *Fryar* factors on which parties present evidence). We believe, however, that findings need not be made in a case such as this where the evidence presented by claimant's counsel, which would support the award, was not contested and the ultimate finding and conclusion stating the amount to be awarded are supported by the evidence. *See Bower v. Western Fleet Maintenance,* 104 N.M. 731, 726 P.2d 885 (Ct.App.1986). Furthermore, neither party requested that the judge make findings. Therefore, the fact that the judge failed to make specific findings with regard to the *Fryar* factors does not require remand. *Id.*

Our review of the evidence presented at the hearing on attorney fees shows that it was sufficient to support an award of $12,000 in attorney fees, approximately 20% of the present value of the award. *See Woodson,* 102 N.M. at 338, 695 P.2d at 488.

CROSS-APPEAL

Claimant argues that the limit of $12,500 for attorney fees in workers' compensation cases, NMSA 1978, § 52-1-54(G) (Repl.Pamp.1987), is unconstitutional in that it denies her a right to a meaningful appeal, her right to equal protection under the laws, and her right to due process. We decline to address the issues regarding the constitutionality of the attorney fee cap for two reasons.

First, the issues were not properly preserved for appeal. SCRA 1986, 12-216(A). No mention was made at the attorney fee hearing regarding the constitutionality of the cap. Moreover, we decline to consider the issues under the exceptions found in Rule 12-216(B). Second, these issues are not ripe for decision. The constitutionality of legislation is open to attack only by a person whose rights are affected thereby. *State ex rel. Overton v. New Mexico State Tax Comm'n,* 81 N.M. 28, 33, 462 P.2d 613, 618 (1969). The fees awarded in this case do not reach the cap. Where there is no showing that claimant has been deprived of equal protection and due process rights, there is no issue for decision. *See State v. Silver,* 83 N.M. 1, 2-3, 487 P.2d 910, 911-12 (Ct.App.1971).

The decision of the workers' compensation administration is affirmed.

IT IS SO ORDERED.

BIVINS and BLACK, JJ., concur.

823 P.2d 339

In re the FORFEITURE OF ONE 1970 FORD PICKUP TRUCK, VIN # F10YKG80404, N.M. LICENSE # HP-7346.

No. 11673.

Court of Appeals of New Mexico.

Nov. 1, 1991.

Tom Udall, Atty. Gen., Gail MacQeusten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Edward L. Hand, John F. Schaber, P.A., Deming, for defendants-appellants.

OPINION

PICKARD, Judge.

The issue we decide in this case is the extent to which property may be forfeited when it is owned by co-owners, only one of whom participated in and was knowledgeable about the criminal wrongdoing that caused the forfeiture. Appellants, Carolina Garcia (mother) and Paul Garcia (son), appeal the trial court's order forfeiting their interests in a 1970 Ford truck. On the merits, each party adopts the extreme position that the presence of an innocent or guilty co-owner operates to require no forfeiture or a complete forfeiture, respectively. We do not agree with either extreme and hold that property may only be forfeited to the extent of the guilty co-owner's interest. The state also filed a motion to dismiss the appeal for lack of jurisdiction. We deny the motion to dismiss, we reverse the order from which the appeal was taken, and we remand for further proceedings.

FACTS

The parties stipulated to the following facts. Mother and son are co-owners of the truck, which is registered to "Carolina B. or Paul B. Garcia." Son used the truck to transport or facilitate the transportation of approximately one-quarter ounce of marijuana for the purpose of sale. Mother did not give consent to or know about the

illegal use of the truck by her son. Mother does not hold a valid driver's license and has not held one since at least June 16, 1986. Son does have a valid driver's license, which was issued on March 7, 1988.

After a hearing, the trial court ordered the truck forfeited to the state. Mother and son appeal, arguing that their interests in the truck cannot be forfeited because one of the owners of the truck did not know about or consent to the illegal activity for which the truck was used. The state filed a verified motion to dismiss the appeal because mother and son had not sought a stay and the state had transferred title to the truck. The state therefore argued that this court lost jurisdiction to hear the appeal.

MOTION TO DISMISS

Relying on *Devlin v. State ex rel. New Mexico State Police Department,* 108 N.M. 72, 766 P.2d 916 (1988), the state originally argued that, because the title had been transferred to another party, in rem jurisdiction was lost and this court has no authority to hear the appeal. However, as the state concedes, while this appeal was pending, our supreme court held that "when a state entity initiates a forfeiture proceeding, thereby invoking the jurisdiction of the courts of New Mexico, those courts retain in personam jurisdiction until all appeals have been exhausted." *In re Forfeiture of Two Thousand Seven Hundred Thirty Dollars and No Cents ($2,730.00) in Cash,* 111 N.M. 746, 747, 809 P.2d 1274, 1275 (1991). Accordingly, we proceed to the merits.

DISCUSSION

NMSA 1978, Section 30-31-34(D) (Repl. Pamp.1989) provides that vehicles "which are used or intended for use to transport or in any manner to facilitate the transportation" of controlled substances for the purpose of sale are subject to forfeiture. However, NMSA 1978, Section 30-31-34(G)(2) (Repl.Pamp.1989) provides that "no conveyance is subject to forfeiture under this section by reason of any act or omission established for the owner to have been committed or omitted without his knowledge or consent." As we mentioned above, the parties stipulated that son transported marijuana for sale and that mother did not give consent to or know about such use of the truck by her son. Appellants argue that, because of mother's lack of knowledge or consent, Section 30-31-34(G)(2) prohibits the forfeiture of her ownership interest in the truck and that her interest extends to the whole truck. The state argues that son's knowledge of the illegal activity as a co-owner is enough to justify forfeiture of both appellants' interest in the truck. As the parties correctly recognize, this case raises an issue of first impression in New Mexico, and there is law in other jurisdictions to support each party's position.

The state suggests that those jurisdictions that protect an innocent co-owner's interest do so because their forfeiture statutes contemplate an innocent-owner exception for multiple owners of the same vehicle. *See State v. Shimits,* 10 Ohio St.3d 83, 461 N.E.2d 1278 (1984) (forfeiture statute refers to "innocent owners"); *State v. One 1984 Toyota Truck,* 69 Md.App. 235, 517 A.2d 103 (1986), *aff'd,* 311 Md. 171, 533 A.2d 659 (1987) (forfeiture exception refers to "the extent of the interest of any owner"); *State v. 1979 Pontiac Trans Am,* 98 N.J. 474, 487 A.2d 722 (1985) (innocent "lessors or lienholders" exception was extended to include innocent owners). *See also One 1973 Cadillac v. State,* 372 So.2d 103 (Fla.Dist.Ct.App.1979). In contrast, the state contends that those states which do not protect an innocent co-owner's interest do so because their statutory forfeiture exceptions only refer to "the owner" in the singular rather than using a plural term. *See State v. One Ford Van, Econoline,* 143 N.J.Super. 512, 363 A.2d 928 (1976); *People v. One 1979 Honda Auto.,* 362 N.W.2d 860 (Mich.App.1984) (forfeiture exception refers to "the owner"). Because New Mexico's innocent-owner exception also refers to "the owner," the state argues that an innocent co-owner's interest in property should not be exempted from forfeiture if the other co-owner has knowledge

of or has consented to the illegal activity. We disagree with the state's conclusion.

The state's argument rests on the assumption that Section 30–31–34(G)(2) refers to "owner" in the singular rather than the plural. However, it is a codified rule of statutory construction that when the legislature uses the singular number, it may be extended to the plural number unless such a construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute. NMSA 1978, § 12–2–2(B) (Repl.Pamp.1988). We do not believe that construing the term "the owner" to protect co-owners as well as sole owners is contrary to the legislature's intent or the context of the statute. The statute clearly contemplates protecting owners who did not participate in or have knowledge of the illegal uses to which their property was put. By protecting an innocent co-owner's interest in a vehicle, we believe that we are furthering the intent of the legislature consistent with the language of the statute. As the Nevada supreme court recognized when interpreting statutory language identical to New Mexico's statute, refusing to protect an innocent co-owner's interest "would ... deprive the limitation on forfeitures explicitly established by the legislature of any force and effect, since mere ownership would be sufficient to justify a forfeiture." *One 1978 Chevrolet Van v. County of Churchill,* 97 Nev. 510, 634 P.2d 1208, 1209 (1981).

The state also argues that a joint owner of an automobile can otherwise dispose of the vehicle without the other owner's knowledge or consent. The state argues that similarly one co-owner can subject the vehicle to forfeiture based solely on his own actions without regard for the knowledge or consent of the other owner. *See State v. One 1968 Buick Electra,* 301 A.2d 297 (Del.1973); *Amrani–Khaldi v. State,* 575 S.W.2d 667 (Tex.Civ.App.1978); *In re 1976 Blue Ford Pickup,* 120 Ariz. 432, 586 P.2d 993 (App.1978). However, our own supreme court has plainly stated that "[f]orfeitures are not favored at law and statutes are to be construed strictly against forfeiture." *State v. Ozarek,* 91 N.M. 275, 275, 573 P.2d 209, 209 (1978). The supreme court has also acknowledged that the "forfeiture provisions of the Controlled Substances Act are penal in nature." *Id.* at 276, 573 P.2d at 210. In contrast, at least one of the cases relied upon by the state does not view such forfeiture provisions as penal in nature. *See State v. One Ford Van, Econoline.* Moreover, many of the cases that allow the forfeiture of an innocent co-owner's interest are grounded in traditional notions that a forfeiture proceeding is an in rem proceeding based on legal fictions that an inanimate object can be guilty of a crime. *See generally* Don F. Vaccaro, Annotation, *Relief to Owner of Motor Vehicle Subject to State Forfeiture for Use in Violation of Narcotics Laws,* 50 A.L.R.3d 172, 176 (1973). Our own supreme court has rejected those traditional notions and legal fictions. *See In re Forfeiture of Two Thousand Seven Hundred Thirty Dollars and No Cents ($2,730.00) in Cash.*

Finally, we are not persuaded by the state's argument that protecting an innocent co-owner from forfeiture could result in drug offenders avoiding the effect of forfeiture statutes by simply placing co-ownership of a vehicle in the name of another person who may well be innocent. *See People v. Garner,* 732 P.2d 1194 (Colo. 1987) (en banc). While the state's policy argument may raise a valid concern, the same argument could be used to advocate disallowing any innocent-owner exception, since it is equally plausible that someone intent on carrying out illegal drug activities would place his vehicle in the sole ownership of an innocent third person to avoid forfeiture proceedings. In any event, the state's policy concerns must be weighed against the legislature's policy determination that innocent owners should not be penalized when their property is used for illegal purposes. And, as we acknowledged above, our forfeiture statutes must be strictly construed against forfeiture. *State v. Ozarek.* We note that the Colorado case relied upon by the state acknowledges the court's equitable powers to fashion "a decree that achieves a fair result

under the particular circumstances of [a] case." *People v. Garner*, 732 P.2d at 1197.

[redacted] For the reasons stated above, we believe mother is correct in arguing that her interest in the truck should be exempt from forfeiture because she is an innocent owner within the meaning of Section 30–31–34(G)(2). *See One 1978 Chevrolet Van v. County of Churchill.* However, we disagree that any innocent co-ownership of mother requires the entire truck to be returned to her. Such a result would contravene the policy and express words of the legislature. We agree with the Georgia Court of Appeals, which stated:

> In our view the better reasoned approach, and the one consistent with the intention of our legislature, is a construction which allows forfeiture of the property interest of the wrongdoer and those who knew or should have known of the criminal use of the property, and provides protection to innocent owners to the extent of their property interest. Accord *In re Forfeiture of $53,* 178 Mich. App. 480, 444 N.W.2d 182 (1989).

State v. Jackson, 197 Ga.App. 619, 399 S.E.2d 88, 91 (1990).

CONCLUSION

We asked the parties to brief what the result should be if we rejected their respective contentions that their positions would require an all-or-nothing result one way or the other. We believe that the approach outlined in *Garner* provides a workable solution, recognizing both the right of the state to a forfeiture of son's interest and the right of mother to retain any interest she has. Therefore, we deny the motion to dismiss, and we reverse the order from which the appeal was taken. We remand to the trial court to use its equitable powers to insure that both rights are upheld in an appropriate manner. *See id.; see also State v. Jackson.* No costs are awarded.

IT IS SO ORDERED.

MINZNER and HARTZ, JJ., concur.

[redacted]

823 P.2d 342

CITY OF FARMINGTON, Plaintiff–Appellant,

v.

Gerald STANSBURY, Defendant–Appellee.

No. 12927.

Court of Appeals of New Mexico.

Nov. 13, 1991.

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[redacted]

OPINION

BLACK, Judge.

Prior to the initiation of this action, the City of Farmington (City) prosecuted defendant under Farmington Municipal Code, Section 21–50.1 (the Ordinance), for distributing two videotapes, "X-Dreams" and "Horny Housewives." The matter went to trial before a jury. The jury in that case returned a general verdict of not guilty.

The City then brought the present charges against defendant for distributing two other videotapes, "Sex Games" and "Cat Alley." The Farmington municipal court found defendant guilty, and he appealed to the district court. Defendant then moved the district court for an order dismissing the charges, arguing that the prior acquittal collaterally estopped the City from prosecuting him further. The district court granted defendant's motion and ordered the case dismissed.

The City argues that the district court erred in applying the doctrine of collateral estoppel to this matter. While we are mindful of the potential misuse of serial prosecutions, based on the facts before us we must agree with the City and reverse.

In a memorandum opinion to the parties, the district court gave two reasons for granting the motion. First, the court determined that, as a matter of fact, all four movies were essentially the same, saying "the plots in these movies are shallow at best. The purpose of the movies is to depict various sexual interludes with the plot as a flimsy vehicle for the assignations to take place." The district court noted that if the first trial resolved the issue of obscenity against the City on the first two videos, and the second two movies depicted similar sex acts, then collateral estoppel would prevent subsequent prosecutions of similar material.

Second, the district court expressed concern that defendant had available for rental 800 of these types of videos at his place of business. Based on the fact that each of the two prosecutions was based on only two movies, the district court surmised that the City could be expected to bring another

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Jay B. Burnham, Deputy City Atty., Farmington, James P. Mueller, Children's Legal Foundation, Phoenix, Ariz., for plaintiff-appellant.

Thomas J. Hynes, Hynes, Hale & Thrower, Farmington, for defendant-appellee.

398 prosecutions against defendant. "Two by Two," said the district court, "is an appropriate way to load an Ark, but a terrible way to bring things to the Courthouse." The court therefore concluded that judicial economy also mandated application of collateral estoppel principles.

The parties do not dispute that these movies had different titles, actors, directors, "plots," etc. The City relies on these differences to support the argument for reversal. Defendant's basic argument is that the trial court is correct because, though the movies are different in their particulars, the numerous sex acts are essentially the same in each movie. We believe defendant's argument is premised upon a fundamental misunderstanding of how the doctrine of collateral estoppel applies to obscenity prosecutions.

The doctrine of collateral estoppel prevents an issue of ultimate fact, once determined by a valid final judgment, from being litigated between the same parties or their privities in any future lawsuit. *Buhler v. Marrujo,* 86 N.M. 399, 524 P.2d 1015 (Ct.App.1974). In criminal prosecutions the principle of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. *State v. Nagel,* 87 N.M. 434, 535 P.2d 641 (Ct.App.1975). Double jeopardy thus comes into play when an ultimate fact has been determined at a previous trial. *State v. Orosco,* 99 N.M. 180, 655 P.2d 1024 (Ct.App.1982). Obviously, the Constitution only requires the application of collateral estoppel when there has been an acquittal on the issues actually raised in the first trial. *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975).

The doctrine of collateral estoppel undoubtedly applies in criminal obscenity prosecutions. *Suki, Inc. v. Superior Court,* 60 Cal.App.3d 616, 131 Cal.Rptr. 615 (1976); *People v. Chang,* 86 Misc.2d 272, 382 N.Y.S.2d 611 (1976). However, the doctrine must be very carefully tailored because of the nature of the test for obscenity. In *Miller v. California,* 413 U.S. 15, 24, 93 S.Ct. 2607, 2614–15, 37 L.Ed.2d 419 (1973), the Court set forth the basic guidelines for determining whether a work is obscene: (1) whether the average person, applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes sexual conduct specifically defined by applicable state law in a patently offensive way; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. While it was not included in the record, it would appear the City Ordinance tracks the *Miller* test and enumerates several specific acts which might be considered "patently offensive" under the second prong of *Miller.* The *Miller* standard, then, requires the literary, artistic, political, and/or scientific value of each work to be judged in light of the community standards where the work is alleged to be obscene.

The first prong of the *Miller* test requires average people in each community to apply contemporary standards at the place and time defendant is charged. The fact that another person has been acquitted on obscenity charges for exhibiting the work in another community does not collaterally estop the state from subsequently prosecuting a different defendant for exhibiting the same work in a different community. *Woodford v. Municipal Court,* 37 Cal.App.3d 874, 112 Cal.Rptr. 773 (1974); *cf. Cinema Assocs. v. City of Oakwood,* 417 F.Supp. 146 (S.D.Ohio 1976) (recent determination by federal court that film was not obscene estopped prosecution of same film by local officials within geographical boundaries of that federal district).

The *Miller* test also recognizes community standards may vary, not only geographically, but over time. In *McKinney v. Alabama,* 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976), the Court recognized that an equity judge's declaration that a work was obscene could not later be used to estop a defendant from presenting that same work to the jury in defendant's criminal trial, so that the jury could apply their interpretation of then-prevailing community standards to determine its obscenity vel non. In his concurrence, Justice Brennan pointed out that community standards may

change over time. 424 U.S. at 689–90, 96 S.Ct. at 1200–01.

The second prong of the *Miller* test requires an examination of whether the work violates the specific ordinance under which charges are filed. It has thus been held the fact that defendant has been convicted of violating a *municipal* obscenity ordinance does not collaterally estop the state from filing charges under a state statute based on performance of the same play on a different occasion. *State v. Ell-Gee, Inc.*, 255 So.2d 542 (Fla.Dist.Ct.App. 1971). It has also been stated a finding that magazines were not obscene under a state statute would not collaterally estop the federal government from a prosecution under a federal statute. *United States v. Luros*, 243 F.Supp. 160 (N.D.Iowa), *cert. denied*, 382 U.S. 956, 86 S.Ct. 433, 15 L.Ed.2d 361 (1965). *But see Cinema Assocs.*, 417 F.Supp. at 148.

Finally, and most pertinent herein, each work has to be individually evaluated to determine whether, taken as a whole, it lacks serious literary, artistic, political, or scientific value. *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); *United States v. Various Articles of Merchandise*, 600 F.Supp. 1383 (N.D.Ill.1985); *KMA, Inc. v. City of Newport News*, 228 Va. 365, 323 S.E.2d 78 (Va.1984), *cert. denied*, 471 U.S. 1100, 105 S.Ct. 2324, 85 L.Ed.2d 842 (1985). Logic therefore requires that collateral estoppel may not be used to transfer the finding of obscenity for one work to an entirely different work, merely because both depict the same general categories of sexual activities. Even before the Supreme Court set forth the present obscenity test in *Miller*, it had been judicially recognized that collateral estoppel does not prohibit the prosecution of the same defendants for distribution of similar materials.

In *United States v. Frew*, 187 F.Supp. 500 (E.D.Mich.1960), defendants were indicted for knowingly using the mails to distribute obscene materials. Defendants argued that the United States Post Office had previously issued an administrative order prohibiting distribution of some of the same materials, but defendants had obtained an injunction from the federal district court at Los Angeles restraining the enforcement of the post office order. *Id.* at 503–05. Based on the injunction, defendants argued collateral estoppel prohibited the subsequent prosecution in federal court in Michigan. *Id.* at 503. The *Frew* court determined that defendants had the burden of proving the materials found not to be obscene in the earlier case were the same materials challenged in the subsequent proceedings. *Id.* at 505. The court refused to assume the materials were identical and refused to apply the doctrine of collateral estoppel. *Id.*

The court found the related doctrine of *res judicata* did not require dismissal of a criminal obscenity indictment in *People v. Cohen*, 22 Misc.2d 722, 205 N.Y.S.2d 481 (1960), *rev'd on other grounds*, 22 A.D.2d 932, 255 N.Y.S.2d 813 (1964) (per curiam) (mem.) (holding 1958 edition of *Sunshine and Health* not obscene, as a matter of law). In *Cohen* the court recognized the United States Supreme Court had previously reversed a lower court decision that the 1955 edition of the same magazine, *Sunshine and Health*, was obscene. *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352 (1958). In considering the 1958 edition of *Sunshine and Health*, the *Cohen* court explained why different decisions on the obscenity of facially similar publications could be upheld:

> The two issues must be regarded as separate publications each to be judged on its own specific contents. The decision in the Summerfield case cannot give the publication in question immunity for all time, a sort of carte blanche for all future issues.
>
> ....
>
> The pictures and other material in both magazines are not the same in contents, description and effect. The February, 1955 issue, which was before the Supreme Court in the Summerfield case, consists of only 32 pages including the covers, and contains 17 pictures of nude persons, while the one before this Court

> consists of 64 pages in addition to the covers, and contains 85 such pictures. In the 1955 issue there were no color pictures; whereas in the 1958 issue there are 10 full-page pictures of nude persons in color. In addition, a number of pictures in the 1958 annual issue appear to be deliberately posed for the obvious purpose of arousing sexual interest. There are more pictures and more close-ups of stark nudity showing male, female and adolescent genitalia in the 1958 issue, and the pictures in it are much sharper in focus than the pictures in the February, 1955 issue. Moreover, most of the pictures in the issue of the magazine before this Court tend to invite particular attention to the sexual organs and pubic hair of the persons depicted; which include men, women and children pictured together and alone, on various pages thereof. The publication in question is permeated with pictures which tend to incite passion and sexual urge and are of such nature and composition that the average person, applying contemporary community standards, could find the dominant theme of the material taken as a whole to appeal to prurient interest.

205 N.Y.S.2d at 487–88.

The obscenity of each work must therefore be judged individually. Defendant has cited no legal authority, and we have found none, which supports his argument that a prior holding a similar work was not obscene would collaterally estop the criminal prosecution of a different work. Indeed, both *Frew* and *Cohen* held to the contrary. Accordingly, we hold that collateral estoppel cannot apply to the facts of this case.

We are, however, not indifferent to the trial court's concerns that, since defendant has 800 videotapes, the City may use the obscenity ordinance to harass defendant through serial prosecutions. Though the City attorney unquestionably has some discretion in choosing which acts merit prosecution, the courts have provided various remedies for the vexatious use of obscenity ordinances. *See, e.g., Krahm v. Graham,* 461 F.2d 703 (9th Cir.1972) (finding of bad faith enforcement of obscenity law and granting of injunction against further prosecution of 90 pending cases where the 11 cases already tried had resulted in acquittals); *Black Jack Distributors, Inc. v. Beame,* 433 F.Supp. 1297 (S.D.N.Y.1977) (injunction granted against harassment through bad faith enforcement of obscenity laws). *But see Collins v. County of Kendall,* 807 F.2d 95 (7th Cir.1986) (instituting 30 criminal prosecutions over two years did not per se constitute bad faith or harassment). If and when there is evidence that the City is misusing the judicial process to harass defendant, we assume defendant will pursue the appropriate remedy.

IT IS SO ORDERED.

ALARID, C.J., and FLORES, J., concur.

823 P.2d 905

Frank W. MONTOYA, Jr., Plaintiff–Appellant and Cross–Appellee,

v.

Group One:

Manuel M. TORRES, Individually, Manuel M. Torres, as Personal Representative of the Estate of Margaret O. Montoya, a/k/a Margarita Vigil Montoya, Erlinda Vigil, Margaret Vigil, Margaret O. Vigil and Margarita O. Vigil Montoya, Deceased, Josephine Vigil Zamora and Antonio Vigil, Jr., Defendants–Appellees and Cross–Appellants.

No. 19656.

Supreme Court of New Mexico.

Dec. 31, 1991.

Popejoy, Leach, Green, Melkus & Giles, P.C., Thomas L. Popejoy, Albuquerque, for plaintiff-appellant and cross-appellee.

William N. Henderson, Albuquerque, for defendant-appellee and cross-appellant Torres.

Hannett, Hannett & Cornish, P.A., George Foster Hannett, Albuquerque, for defendants-appellees and cross-appellants Zamora and Vigil.

OPINION

FROST, Justice.

This action to quiet title to real property located in Bernalillo County, New Mexico, was brought by Frank W. Montoya, Jr. (Frank Jr.) against the estate of his grandfather's wife, Margaret Vigil Montoya, her three children, and various other relatives of Margaret. The case involves the effect of a presumption of undue influence on the validity of the quitclaim deed given to Frank Jr. by Margaret and her husband, Max Emiliano Montoya, who was Frank Jr.'s maternal grandfather with whom he had "a very special relationship ... closer than the average grandfather-grandson." At trial, defendants challenged the deed

and its effectiveness to convey title, alleging undue influence and Margaret's lack of mental capacity to execute the deed. Margaret's children counterclaimed to set aside the deed and the "Statement Regarding Gifts To Take Effect At Death," executed concurrently with the deed, and to quiet title in them. After a bench trial, final judgment was entered in favor of defendants. We affirm.

FACTS

The findings of fact entered by the district court may be summarized as follows. Margaret and Max were married in May 1977. From the Spring of 1977 until July 1981, Frank Jr. visited Max and Margaret weekly and on special occasions. Margaret would give Frank Jr. small amounts of money periodically. In August 1981, Frank Jr. left New Mexico to attend dental school in Kansas and saw Margaret five or six times before her death in 1986, and only twice after September 1982—a period while she was either in the hospital or a rest home.

At the time of the marriage, Margaret owned the subject property as her separate property, in addition to interests in six other properties and various bank accounts. Max had little or no separate property. During the marriage, Margaret converted her bank accounts from single to joint tenancy accounts with Max into which each deposited their separate retirement incomes and Margaret's rental income. In September 1981, Margaret and Max lived in the residence located on the subject property, which had been remodeled in late 1979 to early 1981 at a cost of between $15,500.00 and $24,000.00 and paid for from a joint bank account.

In August 1981, Frank Jr.'s mother arranged for Max and Margaret to meet with attorney Westerfield for the purpose of executing documents to convey the subject property to Frank Jr. Neither Margaret nor Max knew Westerfield. Previously, Margaret had been represented by an attorney "for many years" and currently was represented by another attorney in an unrelated matter. Frank Jr.'s father and mother drove Max and Margaret to Westerfield's office on September 4th and remained in his private office throughout the meeting, although Frank Jr.'s mother and father were "out of earshot of the conversations." Westerfield was informed by Max or Margaret in the presence of the other that they wanted to give the subject property to Frank Jr. "right then and there," despite the court's finding that an immediate gift of this property would leave Margaret without a home and impoverished unless she sold the balance of her separate property. On the date Margaret and Max met the attorney, the subject property was still the separate property of Margaret; however, in November 1981, she executed a warranty deed conveying the property to herself and Max as joint tenants—a deed not prepared by Westerfield. Margaret never notified her children of this conveyance.

Westerfield discussed with Margaret and Max the issues of their living on the property until the death of the surviving spouse and retaining a right to dispose of the property in the case of need. To this end, he subsequently drafted a "Statement Regarding Gifts To Take Effect At Death" (statement) and a quitclaim deed and mailed the documents to Frank Jr.'s father with instruction to have Margaret and Max review them. All correspondence from Westerfield to Max and Margaret concerning the gift was routed through Frank Jr.'s father. On October 12, 1981, Margaret and Max met with Westerfield alone and executed the statement and deed in his presence.

Margaret and Max instructed Westerfield to inform Frank Jr. of their actions and obtain his approval of the statement before Westerfield recorded the documents at the appropriate times. The court found that "Westerfield would not return the documents to Margaret and Max without Frank [Jr.'s] approval even if Margaret and/or Max had requested return of the documents." Frank Jr. signed the statement on November 5, 1981, thereby accepting the conveyance. Margaret told no one about executing the documents or that she had given the property to Frank Jr. She

never referred to Frank Jr. as the owner of the property or mentioned deep affection for Frank Jr. to her close friends or family members. The execution of the statement and quitclaim deed was disclosed only to Frank Jr. and his parents.

Although Frank Jr. did not personally participate in the procurement of the deed and statement, his parents and grandfather participated substantially in the events surrounding the conveyance. Max and Frank Jr.'s parents all had an opportunity to exercise undue influence on Margaret although Frank Jr. did not personally exercise undue influence over her. Margaret was eighty-three years old at the time of the conveyance and in a weakened mental condition since at least 1977. She "had progressive and advanced arteriosclerosis of the brain with an associated mental defect and displayed a wandering mind, inability to concentrate and progressive loss of memory." Her regular physician opined that she "did not have the capacity to make a valid disposition of her property" at this time, although Westerfield believed she was competent to do so.

Margaret was hospitalized in August 1982 and found by the court, in October 1982, to be without the mental capacity to manage her personal affairs, property, and finances. Her son, defendant Manuel Torres, was appointed her guardian and conservator. Not until February 1984 were Margaret's relatives made aware of the quitclaim deed and statement, when Westerfield recorded the statement. In March, Westerfield sent copies of the recorded statement and unrecorded quitclaim deed to Max in care of Frank Jr.'s mother. Copies were not sent to Margaret or her guardian and conservator. During this time, Max was terminally ill and died in April. In August, Margaret's conservator executed a revocation of the statement, although the basis was inconsistent with the reasons Westerfield had given Margaret and Max for retaining the power to dispose of the property since Margaret was not in need of funds that would require sale of the property. Margaret died intestate on May 12, 1986. Westerfield recorded the quitclaim deed four days later.

At the time Margaret executed the documents there was a confidential relationship between Frank Jr. and Margaret by reason of his grandfather's marriage to her, his parents arranging the initial appointment with Westerfield, transporting Margaret and Max to his office, and remaining in the room during their discussions with Westerfield, and Margaret never having met with Westerfield alone. The court found that the gift to Frank, Jr. was not natural, that he gave no consideration for the transfer, and that the value of the gift was greatly disproportionate to what Margaret's children and grandchildren would receive if the balance of her estate were divided evenly among them. The findings stated that a normal distribution would be to a spouse, children, or other blood heirs and that gifts with a value of the subject property to step-relatives when compared to the size of Margaret's estate were unusual especially based on the relatively short and limited relationship between Margaret and Frank Jr.

Based upon the evidence and the findings of fact, the district court concluded that, although Margaret and Max were competent and had the capacity to understand the nature and effect of the transaction when they executed the quitclaim deed and statement, the gift was invalid due to the existence of a presumption of undue influence over Margaret in the execution of the documents. The presumption was based upon the confidential relationship between Margaret and Max and Frank Jr.'s parents, their participation in the transaction, Margaret's weakened mental condition, the lack of consideration by Frank Jr., the unnatural character of the disposition, and the concealment and failure to disclose the gift to Margaret's children, other relatives or close friends. After concluding that Frank Jr. failed to overcome the presumption of undue influence, the court quieted title in defendants and permitted recovery of their costs.

On appeal, Frank Jr. raises issues concerning whether the presumption of undue influence applied to him, whether he successfully rebutted the presumption, and

whether the district court's findings of fact concerning the confidential relationship between Frank Jr. and Margaret and the unnatural character and value of the gift were supported by the evidence. Defendants filed a cross-appeal, which concerned the findings entered on Margaret's intent to convey a present interest and delivery of the deed. Due to our disposition, however, it is unnecessary to address those issues raised by the cross-appeal.

In considering the evidence, we view it in a light most favorable to the prevailing party and disregard any inferences and evidence to the contrary. *In re Will of Ferrill,* 97 N.M. 383, 387, 640 P.2d 489, 493 (Ct.App.1981), *cert. quashed,* 98 N.M. 51, 644 P.2d 1040 (1982). We are mindful that the clear and convincing standard of proof is applicable to cases concerning undue influence. *See Roybal v. Morris,* 100 N.M. 305, 310, 669 P.2d 1100, 1105 (Ct.App.1983). This standard requires the fact finder to reach an abiding conviction as to the truth of the facts found. *See Duke City Lumber Co. v. Terrel,* 88 N.M. 299, 301, 540 P.2d 229, 231 (1975); *State ex rel. Dep't of Human Servs. v. Williams,* 108 N.M. 332, 334, 772 P.2d 366, 368 (Ct. App.), *cert. denied,* 108 N.M. 273, 771 P.2d 981 (1989).

SUSCEPTIBILITY

First, Frank Jr. argues the district court's failure to make a finding of susceptibility by Margaret made it error to conclude there was undue influence, especially in light of the court's refusal of defendants' proposed finding that "she was susceptible to being influenced by others." At oral argument, however, Frank Jr. conceded that susceptibility is not required as proof of undue influence in all cases. "[A] presumption of undue influence ordinarily is based on evidence of mental weakness *or* susceptibility to influence." *In re Estate of Gonzales,* 108 N.M. 583, 586, 775 P.2d 1300, 1303 (Ct.App.1988), *cert. quashed,* 108 N.M. 197, 769 P.2d 731 (1989) (emphasis added).

The finding on Margaret's mental weakness is supported by the testimony of Margaret's physician of thirty years. He testified that, when Margaret came to him in 1977 for a premarital examination before marrying Max, "it was obvious that she had deteriorated mentally, and ... that she wasn't qualified to know exactly what she [was] getting into." The doctor believed that from 1977 to June 1981 Margaret "had significantly deteriorated mentally ... [p]articularly her poor memory and her inappropriate answers." The doctor further opined that "her disease advanced to points where I did not think she was capable of making a rational decision" and that in 1981 "she could be easily influenced by other people."

ROLE OF BENEFICIARY

Frank Jr. also asserts the district court erred in basing its conclusion of undue influence upon the actions of third-person nonbeneficiaries. Relying upon numerous New Mexico cases, Frank Jr. maintains that the beneficiary of a gift must be the one found to have exerted any undue influence. While the primary beneficiary in those cases may have been the party found to have exerted undue influence upon the donor, to accept Frank Jr.'s argument would be wholly inconsistent with the rationale behind the presumption of undue influence. "The law will not permit improper influences to control the disposition of a person's property." *In re Will of Ferrill,* 97 N.M. at 399, 640 P.2d at 505 (Sutin, J., specially concurring). Frank Jr. also relies on cases from other jurisdictions, which we do not consider determinative in light of the New Mexico case law.

It is immaterial whether undue influence is exercised directly or indirectly. *Brown v. Cobb,* 53 N.M. 169, 172, 204 P.2d 264, 266 (1949). In determining whether undue influence is present, a central focus is on the means used and the effect upon the donor. *See McElhinney v. Kelly,* 67 N.M. 399, 404, 356 P.2d 113, 116 (1960) ("It is not the nature and extent of the influence, but its effect upon the mind of the

testator which determines whether it is undue influence.") (quoting 1 William J. Bowe & Douglas H.Parker, *Page on Wills* § 15.6 at 724); *In re Estate of Gonzales,* 108 N.M. at 586, 775 P.2d at 1303 (ultimate issue is effect of influence on donor). The underlying theory of the doctrine is that the donor is induced by various means to execute an instrument that, in reality, is the will of another substituted for that of the donor. *In re Will of Ferrill,* 97 N.M. at 398, 640 P.2d at 504 (Sutin, J., specially concurring). We specifically reject the contention that a beneficiary must be the one who exerts the undue influence.

BURDENS OF PROOF AND PERSUASION

Frank Jr. asserts that the evidence presented on the issue of undue influence failed to satisfy the required quantum of proof by clear and convincing evidence. In addition, he submits that the court erred in its ruling because the evidence failed to show any unfair or improper conduct on the part of Frank Jr.'s grandfather and parents or that they personally benefitted from the gift. Frank Jr. also claims a lack of evidence on the issue of whether Margaret was dominated by Frank Jr.'s grandfather and parents, and that the findings on the confidential relationship between Margaret and Frank Jr.'s grandfather and parents, lack of consideration, unnatural disposition, participation in the transaction by Frank Jr.'s grandfather and parents, and Margaret's failure to disclose the gift are insufficient to create a presumption of undue influence.

We disagree with Frank Jr.'s assessment that he successfully presented evidence to rebut the presumption. A presumption of undue influence is a presumption of fact, not a presumption of law, *McElhinney,* 67 N.M. at 404, 356 P.2d at 116, and, as such, its existence is determined from the facts and circumstances of each particular case. *Galvan v. Miller,* 79 N.M. 540, 546, 445 P.2d 961, 967 (1968). Generally, because of the difficulty in obtaining direct proof in cases where undue influence is alleged, proof sufficient to raise the presumption is inferred from the circumstances. *See In re Will of Ferrill,* 97 N.M. at 387, 640 P.2d at 493. This concept indicates how sensitively the doctrine of undue influence operates. *Id.* at 399, 640 P.2d at 505 (Sutin, J., specially concurring).

The presumption arises if a confidential or fiduciary relation with a donor is shown together with suspicious circumstances. *In re Estate of Gonzales,* 108 N.M. at 585, 775 P.2d at 1302. A confidential or fiduciary relation exists whenever trust and confidence is reposed by one person in the integrity and fidelity of another. *In re Will of Ferrill,* 97 N.M. at 387, 640 P.2d at 493. Some circumstances found to be suspicious in undue influence cases are (1) old age and weakened physical or mental condition of testator; (2) lack of consideration for the bequest; (3) unnatural or unjust disposition of the property; (4) participation of beneficiary in procuring the gift; (5) domination or control over the donor by a beneficiary; and (6) secrecy, concealment, or failure to disclose the gift by a beneficiary. *Hummer v. Betenbough,* 75 N.M. 274, 281, 404 P.2d 110, 115–16 (1965); *Roybal v. Morris,* 100 N.M. 305, 310, 669 P.2d 1100, 1105 (Ct.App.1983); *In re Will of Ferrill,* 97 N.M. at 387–88, 640 P.2d at 493–94. In making its determination the court must answer the question of whether the donor would have made the gift but for the undue influence exerted over him or her. *Galvan v. Miller,* 79 N.M. at 544, 445 P.2d at 965.

To create a presumption the party contesting an instrument has the initial burden of establishing a prima facie case of undue influence. Once this initial burden has been met, the party against whom the presumption would operate has an opportunity to present evidence in opposition to the prima facie proof. *In re Estate of Gonzales,* 108 N.M. at 585, 775 P.2d

at 1302;[1] *see* SCRA 1986, 11-301[2] ("a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption"). This Court, in *Mortgage Investment Co. of El Paso v. Griego,* 108 N.M. 240, 243-44, 771 P.2d 173, 176-77 (1989), stated that when the burden shifts that party must only present evidence to meet or rebut the presumption, not carry the burden of persuasion on the existence of the presumed fact. *Accord In re Estate of Foster,* 102 N.M. 707, 710, 699 P.2d 638, 641 (Ct.App.), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985) (burden of persuasion does not shift but remains with party alleging undue influence).

Evidence sufficient to rebut the presumption must at least balance the prima facie showing of undue influence. *Galvan v. Miller,* 79 N.M. at 546, 445 P.2d at 967. If sufficient evidence is not presented to rebut the presumption, the fact finder may find the presumption of undue influence established. Under our rule of evidence on presumptions, SCRA 1986, 11-301, an inference may operate in an evidentiary sense after introduction of contrary evidence and may sufficiently influence the fact finder to conclude that the presumed fact exists. *In re Estate of Padilla,* 97 N.M. 508, 511, 641 P.2d 539, 542 (Ct.App. 1982).

In the present case, Margaret's children had the burdens of proof and persuasion on their allegation that Margaret was subjected to undue influence in the execution of the quitclaim deed to Frank Jr. Our review of the record shows that their burdens were satisfied, and that the court was correct in finding the presumption had been established. Frank Jr.'s attempt to rebut the presumption was unsuccessful. Frank Jr.'s argument that he rebutted the presumption as a matter of law must fail in light of substantial evidence in support of the court's abiding conviction that Margaret was subjected to undue influence.

SUBSTANTIAL EVIDENCE ISSUES

First, on the finding of a confidential relationship between Margaret and Frank Jr.'s grandfather and parents, the evidence reveals that Margaret placed trust and reliance in these persons to assist her in executing the documents to transfer the property to Frank Jr. The evidence shows Margaret entrusted Frank Jr.'s parents with her business affairs and depended upon them for assistance and advice. Second, each suspicious circumstance found by the district court was supported by the evidence in the record. Alone, the lack of consideration may not be a suspicious circumstance, but when considered together with (1) the fact that Margaret never mentioned to close friends or family any affection for Frank Jr. and her intent to give him the property, and (2) the short and limited nature of their relationship, the district court properly could characterize the lack of consideration as suspicious in this instance.

The evidence further revealed that Margaret had close and affectionate relationships with her three children and that before and during her marriage to Max she expressed an intention to leave the subject property to her son Manuel. This evidence suggests that the gift to Frank Jr. may have been inconsistent with Margaret's previously expressed intention regarding disposition of the property. The subject property adjoined other tracts of property

1. *Gonzales* dealt with the presumption of undue influence in a will contest and involved an interpretation of NMSA 1978, Section 45-3-407 (Repl.Pamp.1989), which is a part of our probate code relating to formal testacy proceedings. The principles involved in the application of the presumption of undue influence are identical with regard to both wills and deeds.

2. The disappearance of a presumption upon the presentation of contrary evidence was eliminated in 1973 when the rules of evidence were adopted. *Trujillo v. Chavez,* 93 N.M. 626, 629, 603 P.2d 736, 739 (Ct.App.1979). In 1980, the rule was amended to eliminate the shift in the burden of persuasion. *Benham v. All Seasons Child Care, Inc.,* 101 N.M. 636, 639, 686 P.2d 978, 981 (Ct.App.), *cert. denied,* 101 N.M. 686, 687 P.2d 743 (1984). The "bursting bubble" theory, under which a presumption vanished upon the introduction of evidence supporting a finding of the nonexistence of the presumed fact, even though not believed, was rejected. *Id.* at 638-39, 686 P.2d at 980-81.

that Margaret co-owned with her children and that had been in the family for forty years. Moreover, Frank Jr. testified that he never visited Margaret during the two years she lived beyond Max's death in 1984. The record contains sufficient support for the finding on the unnatural character of the conveyance to Frank Jr. and warrants the conclusion that the gift was unusual in light of the circumstances. Finally, the evidence on concealment of the transaction and the participation by Frank Jr.'s grandfather and parents overwhelmingly supports the suspicious nature of the transaction. The proximity of the subject property to adjoining parcels co-owned by family members and the length of time of family ownership reasonably suggests it is likely that a conveyance to a nonfamily member would have been discovered.

Frank Jr.'s specific challenges to findings of fact numbers 20 and 22 concerning the confidential relationship between Margaret and Frank Jr.'s grandfather and parents and the unnatural character of the gift have been considered above. Although the evidence may not have been substantial to support finding number 27 concerning a value attached to the subject property, we deem any error in this regard to be harmless. *See Jewell v. Seidenberg,* 82 N.M. 120, 124, 477 P.2d 296, 300 (1970) (supreme court does not correct harmless error). The refusal by the court to accept any of Frank Jr.'s requested findings of fact is regarded on appeal as a finding against the party. *See Pucci Distrib. Co. v. Nellos,* 110 N.M. 374, 376, 796 P.2d 595, 597 (1990).

Based upon the above, the district court properly could have reached an abiding conviction as to the truth of the facts found. Accordingly, the judgment of the district court is affirmed in its entirety.

IT IS SO ORDERED.

RANSOM, C.J., and MONTGOMERY, J., concur.

823 P.2d 912

SUNWEST BANK OF CLOVIS, N.A., Plaintiff–Appellee,

v.

Michael T. GARRETT, Clare Anne Garrett, Malcolm G. Garrett, Donna Jean Garrett, Curry County Grain & Elevator Company, Inc., Citizens Bank of Clovis, and CBC, Inc., Defendants–Appellants.

No. 19530.

Supreme Court of New Mexico.

Jan. 6, 1992.

Rehearing Denied Feb. 7, 1992.

Templeman & Crutchfield, C. Barry Crutchfield, Lovington, for defendants-appellants.

Modrall, Sperling, Roehl, Harris & Sisk, J. Douglas Foster, Diane Mazur, Albuquerque, for plaintiff-appellee.

OPINION

BACA, Justice.

Defendants-appellants Malcolm and Donna Garrett appeal the trial court's order granting a directed verdict in favor of plaintiff-appellee Sunwest Bank of Clovis (Sunwest). We affirm.

I. FACTS

Curry County Grain & Elevator Co. (Curry County Grain) is a family owned and managed corporation. In 1985, Michael Garrett and his brother Malcolm Garrett were officers of Curry County Grain. Michael and his wife Clare Garrett and Mal-

colm and his wife Donna Garrett signed an unconditional and continuing guaranty (the "Guaranty") that guaranteed payment of Curry County Grain's corporate debt to Sunwest. Curry County Grain borrowed money from Sunwest as evidenced by a note signed by Malcolm and Michael on behalf of the corporation on August 12, 1986. The note was secured by mortgages on two properties owned by Curry County Grain. Citizens Bank of Clovis (Citizens Bank) was a junior lien holder on the Curry County Grain properties. The 1986 note was renewed in 1987 in the same principal amount. In addition, Michael and Clare and appellants had received separate personal loans from Sunwest as evidenced by personal notes.

In 1988, Sunwest, Citizens Bank, and Curry County Grain devised a plan to reduce the Curry County Grain debt whereby Sunwest would release the mortgages on the Curry County Grain properties in exchange for two payments from Citizens Bank. The unpaid portion of the Curry County Grain debt to Sunwest would be secured by other property owned by Curry County Grain. After it received the payments from Citizens Bank, Sunwest issued documents that purportedly released the mortgage and the remaining Curry County Grain debt. Even after the purported release of the underlying debt, Michael Garrett, as president of Curry County Grain, acknowledged and continued to negotiate for settlement of the remaining Curry County Grain debt.

In 1989, the personal note of appellants came due. Appellants attempted to refinance this debt but Sunwest refused unless appellants would satisfy the remaining balance due on the Curry County grain debt. Sunwest then instituted this foreclosure action against Curry County Grain, Michael and Clare, Citizens Bank, and appellants. Sunwest sought a money judgment on the corporate debt of Curry County Grain, the personal debts and guarantees of Michael and Clare, the personal debts and guarantees of appellants, and a decree of foreclosure on the properties held as security. Appellants' answer raised the defense of release and accord and satisfaction of the corporate debt along with a counterclaim asserting economic coercion. Appellants made a timely request for a jury trial on their defenses and counterclaim and Sunwest moved for summary judgment on its complaint and on appellants' counterclaim.

The trial court ordered a trial on the merits and allowed appellants to present evidence to demonstrate that they could present issues of fact that were appropriate for a jury determination. On the day of trial, Sunwest reached a settlement with Michael and Clare and released them from the Guaranty. At the close of the hearing, the trial court ruled that appellants had not presented evidence to create questions of fact sufficient to withstand a motion for a directed verdict. The trial court also ruled that, by virtue of their personal guarantees, appellants were liable for the entire amount of Curry County Grain's secured debt. This appeal followed.

II. DISCUSSION

Appellants raise two issues that we address on appeal. First, whether the trial court erred in directing a verdict in favor of Sunwest. Second, whether the trial court erred in awarding Sunwest a judgment for the entire claim in view of Sunwest's release of the co-guarantors. For the following reasons, we affirm the trial court on both issues.

A. Did the trial court err in directing a verdict for Sunwest?

Appellants offer three arguments that we consider in determining if the trial court erred when it directed a verdict in favor of Sunwest. First, whether appellants' defense of payment of the corporate debt raised an issue of fact that entitled them to a jury trial. Second, whether appellants were entitled to a jury determination of their liability on their personal guarantees. Third, whether appellants were entitled to a jury on their counterclaim of economic coercion. Appellants argue that by granting a directed verdict on these issues, the trial court took upon itself the task of the fact finder and eliminated the jury's func-

tion. Appellants conclude that the trial court erred in awarding judgment to Sunwest.

Appellants first contend that whether the corporate debt had been completely satisfied raises a question of fact that must be determined by a jury. Sunwest contends that the corporate debt was not fully paid and the release of total corporate indebtedness was inadvertent. Sunwest argues that appellants failed to present sufficient evidence to create an issue of fact and that appellants were not entitled to a jury determination on this issue. We agree with Sunwest.

A directed verdict is appropriate only when there are no true issues of fact to be presented to a jury. *Melnick v. State Farm Mut. Auto. Ins. Co.,* 106 N.M. 726, 729, 749 P.2d 1105, 1108, *cert. denied,* 488 U.S. 822, 109 S.Ct. 67, 102 L.Ed.2d 44 (1988). All evidence, including the evidence presented by the party moving for the directed verdict, must be considered. *Id.* at 728–29, 749 P.2d at 1107–08. Any conflicts in the evidence or reasonable interpretations of the evidence are viewed in favor of the party resisting the directed verdict. *Id.* The sufficiency of evidence presented to support a legal claim or defense is a question of law for the trial court to decide. *American Employers' Ins. Co. v. Crawford,* 87 N.M. 375, 376, 533 P.2d 1203, 1204 (1975); *Loucks v. Albuquerque Nat'l Bank,* 76 N.M. 735, 740, 418 P.2d 191, 195 (1966).

A release of an instrument is ineffective if it is done unintentionally or by mistake. *Los Alamos Credit Union v. Bowling,* 108 N.M. 113, 114, 767 P.2d 352, 353 (1989). In *Los Alamos Credit Union,* the lender inadvertently marked a note as paid and released the accompanying mortgage even though the note was not paid. The borrowers refused the lender's request to reaffirm the note and to have the mortgage reinstated. After the borrowers failed to make a payment due under the original note, the lender brought a foreclosure suit, alleging that the release was a clerical error. The borrowers asserted that the lender could not avoid a properly executed, unambiguous release of the mortgage. In upholding the trial court's grant of summary judgment in favor of the lender, we held that the borrowers failed to present evidence sufficient to create a genuine issue of fact denying the existence of the obligation and that therefore, summary judgment was appropriate. *Id.*

As in *Los Alamos Credit Union,* appellants in the instant case have failed to present a genuine issue of fact concerning the existence of the obligation. Three letters exchanged among Curry County Grain, Sunwest, and Citizens Bank were introduced into evidence regarding satisfaction of the Curry County Grain debt and release of the debt and mortgages. These letters indicated that the corporate debt was only partially satisfied. Randy Harris, President of Sunwest, testified that the form that purportedly released the debt was used by mistake and that the intent in using the form was to release the mortgages and not the debt. Testimony established that Michael Garrett continued to negotiate on behalf of Curry County Grain after the purported release was issued. This evidence establishes that the Curry County Grain debt was only partially satisfied and that the mortgages, and not the underlying debt, were released. Like the borrowers in *Los Alamos Credit Union,* appellants here have in effect asserted that an unambiguous release cannot be avoided. Appellants have presented no evidence refuting the existence of the underlying corporate debt and thus, have not created an issue of fact. The trial court did not err in granting a directed verdict on this issue.

Appellants next contend that they are entitled to a jury to determine whether they are liable on their personal guarantees of the Curry County Grain debt. A party in a foreclosure action is entitled to a jury trial on legal issues that are independent of the foreclosure suit. *State ex rel. McAdams v. District Court,* 105 N.M. 95, 96, 728 P.2d 1364, 1365 (1986). Whether a party is liable as a guarantor is a legal issue independent of the foreclosure action that entitles the party to a jury trial. *Id.* at 97, 728 P.2d at 1366. However, the party

is not entitled to a jury trial on issues that are incidental to the foreclosure suit such as the existence or amount of the underlying debt. *Id.*

In the instant case, appellants do not contest their liability as guarantors; rather, they contest the existence of the corporate debt. Under *McAdams,* the existence of the debt is an issue incidental to the foreclosure suit that does not entitle appellants to a jury trial. Therefore, the trial court did not err in granting a directed verdict on this issue.

Appellants' final argument regarding their entitlement to a jury trial is that their counterclaim of economic coercion presented an issue of fact. Appellants contend that Sunwest refused to refinance their personal debt unless the Curry County Grain debt was satisfied. Appellants argue that if the Curry County Grain debt had previously been satisfied, Sunwest's actions constitute economic coercion because appellants would be forced to satisfy a debt for which they previously had not been liable. *See B & W Constr. Co. v. N.C. Ribble Co.,* 105 N.M. 448, 734 P.2d 226 (1987); *First Nat'l Bank v. Wood,* 93 N.M. 467, 469, 601 P.2d 437, 439 (Ct.App. 1979).

As appellants recognize, however, their claim of economic coercion is contingent on a finding that the corporate indebtedness had been fully satisfied. As discussed above, the corporate indebtedness was not completely satisfied. Thus, the cases cited by appellant are distinguishable from the instant case. For instance, in *Wood,* the bank forced the borrower to guarantee a loan on which he was not previously liable and thus, he could assert a claim of economic coercion. 93 N.M. at 469, 601 P.2d at 439. Similarly in *B & W Construction,* shareholders were forced to sign individual guarantees of corporate indebtedness to avoid repossession of their equipment. This constituted economic coercion because the shareholders had no individual liability prior to the threats of repossession. 105 N.M. at 449–50, 734 P.2d at 227–28. In contrast, appellants in the instant case were already liable on the Curry County Grain debt when they attempted to renegotiate their personal debt. Sunwest had an existing right to require appellants to satisfy the corporate debt. Thus, appellants' counterclaim fails to present an issue of fact sufficient to avoid a directed verdict.

B. Did the trial court err in granting judgment for the full debt in light of Sunwest's release of the co-guarantors?

Appellants next argue that the trial court erred when it awarded Sunwest a judgment for the full amount of the underlying Curry County Grain debt in light of Sunwest's release of the co-guarantors. The release of the co-guarantors, appellants contend, precludes them from seeking contribution from the released guarantors. Thus, appellants argue that their liability should be proportionately reduced.

At common law, the discharge of one surety without the consent of the co-sureties completely discharged the remaining sureties. *Western Bank v. Aqua Leisure, Ltd.,* 105 N.M. 756, 758, 737 P.2d 537, 539 (1987). However, in a majority of jurisdictions including New Mexico, this rule has been modified to release the co-surety only to the extent that the co-surety was prejudiced by the release. *Id.;* 74 Am.Jur.2d *Suretyship* §§ 82–83 (1974); 72 C.J.S. *Principal & Surety* §§ 173–74 (1987).

In the instant case, appellants argue that the release of Michael and Clare by Sunwest was without appellants' knowledge or consent and that therefore, they are entitled to a pro rata reduction in their obligation under the Guaranty. Sunwest argues that under the terms of the Guaranty, appellants consented in advance to allow Sunwest to release the co-guarantors without affecting or impairing Sunwest's ability to collect from appellants. We agree with Sunwest.

The respective rights of the guarantor and the creditor are determined by reference to the terms of the contract between them. *Aqua Leisure,* 105 N.M. at 759, 737 P.2d at 540; *First State Bank v. Muzio,* 100 N.M. 98, 100, 666 P.2d 777, 779

(1983); *American Bank of Commerce v. Covolo,* 88 N.M. 405, 408, 540 P.2d 1294, 1297 (1975). The guarantor may waive legal defenses to his or her liability in advance under the terms of the guaranty. *Aqua Leisure,* 105 N.M. at 759, 737 P.2d at 540 (waiver of commercially reasonable sale of collateral); *Muzio,* 100 N.M. at 100, 666 P.2d at 779 (waiver of homestead exemption and collection priorities); *Covolo,* 88 N.M. at 409, 540 P.2d at 1298 (waiver of commercially reasonable sale of collateral). The guarantor is a favorite of the law and is entitled to have the guaranty strictly construed in his or her favor. *Shirley v. Venaglia,* 86 N.M. 721, 724, 527 P.2d 316, 319 (1974); *Bank of New Mexico v. Northwest Power Prod., Inc.,* 95 N.M. 743, 747, 626 P.2d 280, 284 (Ct.App.1980).

In the instant case, appellants signed the Guaranty, which contained the following clause:

> SUNWEST may from time to time and without affecting or impairing Guarantors' liability hereunder sell, release, surrender, exchange, settle, compromise, waive, subordinate, modify or amend, with or without consideration and on such terms and conditions as may be acceptable to SUNWEST, any and all of the collateral, security guarantees, documents and instruments evidencing the Guaranteed Obligations or the security for the payment thereof, or other obligors thereunder. All settlements, compromises, compositions, accounts stated and agreed balances entered into between SUNWEST and Borrower shall be binding upon Guarantors.

Appellants contend that, notwithstanding this clause, Sunwest could not release the co-guarantors without reducing the appellants' liability under the Guaranty. We disagree.

In *Muzio,* we upheld the validity of a clause in a guaranty contract that waived the benefit of a homestead exemption. 100 N.M. at 100, 666 P.2d at 779. In that case, we held "that the specific terms of the guaranty contract control the rights of the parties ...." *Id.* We reasoned that "this waiver was an integral part of the credit which was extended, and we are reluctant to impair arms-length contractual obligations and allow [appellant Muzio] to violate his guaranty contract." *Id.*

The reasoning from *Muzio* is applicable to the instant case. The clause quoted from the Guaranty was an integral part of the credit extended by Sunwest to Curry County Grain. Appellants have not asserted that the transaction between Sunwest and Curry County Grain was anything other than an arms-length transaction. Thus, we now hold, as we held in *Muzio,* that the specific terms of the Guaranty control the rights of appellants and Sunwest. The language of the Guaranty establishes joint and several liability among the guarantors of the Curry County Grain debt. To agree with appellants' contention and allow them to avoid the effects of the Guaranty "would require this Court to ignore the plain and express language of the guaranty contract." *Muzio,* 100 N.M. at 102, 666 P.2d at 781. Therefore, we affirm the trial court's ruling that under the Guaranty, appellants are liable for the entire amount of the Curry County Grain debt.

The judgment is AFFIRMED.

IT IS SO ORDERED.

MONTGOMERY and FRANCHINI, JJ., concur.

823 P.2d 917

Pat JOHNSON, as next friend and parent of Dawn Johnson, Plaintiff–Appellant,

v.

SCHOOL BOARD OF ALBUQUERQUE PUBLIC SCHOOL SYSTEM, Defendant–Appellee.

No. 13036.

Court of Appeals of New Mexico.

May 21, 1991.

William S. Ferguson, Ferguson & Lind, P.C., Albuquerque, for plaintiff-appellant.

Eleanor K. Bratton, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, for defendant-appellee.

OPINION

APODACA, Judge.

Does the failure of an appellant to file a docketing statement timely deprive this court of jurisdiction over the appeal? We hold that it does not. Plaintiff has filed a motion for an extension of time in which to file her docketing statement. Defendant opposes the motion on several bases. Having considered the parties' arguments, we grant the motion.

Defendant's principal basis for opposing the motion is that the filing of a docketing statement is jurisdictional in this court. In making this argument, defendant relies on *Schmitz v. Smentowski,* 109 N.M. 386, 785 P.2d 726 (1990), in which our supreme court concluded that this court requires a docketing statement as a jurisdictional matter for perfecting appeals. We do not interpret the *Schmitz* holding, however, to mean that, unless the docketing statement is timely filed, this court does not have jurisdiction to consider the appeal or grant an extension of time within which to file such statement upon a showing of good cause.

Rather, until a docketing statement has been filed in this court, we cannot consider the merits of the appeal because we rely on the docketing statement under our calendaring system to provide us with the facts and issues sought to be raised. Both *Schmitz* and *Gallegos v. Citizens Insurance Agency,* 108 N.M. 722, 779 P.2d 99 (1989), on which *Schmitz* relied, were concerned with issues that were briefed, but not raised in the docketing statement. Here, we are concerned with the filing of the docketing statement, not with its contents.

Defendant also argues a collateral issue that the absence of language authorizing extensions under SCRA 1986, 12–208, as compared to SCRA 1986, 12–201 (Cum.Supp.1990), demonstrates our supreme court's intent not to permit this court to grant extension requests to file docketing statements. We disagree. In *State v. Brionez,* 90 N.M. 566, 566 P.2d 115 (Ct.App.1977), however, we held that this court, not the district court, had authority to grant extensions of time to file docketing statements.

Additionally, cases relied on by defendant to support a requirement that plaintiff show good cause why the extension should be granted are inapposite. Those cases concern amendments to docketing statements already filed. *See State v. Gallegos,* 109 N.M. 55, 781 P.2d 783 (Ct.App.1989). Besides, we determine there was sufficient cause in this case for requesting the extension, since plaintiff maintained that a mistake in calendaring made the extension necessary.

Defendant also urges us to deny the extension request and dismiss the appeal for failure to file a docketing statement within the time required on the basis that strict adherence to our rules is a means of controlling this court's increasing backlog. Because the filing here was only a few days late, we are unpersuaded by defendant's argument. It has often been said

that appellate courts liberally construe their rules to reach the merits of the appeals, rather than dismissing appeals on technicalities. *See Lowe v. Bloom,* 110 N.M. 555, 798 P.2d 156 (1990); *see also Marquez v. Gomez,* 111 N.M. 14, 801 P.2d 84 (1990). We decline to hold that an effective means of controlling our backlog is by dismissing appeals because a document was filed in this court a few days late. *Cf. State v. Baca,* 92 N.M. 743, 594 P.2d 1199 (Ct.App.1979) (state's appeal in criminal case dismissed where unexcused delay of ninety days was considered extreme). We believe the holding urged by defendant would be inconsistent with recent supreme court precedent.

The motion for extension of time in which to file the docketing statement is granted.

IT IS SO ORDERED.

DONNELLY and MINZNER, JJ., concur.

823 P.2d 919

Rudy CASTILLO, Claimant–Appellant,

v.

NORTHWEST TRANSPORT SERVICE and Liberty Mutual Insurance Company, Respondents–Appellees.

No. 12911.

Court of Appeals of New Mexico.

June 20, 1991.

George W. Weeth, Albuquerque, for claimant-appellant.

Paul R. Koller, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for respondents-appellees.

OPINION

APODACA, Judge.

Claimant appeals from the Workers' Compensation Judge's (judge) order determining that his workers' compensation claim for disability benefits was barred by the statute of limitations. Our second calendar notice proposed summary reversal and remand for further findings. Respondents have not filed a memorandum in opposition to our proposed reversal on the issue of the date the claim was filed. We reverse on that issue. Claimant filed a memorandum in opposition to our proposed remand. Not being persuaded by claimant's arguments, we remand for further findings on the question of the timeliness of the claim. Claimant previously filed a motion to strike respondent's response to claimant's docketing statement. We decline to rule on claimant's motion because our decision has rendered the motion moot.

Facts

Claimant filed a pro se claim on April 13, 1990 with the clerk's office of the Workers' Compensation Division. He was later informed, however, that the filing was being voided because he already had an attorney representing him in another pending action

before the Workers' Compensation Division. The filing stamp was obliterated and the claim was returned to claimant, after which a claim was filed by claimant's current counsel on April 19, 1990. Claimant's claim filed on April 13 was within two years and thirty-one days of March 16, 1988, the last date claimant should have known that he had a compensable injury. *See* NMSA 1978, § 52-1-31(A) (Repl.Pamp. 1987); *Cole v. J.A. Drake Well Serv.,* 106 N.M. 484, 745 P.2d 392 (Ct.App.1987). The second filing, however, was not within the required time period. *See id.*

Discussion

Our calendar notice relied on *State v. Aaron,* 103 N.M. 138, 703 P.2d 915 (Ct.App. 1985), for the proposition that claimant's initial filing should have been considered timely because a basis exists for avoiding the effect of the statute of limitations. In *Aaron,* a criminal defendant's notice of appeal was apparently mailed three days after the filing of the order appealed from, but was not timely filed by the district court clerk. Respondents attempt to distinguish *Aaron,* arguing that the authorities on which that case relied were criminal cases. Additionally, respondents contend that the only basis for tolling the workers' compensation statute of limitations is misrepresentation that an employee will receive benefits. *See Howie v. Stevens,* 102 N.M. 300, 694 P.2d 1365 (Ct.App.1984).

We are unpersuaded by respondents' attempt to distinguish *Aaron,* because we believe that the principles upon which that case was decided equally apply to the case of a civil litigant who has done everything necessary to file a pleading within the allotted time period. Respondents do not contest claimant's assertion that he presented his pro se claim to the clerk's office in the manner and form prescribed by law. *See State v. Sisneros,* 98 N.M. 201, 647 P.2d 403 (1982) (facts in docketing statement are accepted as true unless contested). Nothing more was required to set in motion the authority of the Workers' Compensation Division to resolve his claim. *See Zarges v. Zarges,* 79 N.M. 494, 445 P.2d 97 (1968); *In re Lewisohn,* 9 N.M. 101, 49 P. 909 (1897) (party delivering to the clerk a document that should be filed has filed the document).

We should note that, in applying the principles enunciated in *Aaron* to the facts of this appeal, we are not holding that the statute of limitations period is necessarily tolled by the failure of the clerk to perform the ministerial act of accepting claimant's documents and noting the date on which they were received. *Compare Elsea v. Broome Furniture Co.,* 47 N.M. 356, 143 P.2d 572 (1943) (failure to file within time prescribed by the act was excused). Instead, we determine that the claim was effectively filed on April 13, 1990, the date the document was taken to the clerk's office, as opposed to April 19, 1990, when the claim was accepted by the clerk. We conclude that, since the first filing was timely, the claim was not barred by the statute of limitations. *See State v. Aaron; In re Lewisohn.*

Claimant argues that the facts and law demonstrate he was not disabled nor suffering from an impairment before March 13, 1988. The question of whether claimant knew or should have known of an injury entitling him to workers' compensation benefits prior to this date is for the judge to decide based upon his view of the evidence. *See ABF Freight System v. Montano,* 99 N.M. 259, 657 P.2d 115 (1982). This ultimate finding has not yet been made; the findings and conclusions include only evidentiary findings bearing on this question. We will not make the ultimate determination, as the responsibility for weighing evidence and finding facts lies entirely within the province of the judge. *See Hort v. General Electric Co.,* 92 N.M. 359, 588 P.2d 560 (Ct.App.1978).

The judge concluded that the issue of claimant's entitlement to vocational rehabilitation benefits was barred by the statute of limitations. These services are available only for disabled workers. *See* NMSA 1978, § 52-1-50 (Cum.Supp.1990); *Jaramillo v. Consolidated Freightways,* 109 N.M. 712, 790 P.2d 509 (Ct.App.1990). In contrast, an award of medical benefits may properly be made despite the absence of a

finding of disability. *Dimatteo v. County of Dona Ana,* 104 N.M. 599, 725 P.2d 575 (Ct.App.1986). Since a determination of claimant's legal disability will have to await a finding on whether his claim is barred by the statute of limitations, claimant's entitlement to vocational rehabilitation cannot be resolved at this juncture.

Conclusion

In summary, we hold that the claim was effectively filed on April 13, 1990. We remand for findings on the earliest date that claimant knew or should have known that he had a compensable injury. The parties may be permitted to brief this issue for the judge. The judge can then decide the question of timeliness of the filing of the claim as well as claimant's entitlement to compensation benefits.

IT IS SO ORDERED.

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

823 P.2d 921

STATE of New Mexico, Plaintiff–Appellee,

v.

Taylor RUSSELL, Defendant–Appellant.

No. 12715.

Court of Appeals of New Mexico.

Oct. 31, 1991.

Tom Udall, Atty. Gen., Margaret B. Alcock, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Robert H. Graham, Farmington, for defendant-appellant.

OPINION

MINZNER, Judge.

Defendant appeals his sentence for driving while under the influence of intoxicating liquor (DWI) as a fourth conviction under NMSA 1978, Section 66–8–102(E) (Cum.Supp.1990). A district court jury convicted defendant under Section 66–8–102 for an incident that occurred on March 25, 1990. At the sentencing hearing, defendant conceded that on three separate occasions in 1983 he pled guilty and was convicted of driving while intoxicated, contrary to a Farmington municipal ordinance. However, defendant argued that the municipal court convictions could not be used to enhance his sentence under the state statute. The district court considered the conviction a fourth conviction under the statute and sentenced defendant to the mandatory six month jail term followed by six months of probation provided for a "fourth and subsequent conviction." *See* § 66–8–102(E)(2).

While this case was pending on appeal, defendant twice moved for release from incarceration pending disposition of his appeal. The motion was denied while the case remained assigned to the summary calendar. After the case was assigned to the general calendar, defendant renewed his motion, and following a telephonic oral argument before a panel of this court, the case was remanded for an evidentiary hearing on the question of whether defendant was entitled to release pursuant to NMSA 1978, Section 31–11–1(C) (Cum.Supp.1990). After the evidentiary hearing, defendant was released subject to conditions imposed by the district court. At that time, defendant had served six months in the San Juan County Detention Center.

Although defendant has raised five points on appeal, in effect he makes two claims of reversible error: (1) the prior convictions on which the district court relied were uncounseled convictions in which defendant had not voluntarily, knowingly, and intelligently waived his right to counsel, and (2) Section 66–8–102 does not provide for the use of prior convictions under a municipal ordinance to enhance a later conviction under the statute. We conclude the prior convictions were valid. Further, after examining the history of Section 66–8–102 and its apparent purpose, we believe there is sufficient textual support within Section 66–8–102 and in the definitions provided under the Motor Vehicle Code, *see* NMSA 1978, §§ 66–1–1 and –4 (Repl.Pamp. 1989), to permit us to conclude that the legislature intended both district and magistrate courts to recognize a conviction under a prior municipal court ordinance in distinguishing a first offender from a subsequent offender. We are not persuaded, however, that the legislature's purpose in providing a mandatory jail sentence for a fourth or subsequent offense requires that Subsection E(2) be construed to require a mandatory six-month term of imprisonment on these facts, and we think there is insufficient support in the text of Section 66–8–102 or elsewhere to justify such a construction.

Therefore, we reverse and remand for resentencing. On remand, the district court may take into account the existence of the three prior convictions under municipal court ordinance in deciding what sentence would be appropriate.

I.

As defendant correctly points out, prior uncounseled convictions cannot be used to enhance a sentence unless the de-

fendant voluntarily, knowingly, and intelligently waived the right to counsel in the prior case. *See State v. Watchman,* 111 N.M. 727, 809 P.2d 641 (Ct.App.1991). Defendant concedes that he has three prior convictions in municipal court for DWI, and the state concedes that he did not have counsel when he pled guilty in each of those proceedings. Defendant further concedes that he signed waivers of counsel in those instances. However, defendant argues that, because of his fourth grade reading level, he could not read the waiver forms that were written at a twelfth grade level, and thus he could not voluntarily, knowingly, and intelligently waive his right to counsel.

A knowing and intelligent waiver depends on the facts and circumstances of each case. *Smith v. Maldonado,* 103 N.M. 570, 711 P.2d 15 (1985). The judge is required to thoroughly question the defendant to determine if the waiver is valid. *Id.* The inquiry is necessarily focused on the defendant's understanding. *Id.* Based on the testimony in this case, the district court could properly conclude that defendant's waivers of counsel were valid.

Defendant appeared before the same municipal court judge in each of defendant's prior DWI cases. At trial, that judge detailed his procedure for reviewing the waiver of counsel form with defendants who pled guilty and his method of determining whether an individual defendant is making a voluntary, knowing, and intelligent waiver of counsel.

Defendant's expert witness indicated that she believed the procedure used was adequate to ensure defendant's understanding of the waiver form. Indeed, she testified it is the same procedure she uses to ensure her clients understand the documents she gives them to read during her testing procedures.

Defendant emphasizes that the municipal court judge never specifically stated that he followed his procedure with defendant. In fact, the judge acknowledged that he did not remember defendant ever appearing before him. Nevertheless, the judge testified that he followed the same procedure in every case.

This testimony supports a determination that defendant had in fact been questioned prior to waiving counsel and pleading guilty in each of the prior convictions. *See* SCRA 1986, 11–406 (evidence of habit or routine practice admissible to provide conduct on a particular occasion was in conformity with the habit or practice). Moreover, based on the expert witness's testimony that the questioning was sufficient to ensure that defendant understood what he was doing, the district court could properly conclude there were valid waivers of counsel in the past proceedings.

Accordingly, assuming that Section 66–8–102 permits consideration of municipal ordinance convictions for enhancement purposes, the district court could consider each of these convictions. *See State v. Watchman.* We next address whether Section 66–8–102 permitted the court to consider municipal court convictions and, if so, whether defendant's sentence was proper.

II.

Section 66–8–102(E) provides in relevant part that "[a] second or subsequent conviction *under this section* shall be punished ... by imprisonment for not less than ninety days or more than one year[.]" *Id.* (emphasis added). Section 66–8–102(D) provides in relevant part that "[e]very person under first conviction *under this section* shall be punished ... by imprisonment for not less than thirty days or more than ninety days or by a fine of not less than three hundred dollars ... or more than five hundred dollars ... or both[.]" *Id.* (emphasis added). Section 66–8–102(E)(1) provides a mandatory two-day jail term for a second or third conviction occurring within five years of a prior conviction. Subsection E(2) provides a mandatory six-month jail term for a fourth or subsequent conviction.[1]

1. Section 66–8–102 as it read prior to its most recent amendment only distinguished first offenses from second and subsequent offenses. *See* NMSA 1978, § 66–8–102(D), (E), (F) (Repl.

Defendant points out that all of his prior DWI convictions were under a Farmington municipal ordinance. Since he has never been convicted of DWI under Section 66–8–102, he argues that his present conviction cannot be considered a subsequent conviction under it. His argument is premised on the view that the statute is clear and under its terms, strictly construed, he should have been sentenced for a first conviction under Subsection D. "Statutes authorizing a more severe punishment as conviction for a second offense are deemed highly penal and therefore must be strictly construed." *State v. Keith,* 102 N.M. 462, 465, 697 P.2d 145, 148 (Ct.App.1985). Alternatively, defendant contends that if the statute is not clear and therefore not to be strictly construed, the legislature's intent is unclear, and we should resolve the issue on appeal in favor of the rule of lenity. "Doubts about the construction of criminal statutes are resolved in favor of the rule of lenity." *Id.; see also State v. Bybee,* 109 N.M. 44, 46, 781 P.2d 316, 318 (Ct.App.1989); *cf. State v. Edmondson,* 112 N.M. 654, 818 P.2d 855 (Ct.App.1991) (discussing rule of lenity in connection with sentencing as a habitual offender).

Defendant's primary argument is based on reading Section 66–8–102(D) in isolation. This we decline to do.

The usual rules of statutory construction would require us to read the words in context and to include in the relevant context as much of the statute as is necessary to understand the legislature's purpose. *See State v. Sinyard,* 100 N.M. 694, 675 P.2d 426 (Ct.App.1983). In construing a statute, it must be read as a whole; "[e]ach section or part should be construed in connection with every other part or section so as to produce harmonious whole, ... and the court is to give effect to all provisions of a statute and to reconcile different provisions so as to make them consistent." *Id.* at 697, 675 P.2d at 429 (citations omitted).

The term "under this section" appears within Section 66–8–102, which now has ten subsections, twelve times.[2] One of the subsections within Section 66–8–102 specifically attempts to define the phrase "conviction under this section," *see* § 66–8–102(F), and the district court relied on that subsection. We therefore consider that subsection in addressing the question of what the legislature intended.

Section 66–8–102(F) provides as follows:

> In the case of a first offense under this section, the magistrate court has concurrent jurisdiction with district courts to try the offender. This section does not affect the authority of a municipality under a proper ordinance to prescribe penalties for driving while under the influence of intoxicating liquor or drugs. A conviction under a municipal ordinance prescribing penalties for driving while under the influence of intoxicating liquor or drugs shall be deemed to be a conviction under this section for purposes of determining whether a conviction in *magistrate court* is a *second conviction.* [Emphasis added.]

It is not entirely clear from the words used in Subsection F what the legislature intended the third sentence to accomplish.[3] The magistrate court now has jurisdiction in all cases of misdemeanors and petty misdemeanors. *See* NMSA 1978, § 35–3–4(A) (Repl.Supp.1988). There does not seem to be any jurisdictional barrier to a magistrate court sentencing under either

Pamp.1987). Until the 1988 amendment, the mandatory two-day jail term now available for either certain second or a third conviction was required for certain second or subsequent convictions.

2. *See* § 66–8–102(D) (twice); § 66–8–102(E) (once); § 66–8–102(F) (twice); § 66–8–102(G) (twice); § 66–8–102(H) (once); § 66–8–102(I) (three times); § 66–8–102(J) (once).

3. Perhaps the legislature meant to refer to convictions under a municipal court ordinance tried in magistrate court pursuant to NMSA 1978, Section 35–3–4(B) (Repl.Supp.1988), but the language of the third sentence of Subsection F is not so limited. Further, we cannot think of a reason why the legislature would have distinguished municipal court ordinance violations tried in magistrate court from those tried in municipal court.

Subsection D or E.[4]

Thus, the first sentence of Subsection F should not be understood as limiting magistrate court jurisdiction. *Cf. State v. Rue,* 72 N.M. 212, 382 P.2d 697 (1963) (general statute authorizing justice of the peace to exercise jurisdiction over certain misdemeanors did not repeal justice of the peace jurisdiction over first offenses in cases of driving vehicle while intoxicated); *see generally* AG Op. No. 75–45 (1975) (surveying history of first sentence of Subsection F; sentence preceded enlargement of magistrate court jurisdiction under general jurisdictional statute). Rather, it appears that Section 35–3–4(A) is a general jurisdictional statute in which the legislature gradually expanded the jurisdiction of the magistrate courts, and eventually the changes in the general jurisdictional statute made the first sentence of Subsection F surplusage. *Compare* 1973 N.M.Laws, ch. 206, § 2 (expanding magistrate court jurisdiction to all misdemeanors) *with* 1968 N.M.Laws, ch. 62, § 49 (expanding magistrate court jurisdiction in all cases of misdemeanors where punishment is fine of $100 or less or imprisonment for six months or less or both).

When the legislature expanded the magistrate courts' jurisdiction by amending Section 35–3–4(A) to include all misdemeanors, it must have envisioned that the magistrate courts and district courts would be called upon to exercise the new, concurrent jurisdiction in a manner that promoted judicial economy and served the ends of justice. We cannot imagine any legislative purpose that would be served by giving one set of courts different sentencing authority over the same offense than has been given to another set of courts with concurrent jurisdiction. Under these circumstances, we think we must take into account the legislative expansion of magistrate court jurisdiction in Section 35–3–4(A) in trying to understand the legislature's purpose in enacting the third sentence of Subsection F.

Surely the third sentence of Subsection F can be read to provide that when a person has a prior conviction under either Section 66–8–102 or a municipal ordinance prohibiting driving while under the influence, the magistrate court judge should sentence that person for a later offense under Subsection E. We note that the third sentence of Subsection F was added in 1979, after the expansion of magistrate court jurisdiction in Section 35–3–4(A). *See* 1979 N.M.Laws, ch. 71, § 7. At this time, the sentence was part of a single provision, Section 66–8–102(C), that distinguished a "first conviction" from "a second or subsequent conviction."

Further, we think the legislature has made its intent to distinguish first and subsequent offenders clear,[5] and, by defining a "subsequent offender" as one who has a prior conviction under any domestic law prohibiting driving while intoxicated and a "first offender" as one who has no such prior history, has indicated its intent that a defendant with a prior conviction under a municipal ordinance be treated as a subsequent offender. We note that although the legislature defined "first offender" and

4. Under the Motor Vehicle Code, it is a misdemeanor for any person to violate any provision of the Code unless the provision is declared a felony. *See* NMSA 1978, § 66–8–7(A) (Cum. Supp.1990). Under the Motor Vehicle Code, unless another penalty is specified, the penalty for a misdemeanor is a fine of not more than $300 or by imprisonment for not more than ninety days or both. *See* § 66–8–7(B). Thus, the penalty available under Subsection D is the penalty generally assigned a misdemeanor under the Motor Vehicle Code, while the penalty available under Subsection E is "another penalty specified," which is consistent with the penalty generally assigned misdemeanors under the Criminal Code. *See* NMSA 1978, § 31–19–1(A) (Repl.Pamp.1990); *see also* NMSA 1978, § 30–1–1 (Repl.Pamp.1984).

5. *Compare* NMSA 1978, § 66–1–4.16(Q) (Supp. 1990) ("subsequent offender" defined as a person who was "previously a first offender and who again, under state law, federal law or municipal ordinance, has been adjudicated guilty of the charge of driving a motor vehicle while under the influence of intoxicating liquor") *and* NMSA 1978, § 66–1–4(64) (Repl.Pamp.1989) (same) *with* NMSA 1978, §§ 66–5–23, –29, –35 (Repl.Pamp.1989) *and* NMSA 1978, § 66–8–135 (Cum.Supp.1990) (in each of which the term "subsequent offender" appears); *see also* NMSA 1978, § 66–1–4.6 (Supp.1990) (defining "first offender"); § 66–1–4(22) (Repl.Pamp.1989) (same).

"subsequent offender" effective July 1, 1990, after the date of the incident for which defendant was convicted in district court, it had previously defined both terms with similar language effective July 1, 1988, a date prior to that incident.[6] It would make no sense to have the sentence for a second offense depend on which court tried the defendant. We will not construe the statute to reach an absurd result. *Cf. State v. Candelaria,* 113 N.M. 288, 825 P.2d 221 (Ct.App.1991) (construing district court's authority to place a defendant convicted of a misdemeanor on probation consistent with authority of metropolitan or magistrate court). Therefore, we conclude the legislature intended that a person convicted of a municipal court ordinance would be treated as having a prior offense under Section 66–8–102 for purposes of sentencing on a later conviction under that section, whether he or she is tried for the later offense in magistrate court or district court. *Id.*

The next question is whether the district court was required to sentence defendant for a fourth conviction. The third sentence of Subsection F, on which the trial court relied, expressly refers only to treating a conviction under a municipal court ordinance as a second conviction. Although Subsection E refers to a "third conviction" and to a "fourth conviction" without qualification, the most recent amendment, which added those references, was enacted by the same legislature that first defined "subsequent offender" and "first offender," and that legislature failed to say, although it would have been easy to do, whether convictions under a municipal court ordinance should be counted other than for purposes of distinguishing a first offender from a subsequent offender. For a second or subsequent conviction the district court has discretion to sentence the offender for a period of imprisonment up to one year. Thus, we need not construe the statute by adding words to it in order to permit the district court to take into account prior municipal court convictions in deciding how long a term of imprisonment is appropriate.

We recognized in *State v. Greyeyes,* 105 N.M. 549, 553, 734 P.2d 789, 793 (Ct.App. 1987) (*quoting Burch v. Foy,* 62 N.M. 219, 223, 308 P.2d 199, 202 (1957)), that:

> "A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration.... Courts must take the act as they find it and construe it according to the plain meaning of the language employed."

In this case, neither the text nor the statutory purpose makes the legislature's intent with regard to a third or fourth conviction clear.[7] Therefore, we are not certain that the legislature intended that each conviction under a municipal court ordinance would be treated as an offense under Section 66–8–102 for purposes of the most recent amendment, which imposed a mandatory jail sentence not to be suspended, deferred, or taken under advisement for a fourth or subsequent conviction. *See* 1988 N.M.Laws, ch. 56, § 8. Under these circumstances, Section 66–8–102(E)(2) does not provide a sufficiently clear expression of legislative intent to permit us to conclude that the district court was required to sentence defendant to six months in jail. *See State v. Bybee; State v. Keith; cf. State v. Edmondson.*

We conclude that defendant should have been sentenced as having a second conviction "under this section." Because all three municipal court convictions were more than five years prior to the incident for which defendant was convicted in district court, however, the court was not required to sentence defendant to any time

6. *See* 1988 N.M.Laws, ch. 56, §§ 2, 10.

7. Prior to its most recent amendment, Section 66–8–102(E) provided a mandatory two-day jail term for a "second or subsequent conviction occurring within five years of a prior conviction." *Id.* "Subsequent offender," however, was not defined until 1988, at which time the word "third" was substituted for "subsequent" in describing the convictions for which the two-day jail term was mandatory.

in jail. Rather, the court had discretion to require defendant to serve as much as one year in prison or in jail. The record indicates that the district court judge believed he was required to sentence defendant to six months as a fourth offender. Therefore, we reverse and remand with instructions to vacate defendant's sentence and resentence him for a second conviction under Section 66–8–102(E).

CONCLUSION.

Defendant's sentence is reversed, and the case is remanded to the district court for resentencing. Defendant should be resentenced as a second offender pursuant to Section 66–8–102(E).

IT IS SO ORDERED.

BIVINS, J., concurs.

CHAVEZ, J., dissents.

CHAVEZ, Judge (dissenting).

I respectfully dissent. I agree with the majority opinion on the issue that the prior convictions on which the district court relied were valid convictions, but I disagree that NMSA 1978, Section 66–8–102 (Cum. Supp.1990) permits consideration of municipal ordinance convictions for enhancement purposes. Therefore, I believe that the district court erred in considering these convictions in enhancing defendant's sentence.

This case requires us to interpret the meaning of Section 66–8–102(E). The pertinent portion of that section provides in part that "[a] second or subsequent conviction *under this section* shall be punished ... by imprisonment for not less than ninety days or more than one year...." *Id.* (emphasis added). All of defendant's prior DWI convictions were under a Farmington municipal ordinance. Since he has never been convicted of DWI under Section 66–8–102, his present conviction cannot be considered a subsequent conviction under the section.

"Statutes authorizing a more severe punishment as conviction for a second offense are deemed highly penal and therefore must be strictly construed." *State v. Keith,* 102 N.M. 462, 465, 697 P.2d 145, 148 (Ct.App.1985). "Doubts about the construction of criminal statutes are resolved in favor of the rule of lenity." *Id.; see also State v. Bybee,* 109 N.M. 44, 46, 781 P.2d 316, 318 (Ct.App.1989). This court recently reaffirmed its policy of strictly construing criminal statutes in *State v. Leiding,* 112 N.M. 143, 812 P.2d 797 (Ct. App.1991). A strict construction of Section 66–8–102 mandates that defendant's conviction be considered a first conviction under the state statute for sentencing purposes.

The plain words of Section 66–8–102(E) provide for enhanced punishment if the conviction is a second or subsequent conviction under that section. Section 66–8–102(E) does not provide for enhanced punishment if prior convictions were obtained under municipal ordinances. Other sections of the Motor Vehicle Code demonstrate that the legislature will expressly include local ordinance convictions within a statutory scheme if it chooses to do so. *See* NMSA 1978, §§ 66–5–29 & –35 (Repl. Pamp.1989). Because defendant's prior convictions were secured pursuant to a Farmington municipal ordinance and not the state DWI statute, defendant should only be sentenced for a first conviction under Section 66–8–102(D).

The majority points out that the trial court considered the municipal ordinance convictions prior convictions under the state statute based on Section 66–8–102(F). The portion relied upon by the majority provides that "[a] conviction under a municipal ordinance prescribing penalties for driving while under the influence of intoxicating liquor or drugs shall be deemed to be a conviction under this section for purposes of determining whether a conviction in *magistrate court* is a *second conviction.*" *Id.* (emphasis added). The state argues, and the majority agrees, that although only magistrate courts are mentioned in the subsection, since district courts have concurrent jurisdiction with magistrate courts, the statute should be read to encompass district courts as well. Moreover, the trial court ruled that although the quoted language only specifies that municipal ordinance convictions can be used to enhance a second conviction, such a

reading is too limited. The trial court believed the language in Subsection F should be construed to allow enhancement up to a fourth or subsequent conviction, as was done in this case.

I understand that the trial court was confronted with the difficult task of reconciling the limited language of Section 66–8–102(F) with the statute's overall purpose of preventing drunk driving anywhere in the state. *See* § 66–8–102(A). However, I believe adopting the construction used by the majority would require us to change the language enacted by the legislature. As our supreme court has stated in the past, we will not change the wording in a criminal statute so that it can be construed against the accused. *See State v. Collins,* 80 N.M. 499, 502, 458 P.2d 225 228 (1969).

We recognized in *State v. Greyeyes,* 105 N.M. 549, 553, 734 P.2d 789, 793 (Ct.App. 1987) (quoting *Burch v. Foy,* 62 N.M. 219, 223, 308 P.2d 199, 202 (1957)), that:

> "A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration.... Courts must take the act as they find it and construe it according to the plain meaning of the language employed."

As we said in *Greyeyes,* we may not invade the legislature's province to enlarge the penalty for violation of an offense. *Id.*

The state argues it does not make sense to allow a prosecutor the discretion of securing a greater punishment by filing all DWI charges in magistrate court rather than district court. Whether the state's concerns are valid, complaints about the "inadequacy of legislation to reach the result desired by the State must ... be addressed to the legislature, not the courts." *See State v. Garcia,* 98 N.M. 585, 589, 651 P.2d 120, 124 (Ct.App.1982). "Where the state seeks to broaden the application of the statute beyond the plain wording of the act, the appropriate remedy, however, involves 'legislative therapy and not judicial surgery.'" *See State v. Gardner,* 112 N.M. 280, 814 P.2d 458 (Ct.App.1991) (quoting *City of Albuquerque v. Sanchez,* 81 N.M. 272, 273, 466 P.2d 118, 119 (Ct.App. 1970), *overruled on other grounds, State v. Ball,* 104 N.M. 176, 718 P.2d 686 (1986)).

Defendant mentions in his reply brief that the definition of a "subsequent offender" in NMSA 1978, Section 66–1–4.16(Q) (Cum.Supp.1990), may be construed to indicate that the legislature intended municipal court convictions to be considered prior convictions under Section 66–8–102. However, defendant argues that Section 66–1–4.16(Q) did not go into effect until after defendant was arrested for DWI, and is therefore inapplicable to this case. Although the state has not argued this point, we must point out that the language in Section 66–1–4.16(Q) was in effect at the time of defendant's arrest under NMSA 1978, Section 66–1–4(B)(64) (Repl.Pamp. 1989). Nevertheless, I do not believe the definition of a "subsequent offender" found in Section 66–1–4(B)(64) or Section 66–1–4.16(Q) warrants treating defendant's current conviction as a fourth conviction under Section 66–8–102(E).

Although a subsequent offender is defined as someone who has been adjudicated guilty of DWI under a state statute, federal law, or municipal ordinance, the precise term "subsequent offender" only appears in the Motor Vehicle Code for license revocation proceedings. *See* NMSA 1978, §§ 66–5–23, –29, –35 (Repl.Pamp.1989); NMSA 1978, § 66–8–135 (Repl.Pamp.1987). The legislature could have easily used the term "subsequent offender" in Section 66–8–102, but it did not. Aside from the limited use of municipal ordinance convictions allowed by Section 66–8–102(F), the narrow use of the term "subsequent offender" appears to indicate a legislative intent to limit the use of municipal ordinance convictions to enhancing license revocation penalties rather than more severe criminal penalties.

For the foregoing reasons, I would reverse and remand this case with instructions to vacate defendant's sentence and resentence him for a first conviction con-

sistent with the provisions of Section 66–8–102(D).

823 P.2d 929

Shirley D'AVIGNON, Plaintiff–Appellant,

v.

James O. GRAHAM, Defendant–Appellee.

No. 12062.

Court of Appeals of New Mexico.

Nov. 7, 1991.

Winston Roberts–Hohl, Santa Fe, Marvin Baggett, Farmington, for plaintiff-appellant.

Randall S. Roberts, Roberts & Jolley, Farmington, for defendant-appellee.

OPINION

ALARID, Chief Judge.

Plaintiff (mother) appeals a trial court judgment that her lien on defendant's (father) real and personal property arising out of child support arrearages pursuant to NMSA 1978, Section 40–4–15 (Repl.Pamp. 1989) cannot be foreclosed because father timely interposed an exemption defense pursuant to NMSA 1978, Sections 42–10–1 or –2 (Orig.Pamp.). We reverse.

FACTS

This case was tried by non-jury trial. The parties have agreed to the following stipulated facts on appeal: Defendant is the unemployed father of a minor child. Following a divorce between father and the mother of the child, the parties entered into a child support agreement. Pursuant to this agreement, father is indebted to mother for child support arrearages in the amount of $2,625.

Father owns a pickup truck with a fair market value of less than $4,000 and an attached camper shell valued at less than $300. Father owns no other personal property and does not own a homestead. Pursuant to Section 40–4–15, mother obtained a perfected statutory lien on the real and personal property of father for the amount of the child support arrearages. Mother attempted to foreclose the lien on father's pickup truck and camper. Father timely interposed a statutory exemption defense. The trial court, relying on Sections 42–10–1

or -2 (exemptions), found the lien valid, but unenforceable against the truck and camper shell as a matter of law.

DISCUSSION

Today there exists in our statutory child support enforcement scheme an ambiguity which apparently makes possible the interposition of an exemption defense between a parent and a minor child's claim for child support. The sole question on appeal is whether a statutory lien based on child support arrearages may defeat a statutory exemption defense. For the reasons set forth below, we conclude that the statutory exemption defenses set forth at NMSA 1978, Chapter 42, article 10, are unavailable to a parent as against a lien for child support obligations under Section 40-4-15.

I. Issues Properly Preserved for Appeal

Father has taken the position that the issue of whether an exemption defense may defeat a lien based on child support arrearages was not properly preserved for appeal. Father complains that mother failed to submit, and the trial court failed to enter, findings of fact which support the required predicate that father was not supporting his child.

Whether or not a parent is "supporting another person" within the contours of the exemption statute is a question of fact. *See Ruybalid v. Segura,* 107 N.M. 660, 666, 763 P.2d 369, 375 (Ct.App.1988). In *Ruybalid,* this court indicated that the question turns on the extent of financial contribution made by the parent. *Id.* at 666, 763 P.2d at 375. In this case, the trial court's findings establish father owes mother $2,625 in child support arrearages. The record also establishes that father admitted in his answer to mother's complaint that he was so indebted. The record contains no evidence that father is supporting his minor child. We conclude the trial court findings are sufficient and establish that the issue was properly preserved below.

II. The Relevant Statutes

The trial court held that mother had a valid lien pursuant to Section 40-4-15. Section 40-4-15 provides that a money allowance to children constitutes a lien on the real and personal property of the party so obligated.

> In case a sum of money is allowed to the children by the decree for the support, education or maintenance of the children, *the decree shall become a lien on the real and personal property* of the party who must furnish the child support from the date of filing for record a certified copy of the decree in the office of the county clerk of each county where any of the property may be situated. [Emphasis added.]

Id.; see also Gonzalez v. Gonzalez, 103 N.M. 157, 161, 703 P.2d 934, 938 (Ct.App. 1985) (child support payments become vested final judgments at time due and not paid in full). However, because the foreclosure of judgment liens by judgment creditors is apparently subject to article 10 (§§ 42-10-1 to -11) statutory exemptions, and nothing in article 10 expressly excepts liens based on child support obligations from being defeated by an exemption defense, the trial court held the lien unenforceable. *See* NMSA 1978, § 42-10-11 (Orig.Pamp.) (statutory exceptions to homestead exemption defense).

The trial court relied in part on NMSA 1978, Section 40-4-16 (Repl.Pamp.1989), which provides:

> The liens created by this act [§§ 40-4-12 to 40-4-19 NMSA 1978] may be satisfied by execution or *may be foreclosed under the same procedure* as is now allowed for the foreclosure of judgment liens. [Emphasis added.]

At the trial, the trial court sought but did not receive adequate authority to derive the true legislative intent in this area of law. Where a defendant debtor has no wages to garnish, to construe the above provisions as father urges produces the draconian result of statutory child support obligations that are unenforceable. Moreover, it is inconsistent with the strong public policy requiring that our child support

statutes be construed to ensure the welfare of minor children. *See Spingola v. Spingola,* 91 N.M. 737, 743, 580 P.2d 958, 964 (1978) (welfare of child is primary concern on review of child support awards and support order modifications). We do not believe that the legislature intended both to create statutory liens and render them unenforceable as a matter of law. We conclude that father's reading of Section 40–4–16 is incorrect. We address below the proper construction of the statutory provisions in issue.

III. Statutory Construction Concerns

Father argues that the rules of statutory construction preclude a holding that the article 10 exemptions contain an implied exception for liens based on child support obligations. Father relies primarily on the "plain meaning" rule. *See General Motors Acceptance Corp. v. Anaya,* 103 N.M. 72, 703 P.2d 169 (1985) (plain language of statute is primary means of ascertaining legislative intent). Specifically, father argues that the terms used in the exemption statutes "clearly indicate that public policy does not favor payment of child support which overrides the public policy favoring minimum exemptions from execution or judgment liens." We disagree. The enactment of the article 10 exemptions by the New Mexico legislature does not positively require that the exemption be effective against minor children seeking to foreclose liens based on child support arrearages.

Father overlooks that the cardinal rule of statutory construction is to determine legislative intent. *See Quintana v. New Mexico Dep't of Corrections,* 100 N.M. 224, 668 P.2d 1101 (1983) (purpose of rules of statutory construction is to determine legislative intent). True, legislative intent is first sought by reference to the plain meaning found in the language used by the legislature. However, both this court and the New Mexico Supreme Court have rejected formalistic and mechanistic interpretation of statutory language. *See Martinez v. Research Park, Inc.,* 75 N.M. 672, 410 P.2d 200 (1965) (intention of legislature prevails over strict adherence to letter of statute), *overruled on other grounds, Sundance Mechanical & Utility Corp. v. Atlas,* 109 N.M. 683, 789 P.2d 1250 (1990); *Lakeview Investments, Inc. v. Alamogordo Lake Village, Inc.,* 86 N.M. 151, 520 P.2d 1096 (1974); *Security Escrow Corp. v. State Taxation & Revenue Dep't,* 107 N.M. 540, 760 P.2d 1306 (Ct.App.1988) (central concern of reviewing court is to determine legislative intent). Judge Learned Hand, in his concurring opinion in *Guiseppi v. Walling,* 144 F.2d 608, 624 (2d Cir.1944), has said:

> There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.

Our courts have said of the exemption statute in issue today:

> In a comprehensive statute such as this, harmony and consistency, while greatly to be desired, are not always found. A momentary lapse from them may easily be given too much weight in interpretation.

McFadden v. Murray, 32 N.M. 361, 367, 257 P. 999, 1002 (1927); *see also* 35 C.J.S. *Exemptions* § 4 (1960) ("the intention of the lawmaker must prevail over the literal sense of the terms, and the spirit and intention of the statute must prevail over its strict letter").

We review the history and application of our exemption statute to ascertain the proper construction of the language in issue.

IV. Exemption Laws: History, Application and Proper Construction

Exemption laws rest entirely on constitutional or statutory grounds. *See* 31 Am.Jur.2d *Exemptions* § 1 (1989); *see also* 35 C.J.S. *Exemptions* § 1 (1960); *New*

Mexico Nat'l Bank v. Brooks, 9 N.M. 113, 49 P. 947 (1897) (exemption is personal right and is purely statutory). Exemptions were unknown at common law, and are in derogation thereof. *See* 31 Am.Jur.2d *Exemptions* § 2 n. 13; 35 C.J.S. *Exemptions* § 1 nn. 10 & 11; Exemptions are privileges granted by law on public policy grounds. *See* 31 Am.Jur.2d *Exemptions* § 1; 35 C.J.S. *Exemptions* § 3. "The purpose of a homestead exemption, and of exemptions in general, is to benefit the debtor and the debtor's dependents. [Citation omitted.]" *Ruybalid v. Segura,* 107 N.M. at 666, 763 P.2d at 375; *see also In re Spitz Bros.,* 8 N.M. 622, 45 P. 1122 (1896) (exemptions protect debtor's necessities and guard against familial destitution); *Schlaefer v. Schlaefer,* 112 F.2d 177 (D.C.Cir.1940) (it is not the purpose of exemption laws to relieve the debtor of family obligations); *In re Niemyjski,* 26 B.R. 466 (Bkrtcy.D.N.M. 1983); *In re Welch,* 8 F.Supp. 838 (D.N.D. 1934) (purpose of exemption statutes is to provide for care of dependents); *Davis v. Davis,* 246 Iowa 262, 67 N.W.2d 566 (1954); *Mahone v. Mahone,* 213 Kan. 346, 517 P.2d 131 (1973); *Pope v. Pope,* 283 Md. 531, 390 A.2d 1128 (1978); *Meadows v. Meadows,* 619 P.2d 598 (Okl.1980). The exemption is an affirmative defense which may be relied upon only as a matter of privilege; it is not a vested right and the right to assert it may be waived. *See* 31 Am.Jur.2d *Exemptions* § 1; *Speckner v. Riebold,* 86 N.M. 275, 523 P.2d 10 (1974); *but see USLife Title Ins. Co. of Dallas v. Romero,* 98 N.M. 699, 652 P.2d 249 (Ct.App.1982) (1979 legislative amendment relieves defendant of obligation to assert exemption defense in original answer). Moreover, a debtor may be estopped from asserting an exemption defense. *See* 31 Am.Jur.2d *Exemptions* § 1; *Bagalini v. Arizona Dep't of Economic Sec.,* 135 Ariz. 326, 660 P.2d 1253 (Ct.App.1983) (statutes exempting property from legal process intended to benefit wife and children as much as debtor); *but see County of Nicollet ex rel. Block v. Havron,* 357 N.W.2d 134 (Minn.Ct.App.1984) (court authority to order sale of property to satisfy child support arrearages is limited by statutory homestead and personal property exemption).

V. New Mexico Exemption Statute

New Mexico's first exemptions were promulgated by the legislature in 1887. *See* 1887 N.M.Laws, ch. 37. The terms of the statute have evolved, sometimes in response to judicial constructions of the statute and sometimes in response to the changes in society at large. Despite the amendments, no alternation of the underlying policy can be derived therefrom. *See Hewatt v. Clark,* 44 N.M. 453, 103 P.2d 646 (1940) (rejecting contention that legislative amendment indicates alteration of underlying policy of statute).

With the exception of situations involving garnishment, New Mexico's exemptions have been construed consistently since 1897. *See Hewatt v. Clark* (construing exemption statute after legislative amendment addressed *McFadden* and *Dowling-Moody* judicial constructions); *Dowling-Moody Co. v. Hyatt,* 39 N.M. 401, 48 P.2d 776 (1935) (garnishment not a device to reach exempt property); *McFadden v. Murray* (garnishment and exemptions). Additionally, New Mexico's treatment has been consistent with the general trend in interpretation demonstrated by the majority of jurisdictions. *See generally* 35 C.J.S. *Exemptions;* 31 Am.Jur.2d *Exemptions.*

In *In re Spitz Bros.,* our supreme court declined to allow partners in a bankrupt partnership to claim personal exemptions in the nature of those available to the heads of households where the debts sued upon were debts of the partnership. The court said:

> The language of the act should be construed in harmony with its humane and remedial purpose * * * * The interest it assumes to protect is that belonging to the debtor, be it more or less, whatever it be within the limitations of the statute the debtor's interest is exempt, in view of his own necessity and of the probable destitution to which its loss might reduce the family depending on him for support.

Id., 8 N.M. at 628, 45 P. at 1123. This language indicates that from the very out-

set of our judicial construction of our exemption laws, the underlying policy rather than the letter of the statute has guided its interpretation. Moreover, the rule of liberal construction, in favor of the "poor debtor," is not applied where it would work to defeat a cardinal purpose of the statute: to protect the innocent dependents from the consequences of poor fiscal choices by the primary fiscal decisionmaker.

In *New Mexico Nat'l Bank v. Brooks,* a bank sought to recover on a debt owed by an employee of the Santa Fe Railroad. Unable to collect, it instituted garnishment proceedings against the railroad and it was determined that the railroad owed the employee two months of salary. Defendant employee moved to exempt his wages as necessary for the support of himself and his family. The trial court allowed collection from the railroad but placed the funds in the court registry and allowed the defendant employee to interpose his claim of exemption. The court thereon granted the exemption.

In choosing to reverse the trial court on the issue of whether the owed wages for which exemption was claimed should stand, our supreme court noted that whether or not the funds were truly in the nature of money necessary to support the defendant employee's family was dispositive.

> The legislature, in conformity with public policy now generally prevalent, enacted the exempting statute *to encourage the formation of the family relation* by conferring upon the heads of household privileges to protect their families against want in the event of misfortune[.] * * * The statute exempts the personal earnings of the debtor entitled to its benefits to the amount necessary *for the support of his family,* and courts in administering the law should take into due consideration the facts and circumstances of each case. [Emphasis added.]

Id., 9 N.M. at 128–29, 49 P. at 952.

Tomson v. Lerner, 37 N.M. 546, 25 P.2d 209 (1933), is nearly on all fours with today's case. In *Lerner,* the appellee, a woman heading a household, leased a store from appellant and fell behind in her rent. Appellant obtained a statutory landlord's lien on merchandise and goods in the store. Appellee interposed her claim of exemption, arguing a landlord's lien cannot attach to exempt property and that there was no exception to the exemption statute permitting landlord's liens to attach. The trial court permitted the exemption and the appeal followed. The supreme court, relying on statutory construction and equity grounds, reversed.

In *Lerner,* a statute granted a lien on all the personal property in the rented house for the rent due. An existing exemption statute provided an exemption, in lieu of a homestead, from levy and sale, real or personal property in the amount of $500. Another statute provided that an owner of real estate could, by mortgage or other act, waive an otherwise available exemption. The court said:

> It is apparent that the Legislature favored liens as against exemptions in the very law granting exemptions. The landlord's lien originates because of the relationship resulting from landlord and tenant. When the tenant moves into the premises of his landlord, by *his own act* he creates the lien in favor of the landlord, and thereby waives his exemption as effectively as though he had granted a mortgage.
>
> It is the appellee's theory that the statute fails to except landlord's liens from the operation of the exemption statute, as it does mortgages, mechanic's liens, etc.
>
> It is not necessary to except landlord's lien from the operation of the statute. The lien has always been deemed superior to the exemption, and it was not necessary to specifically provide that exemptions could not be claimed as against a lien for rent, other than as a matter of extra precaution. [Emphasis added.]

Id. at 547–48, 25 P.2d at 210. The court also noted:

> The exemption statute was adopted as a humane policy to prevent families from becoming destitute as the result of misfortune through common debts which generally are unforeseen, but leaves to

> the individual the right to waive his exemption either by mortgage or operation of law * * *.
>
> This is not a weighing of equities, nor of determining priorities of liens. The rights of both landlord and tenant are founded in law, *and it was never the intention of the Legislature to permit a claim of exemption to defeat a statutory lien[.]* [Emphasis added.]

Id. at 549, 25 P.2d at 210–11. The *Lerner* holding is twofold. First, the court noted the landlord lien was an older legislative enactment than the exemption enactment and reasoned the policy of our legislature was to preclude the interposition of an exemption defense to defeat a statutory lien, where to do so would permit the abrogation of a duty well-settled as a matter of statutory law. The implicit judicial policy is that statutory liens are not to be defeated by policy-based exemption defenses unless the legislative intent to permit such exemptions is overwhelmingly clear. Because the tenant knew or should have known of the well-settled law granting landlords liens on the chattel property within the rented premises, the court found that acting in open derogation of a rent obligation operated as a waiver of the exemption privilege as to the property located therein. Second, where the *conduct* of the party attempting to assert the exemption defense is of a certain character as a matter of law, that party may be estopped from interposing the exemption.

In the case before us, we need not decide whether father's actions constitute waiver or the conditions of estoppel.[1] Under either analysis, the exemption defense is unavailable.

As noted above, the divorce decree awarding child support created an immediate lien on all the personal and real property of father. *See* § 40–4–15. Construing the statute consistent with *Lerner* suggests that father in this case be estopped from asserting the exemption defense because of the well settled, common law duty of support for his minor child. *See In re Quintana,* 83 N.M. 772, 774, 497 P.2d 1404, 1406 (1972) (as a matter of law, it is unquestionable that both male and female parents owe minor child a duty of support); *Wilson v. Wilson,* 45 N.M. 224, 114 P.2d 737 (1941) (support duty of father is to exhaust every reasonable resource prior to judicial relief therefrom); *Fullen v. Fullen,* 21 N.M. 212, 237, 153 P. 294, 302 (1915) (duty to support minor children arises from common law). This duty existed long prior to the enactment date of the exemption statute. *See* 1 W. Blackstone, *Commentaries on the Laws of England* 436 (1979) Chicago (duty of support and maintenance is a principle of natural law). This court is aware of no legislature, either within New Mexico or without, that has ever specifically abrogated this duty. On the contrary, our statutes encourage respect for, and enhance opportunities for, successful discharge of this solemn duty. *See generally,* NMSA 1978, Chap. 40 (1989 Repl.Pamp.). Moreover, this duty has been consistently reaffirmed by our courts. *Niemyjski v. Niemyjski,* 98 N.M. 176, 177, 646 P.2d 1240, 1241 (1982) (emphasizing that most important single obligation of a parent is the support of a minor child); *Spingola v. Spingola,* 91 N.M. at 743, 580 P.2d at 958 (paramount issue in child support matters is welfare of the child).

This court does not believe the legislature ever intended to undermine the strong public policy underlying the support duty present in our statutes and our cases by permitting the creation of liens for child support that cannot be foreclosed. The privilege of the exemption must defer to the unavoidable duty arising out of the common law. If the legislature wishes to modify this long standing policy, it must do so with specific language evidencing clear

1. In this case, the principle of estoppel would bar father from interposing his defense. The discussion above demonstrates that the exemption defense is a defense designed to protect *both* the debtor and his dependents. Taking the position that the property in question is immunized from foreclosure, and necessary for his minimum needs, precludes the defendant debtor from taking the legal position that the property is exempt from foreclosure for child support obligations. To rule otherwise would turn the very statute designed to protect the dependents into the mechanism whereby they are cast into even further pecuniary strangulation.

legislative intent. Absent such intent, this court will never hesitate to cast its mantle of charity around the shoulders of children near to whom avoidable suffering lurks. A defendant in a suit seeking to foreclose on a lien created by Section 40–4–15 is estopped as a matter of law from relying on a statutory exemption defense.

In *Laughlin v. Lumbert,* 68 N.M. 351, 354, 362 P.2d 507, 509–10 (1961), the supreme court noted:

> The conclusion we have reached is in accord with the purposes of the exemption statute which is to "prevent families from becoming destitute as the result of misfortune through common *debts which generally are unforeseen* * * *" [Emphasis added.] (citations omitted).

This judicial statement of legislative intent is consistent with the analysis under *Lerner* and provides additional support for our ruling today. Unlike a business or consumer debt, the cost of raising children cannot fairly be said to be a debt which is unforeseen. It would be inappropriate to conclude that unforeseen debt and debt for support of a minor child are debts of the same character. *See In re Weaver,* 98 B.R. 497, 501 (Bkrtcy.D.Neb.1988) ("Dependents are not 'creditors' within the meaning of the statute."); *Bagalini v. Arizona* (wife and children not creditors in ordinary sense); *State v. Reed,* 5 Conn.Cir.Ct. 69, 241 A.2d 875 (1967) (welfare commissioner having provided necessary funds to sustain family is not normal creditor and is not barred by exemption statute in suit to recover from delinquent father); *see also Steller v. Steller,* 97 N.J.Super. 493, 235 A.2d 476 (App.Div.1967) (exemption clause designed to protect funds from claims by third parties with interests hostile to both debtor and his dependents).

Hernandez v. S.I.C. Finance Co., 79 N.M. 673, 448 P.2d 474 (1968), involved the issue of whether property covered by a security agreement could be exempt. The trial court held that the security agreement controlled. Our supreme court upheld this ruling.

Citing *Lerner, Hernandez* rejected defendant debtor's argument that an exemption could not be impliedly waived. *Id.* at 674, 448 P.2d at 475. The court found that *Lerner* stood for the principle that waivers may be created by the action or conduct of the party seeking to interpose the exemption defense. It also noted that such waiver by action is the rule in the majority of jurisdictions. Defendant argued that no agreement under the Uniform Commercial Code could be construed as an implied waiver of an exemption. *Id.* The court reasoned a security agreement constitutes an immediate transfer of a property interest.[2]

> The waiver is present, not future, regardless of whether the interest transferred be deemed "title," "lien," or something else. *See also* § 50A–9–202, N.M.S.A. 1953.
>
> We recognize that the exemption statutes are designed to protect debtors from becoming destitute as a consequence of *unforeseeable indebtedness. Tomson v. Lerner,* supra. [Emphasis added.]

Id. at 675, 448 P.2d at 476. *Hernandez* holds that a security interest, when considering exemption defenses, transfers the interest immediately and operates to waive any exemption which might later be asserted. In the case before us, a lien on all father's property was created by operation of law after the decree was properly filed with the county clerk in the county in which the property was situated. *See* § 40–4–15. Tracking the logic of both *Lerner* and *Hernandez,* the interest in the property father now seeks to exempt from foreclosure is not his interest, it is his child's interest held by and through his former wife.

We also briefly note that while Section 40–4–16 provides the lien is *procedurally* enforced like any other judgment creditor lien, it does not equate the two types of

2. The New Mexico Legislature affirmed this construction with the passage of Section 42–10–6 in 1971. *See* 1971 N.M.Laws, ch. 215, § 3.

creditors. As noted above, cases from other jurisdictions suggest debt arising out of child support obligations is not a consumer or business debt. *See In re Weaver; Steller v. Steller.* Nothing in our exemption statute or its interpretation requires this court find a mother seeking to foreclose a lien based on child support arrearages is cut from the same cloth as a creditor seeking to recover on a business deal gone bad.

We briefly distinguish our recent case of *Ruybalid v. Segura.* In *Ruybalid,* we reversed a trial court ruling because the trial court had not liberally construed the exemption statute, as is our policy. Noting that legislative intent controls our interpretation of the statute, and finding the statute unambiguous as to the issue at bar, we reversed because the trial court *added* elements not found in the plain language of the statute.

Ruybalid relied upon a rule of construction typically applied to favor the "poor debtor." However, as the other cases discussed above demonstrate, we cannot rely on the liberal construction rule to favor the poor debtor where it would defeat a well settled and principal purpose underlying the exemption statute as well as a common law duty expressly affirmed by our courts. *See Niemyjski v. Niemyjski* (single most important fiscal obligation is support of minor child). Both the legislative and judicial history of the federal bankruptcy code supports this analysis as well. *See In re Mojica,* 30 B.R. 925, 8 C.B.C.2d 997 (Bkrtcy.E.D.N.Y.1983); Cowans *Bankruptcy Law and Practice* § 6.47 (Interim ed. 1983) ("Rehabilitation of helpless debtors is an important objective but there is no compelling reason why this should be at the expense of the economically helpless members of his, or her family.").

Because protection of dependents is a purpose of our statute, to liberally construe it in favor of father in this case would result in frustration rather than fulfillment of its principal purpose.[3] Where our supreme court has declared the single most important obligation of a person owing child support to be the payment of that support, our exemption statute cannot be construed by this court to defeat that declaration. Moreover, it would defy logic to permit the exemption to be interposed between father and his dependent because not only would the purposes of the lien and the exemption statute be frustrated, but the exemption statute would be the means by which the support obligation could be avoided. Our holding, we believe, is supported by the test for determining true legislative intent as noted by Judge Learned Hand in his concurring opinion in *Guiseppi. But see Utley v. Utley,* 355 Mass. 469, 245 N.E.2d 435 (1969) (court unauthorized to create exceptions to exemption statute where precise language precludes interpretation).

Finally, we are persuaded that the conclusion we reach today is correct because the structure of our statutory framework relating to child support matters favors our reading. First, the trial court, with jurisdiction over the decree and therefore the child support amount, exercises wide discretion as to modification. *See Spingola v. Spingola; see also* NMSA 1978, § 40–4–7 (Repl.Pamp.1989). This discretion includes the statutory authority to either reduce the amount of child support obligation or to order a stay of execution of a lien based on child support arrearages. Additionally, under Section 40–4–17, a lien on real estate arising out of 40–4–15 may be lifted for good cause shown. We conclude ample avenues of relief have been provided by the legislature within the article creating the lien.

Moreover, Section 40–4–13 (Repl.Pamp. 1989) (liens for alimony), permits liens to attach only to real property of the debtor. Section 40–4–15 (liens for child support) permits liens to attach to *both* real and

3. We note that the trial court considered the application of Section 42–10–2 (exemptions of persons who support only themselves) to the facts of this case. Section 42–10–2 is unavailing to father. Where an individual is under a court order to support another person, an exemption defense available to persons supporting only themselves cannot stand. To permit relief under Section 42–10–2 would make a mockery of our child support enforcement scheme because mere refusal to pay would create the predicates for the application of the defense.

personal property. While the trial judge has discretion to remove liens on real property entered to secure either alimony or child support, no such discretion exists as to liens on personal property used to secure child support. *See* Section 40–4–17. The enhanced attachment capability of 40–4–15 for child support obligations, combined with diminished judicial authority to fashion relief from the personal property lien under 40–4–17, suggest that the legislative intent is to preclude relief from child support obligations.

The preferred practice in cases such as this is to first move for modification of the child support amount due pursuant to Section 40–4–7. Second, a defendant debtor might then seek a stay of execution on any real property under 40–4–17. It appears that our legislature intended to foreclose any possibility of avoiding execution on personal property attached by lien for child support debt. The shield of exemption may not be substituted for the above procedures nor used as a sword of retribution against innocent minor children.

CONCLUSION

Exemption laws were enacted to protect the head of a household and his dependents from the harsh vicissitudes of poor fiscal decision-making. As this case demonstrates, the concept of the "fresh start" for the poor debtor must defer to the needs of innocent minor children unable to provide for themselves. Because the duty to support minor children arises out of the common law, and exemptions are in derogation of the common law and for the purpose of protecting dependents, and Section 40–4–15 creates a lien to secure the minor child's support, this court concludes that father has waived, by operation of law, any right to assert an exemption defense between himself and his child support obligations.

Reversed and remanded.

IT IS SO ORDERED.

APODACA, J., concurs.

HARTZ, J., specially concurs.

HARTZ, Judge (specially concurring).

Although I concur in the result, I cannot join in the majority's opinion. My principal disagreement is with what I perceive to be the majority's approach to statutory interpretation.

Most legislative enactments represent a compromise between competing interests. Not uncommonly judges, just as other citizens, will view one of those competing interests as the more "moral" and the other as the more "self-interested." Support for the moral interest may well be found in other statutes and judicial opinions. Of course, these sources of authority may shed light in interpreting a statutory provision. It is a mistake, however, to focus entirely on support for the moral interest and to ignore the influence on the statute of the less attractive self-interest when one is construing the statute to resolve a dispute between those two interests. If in such disputes the statute is always read to support the moral interest as much as possible, then the court may well be undermining the compromise intended by the legislature that enacted the statute. Our function is to interpret the statute as enacted, not to give the "forces of good" a victory which they were not able to achieve in the legislative arena.

In this case the majority clearly identifies the moral high ground and the reprehensible self-interest. The moral high ground is enforcement of a father's obligation to support his children. The self-interest is the father's desire to maintain some personal possessions. Few people would question the priority of the father's obligation to his children.

Yet there is room for debate on where to draw the line. Is a parent who owes child support nevertheless entitled to maintain some minimum amount of personal property? It is not inconceivable that concern for the father's interest could find expression in legislative enactments. For example, although one who owes child support is not entitled to the ordinary debtor's statutory exemption from wage garnishment of 75% of disposable earnings, one who is delinquent in child-support payments is still enti-

tled to a 50% exemption. NMSA 1978, § 35–12–7. This garnishment statute reflects a compromise between the moral imperative of supporting one's child and the self-interest of the defaulting parent.

Similarly, the legislature may determine that a parent who has defaulted on child support is still entitled to exempt a car of limited value from enforcement of the support obligation. One might distinguish such an exemption from the limitation on garnishment on the ground that the garnishment exemption is necessary to encourage the defaulting parent to seek and maintain employment. Perhaps that consideration was a factor in fixing the limitation on garnishment. Yet a motor vehicle may also be necessary to seek and maintain employment. In this case it appears that father was not employed, so that particular argument for an automobile exemption may not apply to him; but there may also be circumstances in which the 50% exemption from garnishment would not be necessary to encourage a particular defaulting parent to keep a job. The legislature simply may have decided that regardless of whether the exemption enables or encourages the debtor to work, the exemption is fair and justified. I should note that courts in other states—courts that are not ordinarily considered to be benighted—have interpreted state statutes to provide the defaulting parent with a normal exemption of debtors from creditors. *Ogle v. Heim,* 69 Cal.2d 7, 69 Cal.Rptr. 579, 442 P.2d 659 (1968) (en banc) (rejecting argument that the exemption be read in light of its purpose to protect family of the debtor); *Utley v. Utley,* 355 Mass. 469, 245 N.E.2d 435 (1969) (rejecting argument that exemption was not intended to shield one from duty to support wife and children).

In short, the question of statutory interpretation confronting us in this case should not be decided by a simple appeal to the general proposition that parents have a fundamental obligation to support their children.[1] Instead, this court should focus on the specific language of the pertinent statutes and on authority relating to the relative weight to be given the competing interests in this case.

The specific statutory language lends substantial support to mother's view. Both NMSA 1978, Section 42–10–1, entitled "Exemptions of Married Persons or Heads of Households," and Section 42–10–2, entitled "Exemptions of Persons Who Support Only Themselves," exempt personal property in the amount of $500 and one motor vehicle in the amount of $4,000 [2] "from receivers or trustees in bankruptcy or other insolvency proceedings, fines, attachment, execution or foreclosure by a judgment creditor." [3] In this case mother foreclosed on a child-support lien created by NMSA 1978, Section 40–4–15 (Repl.Pamp.1989). Strictly speaking, the proceeding was not a "foreclosure by a judgment creditor" and therefore would not come within the exemption statutes.

Father relies on NMSA 1978, Section 40–4–16, which provides that child-support liens "may be foreclosed under the same procedure as is now allowed for the foreclosure of judgment liens." I doubt, however, whether the availability of exemptions is part of the "procedure" for the foreclosure of judgment liens. The availability of an exemption would appear to be a matter of substance, to be distinguished from procedures such as those governing notice of sale. Thus, on their face the relevant statutory provisions do not appear to provide for the exemption sought by father.

Moreover, other authority indicates that the legislature intended to give the child-support lien priority over a parent's claim of exemptions. First, the language of

1. I should add that this case also should not be decided on the basis of the hyperbolic claim that a contrary construction of the statute would render child-support obligations unenforceable.

2. Because essentially the same personal property exemptions are permitted to persons with dependents and persons without dependents, I find it difficult to read into the exemption statutes a priority of the interests of the dependents over the interest of the debtor.

3. The exemption in Section 42–10–2 applies also to executors or administrators in probate.

Tomson v. Lerner, 37 N.M. 546, 25 P.2d 209 (1933), suggests that statutory liens in general cannot be defeated by claims of exemption. We can presume that the legislature was familiar with that decision when it reenacted the child-support lien statute in 1947, N.M.Laws 1947, ch. 16, § 4, and that it would have made special provision to recognize exemptions to the lien if that was the legislative intent. *See Quintana v. New Mexico Dep't of Corrections*, 100 N.M. 224, 668 P.2d 1101 (1983) (legislature presumed to know the law).

Second, the law gives the obligation of child support priority over any property interest of the parent at the time of dissolution of the marriage. When a marriage is dissolved and the district court makes a determination regarding the children's need for support, the court may "set apart out of the property of the respective parties, such portion thereof, for the maintenance and education of their minor children, as may seem just and proper." NMSA 1978, § 40–4–7(B)(3). A parent could not claim that property is exempt from being set aside for purposes of child support, because it is impossible to read the list of circumstances in which Sections 42–10–1 and –2 apply (receiverships, foreclosures, etc.) as including an order under Section 40–4–7(B)(3). One can view the statutory scheme as in essence providing the district court with two alternatives for ensuring that the children receive proper support: (1) setting aside at the outset property which could be used to pay all or a portion of the necessary support or (2) relying upon the parents to provide for support out of their income, but securing that obligation with the statutory lien on their assets.[4] When the child-support lien is seen in this light—as an alternative to assigning the property for the benefit of the children in the first place—it would be peculiar to exempt property from the lien when that property could not have been exempted from the assignment.

Finally, I find it significant that even if father could claim an exemption here, mother could eventually overcome that exemption if father continued to fail to pay his child-support obligation. If mother forced father into bankruptcy, all of father's property would be subject to the claim for support obligations. *See* 11 U.S.C. §§ 522(c)(1), 523(a)(5); *Matter of Sullivan*, 83 B.R. 623, 624 (Bkrtcy. S.D.Iowa 1988). To be sure, we cannot assume that the New Mexico legislature will balance the interests of the defaulting parent and the children the same way the Congress does. Still, we should refrain from adopting a construction of New Mexico law which, in the face of federal law, would serve little or no purpose. To permit a claim of exemption to a child-support lien would create a pointless anomaly in the law, because the exempt property could have been reached initially by setting it aside for child support under § 40–4–7(B)(3) or could be reached ultimately under federal bankruptcy law.

Thus, denial of the exemption claimed by father is the construction of New Mexico law that best follows the literal language of our statutes, that best comports with other expressions of legislative intent to give the statutory child-support lien priority over the exemption, and that "fits most logically and comfortably" into the surrounding body of law. *West Va. Univ. Hosps. v. Casey*, — U.S. —, 111 S.Ct. 1138, 1148, 113 L.Ed.2d 68 (1991). I therefore concur in the result.

4. This scheme was perhaps more explicit in the predecessor to the present child-support lien statute, 1941 Comp. § 25–708, which in the same paragraph both (1) permitted the judge to vest title to the parents' property in a trustee for the purpose of maintenance and education of the children and (2) provided that if money was allowed to the children, the obligation would be secured by a lien on all property of the parents.

823 P.2d 940

STATE of New Mexico,
Plaintiff–Appellee,

v.

CODY R., a Child, Defendant–Appellant.

No. 12849.

Court of Appeals of New Mexico.

Nov. 8, 1991.

Certiorari Denied Dec. 12, 1991.

Sammy J. Quintana, Chief Public Defender, Hugh W. Dangler, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Tom Udall, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

DONNELLY, Judge.

The child appeals from an order committing him to the custody of the New Mexico Youth Authority following his plea of no contest to a charge of involuntary manslaughter. The single issue raised on appeal is whether the children's court abused its discretion in ordering the child's transfer to the custody of the Youth Authority for an indeterminate period not exceeding two years. Other issues listed in the docketing statement but not briefed are deemed abandoned. *State v. Haar*, 110 N.M. 517, 797 P.2d 306 (Ct.App.1990). We affirm.

FACTS

The events culminating in the death of the victim arose out of a dispute between the child and the victim, a fellow high school student. The child had been engaged in an extended argument with the victim about alleged statements he had made concerning the child's girlfriend. The child warned the victim about spreading rumors and, at one point, the victim and the child met with the assistant principal and a school counselor in an attempt to resolve the problems. Shortly after that meeting, however, the child confronted the victim in a school hallway and began attacking him. At the dispositional hearing, the child admitted to striking and kicking the victim several times. According to some of the witnesses, the victim did not fight back, and the child continued to beat the victim after he had fallen to the floor. As a result of injuries received from the beating, the victim died.

The state charged the child with an open count of murder and moved to have the child transferred to district court for trial as an adult. The children's court denied the motion and found that the child was amenable to treatment and rehabilitation as a child through available facilities. Thereafter, an adjudicatory hearing was held at which the child agreed to the entry of a consent decree and entered a plea of no contest to involuntary manslaughter. The children's court ordered the child committed to the New Mexico Youth Diagnostic and Development Center (YDDC) for purposes of diagnosis, rehabilitation, and education. The court also ordered that a report be prepared by the YDDC indicating what disposition appeared to be most suitable for the best interests of both the child and the public.

At the dispositional hearing, the children's court heard testimony from various witnesses and had before it a number of reports and recommendations concerning dispositional alternatives. Dr. Daniel B. Matthews, a clinical psychologist, testified, outlining his findings and recommendations. He stated that he had worked with the court-appointed psychologist who had performed an evaluation of the child and that he had reviewed the report prepared by Dr. Art Brambila, a psychologist for Valencia Counseling Services. Dr. Matthews stated that he had found a remarkable accord among the conclusions reached by the various individuals who had examined the child, despite the fact that several different diagnostic findings had been made. Dr. Matthews expressed his belief that the child was in need of treatment, that the child was capable of accepting responsibility for his actions, and he recommended that the child receive outpatient treatment without incarceration. On cross-

examination, Dr. Matthews was asked about those portions of the YDDC report indicating that the child suffered from intermittent explosive personality disorder, that he had a potential for future violent acts, and that the prognosis for the child was poor. Dr. Matthews testified that he had found no symptoms of intermittent explosive disorder in the child, and that such diagnosis generally was reached only upon a showing of multiple incidents or incidents wherein the attacks were unprovoked.

Orlando R. Sais, the child's juvenile probation and parole officer, also recommended that the child be placed on probation and testified that he believed the child was amenable to treatment without being placed in the custody of the Youth Authority. The child testified at the dispositional hearing as well, expressing his remorse over the events leading to the victim's death.

After hearing closing arguments, the children's court ordered that the child be placed in the custody of the Youth Authority, noting that it might have considered probation as a dispositional alternative if the child had stopped the attack on the victim after he had knocked him to the floor. The court also stated that it could not overlook the fact that the child pursued the attack on the victim after he was defenseless, that the victim had died as a result of the beating, and that "even juveniles, especially one that's seventeen years old, [have] to face the consequences of [their] actions." Additionally, the court remarked that none of the reports indicated that the family of the victim had been contacted in order to determine the impact of the incident upon them.

DISCUSSION

The child contends that the children's court abused its discretion in failing to follow recommendations of the various counselling and probation authorities who urged that he not be incarcerated, and that, instead, he be treated on an outpatient basis. The child also asserts that the statements made by the court at the dispositional hearing indicate that in imposing sentence the court disregarded evidence presented at the hearing concerning his best interests and welfare.

In determining the appropriate disposition to be entered following the court's finding that the youth is a delinquent child, the children's court is vested with discretion concerning the weight and effect to be accorded the evidence and matters presented at the dispositional hearing. *See* NMSA 1978, § 32–1–34(E) (Repl.Pamp. 1989); *see also* NMSA 1978, § 32–1–31(E) (Repl.Pamp.1989). Determination of the final disposition to be imposed under the Children's Code following adjudication that a child has committed a delinquent act is vested in the sound discretion of the children's court under the provisions of the Code and the facts of each particular case. *See* § 32–1–34. *Cf. State v. Madrigal,* 85 N.M. 496, 513 P.2d 1278 (Ct.App.1973) (sentencing alternatives are within the discretion of the trial court). *See generally* ABA Juvenile Justice Standards Relating to Dispositional Procedures, Part VII, § 7.1 (1980). The court in *Madrigal* observed:

> Judicial discretion is a discretion " * * * guided by law, caution, and prudence; it is an equitable determination of what is just and proper under the circumstances." *State v. Alaniz,* 55 N.M. 312, 232 P.2d 982 (1951). It is " * * * not a mere whim or caprice, but an honest attempt, in the exercise of power and duty, to see that justice is done. * * *" *Independent Etc. Co. v. N.M.C.R. Co.,* 25 N.M. 160, 178 P. 842 (1918).

State v. Madrigal, 85 N.M. at 501, 513 P.2d at 1283.

Section 32–1–31(G) states:

> In that part of the hearings held under the Children's Code on dispositional issues, all relevant and material evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value even though not competent had it been offered during the part of the hearings on adjudicatory issues and the issue of need for care and rehabilitation.

The child argues that since this court has previously held that the children's court must consider uncontradicted evidence of amenability to treatment before transferring a juvenile offender to district court to be tried as an adult, a similar requirement should be recognized to exist concerning the final disposition to be imposed. *See State v. Doe,* 93 N.M. 481, 601 P.2d 451 (Ct.App.1979); NMSA 1978, § 32–1–30(A)(4) (Repl.Pamp.1989). We do not agree. It is true that Section 32–1–30(A)(4) has been interpreted as requiring the children's court to consider uncontradicted evidence of amenability to treatment or rehabilitation as a child prior to transferring the matter to the district court. *See State v. Doe,* 93 N.M. at 482, 601 P.2d at 452. In contrast, however, Section 32–1–31(G) evinces a legislative intent to permit the children's court to exercise its discretion concerning what disposition should be made for a child who has been adjudicated a delinquent. *See State v. Michael R.,* 107 N.M. 794, 765 P.2d 767 (Ct.App.1988).

The child also argues that the children's court must consider the recommendations regarding rehabilitation at sentencing as it must consider amenability to treatment at a transfer proceeding. Comparison of Sections 32–1–30(A)(4) (discretionary transfer), 32–1–31(G) (dispositional matters), and 32–1–34(E) (options for disposition of delinquent child) indicates that in adopting the Children's Code, our legislature imposed different criteria between transfer proceedings and dispositional decisions for delinquent children. The dispositional authority of the children's court is restricted to that which is conferred by the legislature under the Children's Code. *Cf. State v. Jennings,* 102 N.M. 89, 691 P.2d 882 (Ct.App.1984) (trial court's sentencing authority must be consistent with legislative authority). The child contends that the evidence was uncontradicted that he should not be committed to the Youth Authority and instead be placed on probation with outpatient treatment.

The only prerequisite to the determination that a child is delinquent is the finding that the child has committed a delinquent act. NMSA 1978, § 32–1–3(P) (Repl.Pamp.1989); *State v. Michael R.,* 107 N.M. at 795, 765 P.2d at 768. However, a finding of need for care and rehabilitation is a prerequisite to ordering that a child be placed in the custody of Youth Authority. § 32–1–31(E). The record indicates that the children's court properly entered its findings that the child had committed a delinquent act and that the child was in need of care and rehabilitation. The children's court's dispositional order will not be disturbed on appeal absent a showing of manifest abuse of discretion. *See In re Doe,* 88 N.M. 505, 542 P.2d 1195 (Ct.App. 1975).

In formulating its decision concerning the appropriate disposition to be imposed, the court must consider the best interests of the child, the child's family, and the public. *See* NMSA 1978, § 32–1–2(A)–(C) (Repl.Pamp.1989). The court should also consider "any other matters relevant to the need for treatment or [the] appropriate disposition of the case." NMSA 1978, § 32–1–32(A) (Repl.Pamp. 1989). This authority allows the court to consider the seriousness of the child's conduct.

In the instant case, the disposition of the children's court was supported by the record and was in accordance with the provisions of the Children's Code. Contained in the various recommendations submitted to the court were findings which supported its disposition. The YDDC report stated that the child did not perceive any wrongdoing regarding his behavior aside from the end result of the victim's death, and that the child had intermittent tendencies toward explosive behavior, the unpredictability of which posed a risk toward the personal safety and well-being of others. Additionally, the report stated that, without significantly altering his perceptions and attitude, the child's potential for future acts of violence is strong and his prognosis poor. Despite the existence of countervailing testimony, in light of the evidence detailed above, the dispositional order was consistent with the evidence and

the dispositional authority invested in the children's court. *See In re Doe.*

Nor do we agree with the child's contention that the children's court failed to consider the recommendations before it or to weigh the options specified in Section 32–1–34(E) prior to entering its dispositional order. The record reveals that the court received evidence favorable to the child from Dr. Matthews and from Mr. Sais, the child's juvenile probation and parole officer. *See State v. Doe,* 100 N.M. 649, 674 P.2d 1109 (1983) (the fact that the children's court heard evidence of the advantages and disadvantages of two alternatives was indicative that it had considered the matter within the provisions of the statute). The children's court also received and examined letters recommending leniency toward the child. The children's court even remarked that it might have considered probation but for the existence of certain facts. These factors indicate that the court evaluated and weighed the matters presented by both the child and the children's court attorney at the dispositional hearing.

Similarly, we are unpersuaded by the child's contention that the children's court in fashioning its dispositional order failed to consider the primary purposes of the Children's Code. Section 32–1–2(B) states that the Code shall be interpreted and construed to effectuate the following legislative purpose:

> [C]onsistent 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 * * *.

Another stated purpose of the Code is "to provide effective deterrents to acts of juvenile delinquency, including an emphasis on community-based alternatives[.]" § 32–1–2(F).

Considering these purposes, we find no abuse of discretion in the children's court's dispositional order. The court's remarks emphasized that in reaching its decision it had considered, among other things, the child's age, the manner in which the attack occurred, and the fact that the victim died. Given the circumstances under which the death occurred, the children's court could have reasonably determined that in view of the evidence and matters presented, transferring the custody of the child to the Youth Authority was consistent with the child's best interests, the interests of the child's family, and the interests of the public. § 32–1–2(A)–(C).

CONCLUSION

The disposition of the children's court is affirmed.

IT IS SO ORDERED.

BIVINS and PICKARD, JJ., concur.

823 P.2d 944

NEW MEXICO WATER QUALITY CONTROL COMMISSION and the Environmental Improvement Division of the New Mexico Health and Environment Department, Plaintiffs–Appellants,

v.

EMERALD CORPORATION, INC., Ralston Oil Company, Inc., Ralston, Inc., and Unico, Inc., Defendants–Appellees.

No. 11712.

Court of Appeals of New Mexico.

Nov. 22, 1991.

Louis W. Rose, Sp. Asst. Atty. Gen., Deputy Gen. Counsel, Susan C. Kery, Sp. Asst. Atty. Gen., Asst. Gen. Counsel, Santa Fe, for plaintiffs-appellants.

Michael J. Condon, Gallegos Law Firm, Santa Fe, for defendant-appellee Unico, Inc.

Lyman G. Sandy, Miller, Stratvert, Torgerson & Schlenker, P.A., Albuquerque, for defendant-appellee Emerald Corp.

Esteban A. Aguilar, The Payne Law Firm, P.C., Albuquerque, for defendant-appellee Ralston Oil Co.

OPINION

APODACA, Judge.

The New Mexico Water Quality Control Commission and the Environmental Improvement Division of the New Mexico Health and Environment Department (plaintiffs) appeal the district court's dismissal with prejudice of plaintiffs' complaint. The dismissal was based on SCRA 1986, 1–041(E) (Rule 41(E)), which allows such dismissal if a plaintiff has failed to take steps to "bring such action or proceeding to its final determination for a period of at least three (3) years * * *." We hold that plaintiffs' action in the proceeding against only one defendant of several multiple defendants was sufficient to defeat a Rule 41(E) motion. We therefore reverse the district court.

On August 1, 1985, plaintiffs filed a complaint against Emerald Corporation, Ralston Oil Company, Ralston, Unico (defendants), and Bar–F Enterprises (Bar–F). Plaintiffs sought civil penalties and injunctive relief based on alleged contamination of soil and ground water due to leaking underground storage tanks located under a Diamond Shamrock gas station. The complaint alleged that each defendant owned the storage tanks, transmission lines, and pumps at the station during the relevant period. Bar–F was the last defendant to

own the station. The parties engaged in pretrial discovery from November 21, 1985, to June 16, 1986. During discovery, plaintiffs and Bar-F initiated settlement discussions, which eventually culminated in a settlement agreement on May 5, 1987.

As part of the settlement agreement, Bar-F conducted a hydrogeological investigation to define the area extent and magnitude of petroleum products contamination both on and off site attributable to losses of oil products from the Diamond Shamrock station. This investigation was completed in November 1988. Plaintiffs and Bar-F filed a joint motion to dismiss Bar-F from the action on February 10, 1989, and an order of dismissal was entered that same day.

On June 6, 1989, defendants moved for dismissal with prejudice under Rule 41(E), asserting that plaintiffs had failed to take any action to bring the case to a final determination for more than three years. Plaintiffs opposed the motion on the ground that their pursuit of a settlement against one defendant in anticipation of resolving the dispute against the other defendants was sufficient to avoid dismissal under Rule 41(E). After a hearing, the district court granted defendants' motion and ordered plaintiffs' suit dismissed with prejudice on July 5, 1989.

The precise issue presented by this appeal, whether action against one defendant in an action involving multiple defendants is sufficient to avoid dismissal under Rule 41(E), has not been addressed previously in New Mexico. The rule states:

> **E. Dismissal of action with prejudice.** (1) In any civil action or proceeding pending in any district court in this state, including actions in which a jury trial has been demanded, when it shall be made to appear to the court that the plaintiff therein * * * has failed to take any action to bring such action or proceeding to its final determination for a period of at least three (3) years after the filing of said action or proceeding * * *, any party to such action or proceeding may have the same dismissed with prejudice * * * by filing in such pending action or proceeding a written motion moving the dismissal thereof with prejudice.

R. 1-041(E). A district court has discretion in determining whether to dismiss for inactivity, and its decision will be reversed only if there has been an abuse of discretion. *Cottonwood Enters. v. McAlpin*, 109 N.M. 78, 781 P.2d 1156 (1989).

We hold that neither Rule 41(E) nor our case law requires that a plaintiff be equally active in prosecuting the claim against all of the defendants. "What constitutes activity bringing a case to a final determination must be decided considering the facts of each case." *Cottonwood Enters. v. McAlpin*, 109 N.M. at 80, 781 P.2d at 1158. The trial court must consider all the activity conducted by the plaintiff, not just activity appearing in the court record. *State ex rel. Reynolds v. Molybdenum Corp. of Am.*, 83 N.M. 690, 496 P.2d 1086 (1972). As noted in *Jones v. Montgomery Ward & Co.*, 103 N.M. 45, 47, 702 P.2d 990, 992 (1985):

> Many factors must be considered by the district court in ruling on a motion to dismiss pursuant to Rule 41(e), whether or not they are made a part of the court file. These factors include 1) all written and oral communications between the court and counsel; 2) actual hearings by the court on motions; 3) negotiations and other actions between counsel looking toward the early conclusion of the case; 4) all discovery proceedings; and 5) any other matters which arise and the actions taken by counsel in concluding litigation.

A plaintiff is not required to have actually concluded the matter within three years; he is only required to have "made some effort within three years of the filing of his complaint to further the prosecution of his case toward a final determination." *Jimenez v. Walgreens Payless*, 106 N.M. 256, 258, 741 P.2d 1377, 1379 (1987). In fact, the mere filing of requests for discovery constitutes sufficient action to avoid dismissal under Rule 41(E). *See id.*

In a case in which there are multiple defendants, and no action is taken against one or more of the defendants, but plaintiff has acted to bring the case to a final con-

clusion against one or more of the other defendants, the court should consider the entire history of the case, the effect that a dismissal of one party will have on the litigation, and other attendant circumstances, in determining whether the case should be dismissed against one or more of the remaining defendants under Rule 1-41(E). *See Jones v. Montgomery Ward & Co.*

In this appeal, we believe that plaintiffs took sufficient action toward bringing the case to a final determination, thus satisfying Rule 41(E)'s requirement. In fact, plaintiffs reached a final determination against Bar-F. Plaintiffs and Bar-F entered into a settlement agreement in May 1987, and entered a Joint Order of Dismissal dismissing Bar-F from the case in February 1989. Between May 1987 and November 1988, as part of the settlement agreement with plaintiff, Bar-F conducted an extensive hydrogeological investigation into the extent of the contamination. Thus, in light of each of these factors, we conclude that plaintiffs did not "[fail] 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 or proceeding," as required by Rule 41(E). We therefore hold that the district court abused its discretion in dismissing the action with prejudice.

Although our holding is based solely on our reading of the New Mexico case law previously addressing dismissals under Rule 41(E), we observe that only one other state with a rule comparable to ours has addressed that rule's application to multiple defendants. The courts in Florida have generally held that action taken against one of several defendants involved in the same lawsuit will defeat dismissal under Florida's rules. *See, e.g., Belli v. Porsche-Audi of Broward, Inc.*, 503 So.2d 441 (Fla. Dist.Ct.App.1987); *Koenig v. Delotte Haskins & Sells*, 474 So.2d 305 (Fla.Dist.Ct. App.1985); *Mueller v. North Broward Hosp. Dist.*, 403 So.2d 581 (Fla.Dist.Ct.App. 1981); *DeVaney v. Rumsch*, 247 So.2d 69 (Fla.Dist.Ct.App.1971).

Relying on *Martin v. Leonard Motor-El Paso*, 75 N.M. 219, 402 P.2d 954 (1965), defendants next contend that "New Mexico has long recognized the trial court's inherent power to dismiss a complaint for lack of prosecution in furtherance of the orderly administration of justice." A trial judge has the "inherent power to dismiss a cause of action for failure to prosecute, independent of any statutory authority." *Cottonwood Enters. v. McAlpin*, 109 N.M. at 81, 781 P.2d at 1159. Such dismissals are reviewed for abuse of discretion. *Id.*

Defendants argue that the district court "could have and should have" dismissed plaintiffs' claim under its inherent power to dismiss actions for inactivity. Yet, there is no indication in the record that the district court exercised such authority independent of Rule 41(E). Nevertheless, plaintiffs' activity regarding Bar-F, as previously noted, demonstrated plaintiffs' efforts to bring the cause to a final determination and therefore, had the district court exercised such inherent power, it would have been an abuse of discretion in any event.

In summary, we conclude that, under the facts of this appeal, action taken by plaintiffs with respect to Bar-F, in an action involving multiple defendants, was sufficient to avoid dismissal under Rule 41(E). We thus hold that the district court abused its discretion in dismissing the case for failure to prosecute. We remand with instructions to reinstate plaintiffs' complaint and for further proceedings consistent with this opinion.

IT IS SO ORDERED.

DONNELLY and FLORES, JJ., concur.

823 P.2d 948

STATE of New Mexico, Plaintiff–Appellee,

v.

SANTIAGO RENE O., a child, Defendant–Appellant.

No. 13295.

Court of Appeals of New Mexico.

Dec. 4, 1991.

[redacted]

Tom Udall, Atty. Gen., Max Shepherd, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

CHAVEZ, Judge.

The child appeals a children's court judgment, after a jury trial, adjudging him to be delinquent and in need of care or rehabilitation. Our second calendar notice proposed summary reversal. The state has filed a memorandum in opposition. We have considered the state's arguments and reverse.

The child, who was fourteen years old at the time, shot another teenager in the leg. He then fled and was arrested at his home. The police questioned the child and took a taped statement in which he stated that he had acquired the gun while he was living with his mother in Albuquerque.

The child was charged with aggravated battery and testified at his jury trial that he was only in possession of the gun because he was holding it as collateral for a BB gun which he had loaned another youth. The state sought to use the statement made on the night of the shooting to impeach the child's testimony. The court ruled that the state could use the prior statement for the purposes of impeachment on the strength of *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). The state asked the child about his prior inconsistent statements, and the child admitted that he lied to the officer who took his statement.

In *Harris,* the Supreme Court held that a prior inconsistent statement which was not admissible in the prosecution's case in chief because defendant had not been given *Miranda* warnings was admissible for impeachment purposes. NMSA 1978, Section 32–1–27(F) (Repl.Pamp.1989) states that "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." Our statute does not limit the restriction against admission for purposes of establishing guilt.

In *State v. Jonathan M.,* 109 N.M. 789, 791, 791 P.2d 64, 66 (1990), our supreme court observed that "[c]hildren of tender years lack the maturity to understand [their] constitutional rights and the force of will to assert those constitutional rights." Under the circumstances present in this case it is unlikely that an adult or child over age fifteen would have made an incriminating statement such as that given by the child. *See id.* By prohibiting the admission of such statements, Section 32–1–27(F) accomplishes the goal of encouraging children to converse with adults freely without fear that their statements will be

used against them at a later date. *State v. Jonathan M.* Nonetheless, the state argues that the statement should be admissible to impeach the child's trial testimony in order to accomplish the "larger" goal of rehabilitation of a dishonest child.

We are not persuaded that the goal of encouraging free communication is less significant than the goal of rehabilitation. Nor do we believe that rehabilitation is sacrificed on the altar of open communication. As our supreme court in *Jonathan M.* points out, "[i]t 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.*" *Id.* at 790–91, 791 P.2d at 65–66 (emphasis added). The state's concern over a juvenile's ability to perjure himself with impunity under Section 32–1–27(F) is therefore unfounded. The court may fully consider the prior inconsistent statements of a child in formulating that child's course of rehabilitation. Furthermore, we believe that the procedure for which the state seeks approval would impermissibly weaken the protections created by the statute and discourage children under fifteen from communicating with adults.

Since the language of Section 32–1–27(F) is plain and unambiguous, there is no basis for reading into the statute the exception sought by the state. *State v. Ortiz,* 78 N.M. 507, 433 P.2d 92 (Ct.App.1967). Furthermore, we do not believe that *Jonathan M.* admits of such a result. *See Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973).

We reverse and remand for a new trial.

IT IS SO ORDERED.

DONNELLY and MINZNER, JJ., concur.

823 P.2d 949

CITY OF ALBUQUERQUE, Plaintiff–Appellee,

v.

JACKSON BROTHERS, INC., and Wesley Jackson, Defendants–Appellants.

No. 11697.

Court of Appeals of New Mexico.

Dec. 4, 1991.

Robert M. White, Asst. City Atty., Albuquerque, for plaintiff-appellee.

Mark C. Dow, Stephanie Landry, Hinkle, Cox, Eaton, Coffield & Hensley, Albuquerque, for defendants-appellants.

OPINION

BIVINS, Judge.

Defendants, Jackson Brothers, Inc., and Wesley Jackson (Jackson Brothers) appeal a judgment of the district court enjoining them from continued violation of the City of Albuquerque's (City) Zoning Code regulations with respect to a sign, and ordering immediate compliance. Because the sign is located partially on the State of New Mexico Highway and Transportation Department's (SHTD) right-of-way pursuant to an encroachment agreement, Jackson Brothers argue on appeal that: (1) the sign is not subject to City regulation because of the State's supremacy and therefore, the City cannot encroach on the State's exercise of its sovereign powers; (2) the contract between the State and Jackson Brothers preempts the City's zoning ordinance. We affirm the district court to the extent its judgment affects the private property interests of Jackson Brothers. Because the State is not a party to this action, we make no disposition with respect to its interests or the exercise of its sovereign power over that interest. Affirmed in part; reversed in part.

The district court decided the case on stipulated facts. Those facts, in part, together with the pleadings provide the following background. Jackson Brothers own and operate a motel near the Candelaria off-ramp from Interstate 25. They erected a fifty-five foot free-standing sign on their property. The City gave notice that the sign violated the municipality's zoning ordinance which restricts signs in the applicable zone to twenty-six feet. Before the present action was filed, the SHTD sued to condemn part of Jackson Brothers' property which included a portion of the land on which the sign is located. As a result of a settlement between the SHTD and Jackson Brothers, and as part of the consideration for the settlement, the SHTD agreed to allow a portion of the sign to remain on the highway right-of-way. The SHTD issued a sign permit to Jackson Brothers pursuant to New Mexico State Highway and Transportation Department Rule 88–5(L), Paragraph E(2)(b) (1988). At the time of the encroachment agreement (agreement), the SHTD was aware the City had given notice that the sign was out of compliance. The record shows this action to abate the zoning ordinance violation was filed approximately two months before the agreement was made between the SHTD and Jackson Brothers.

The district court, in its conclusions, recognized that when municipal law conflicts with state law, the latter controls. Nevertheless, the court reasoned that the SHTD did not grant rights to Jackson Brothers that conflicted with the City's Zoning Code. We agree with the first conclusion; however, without the State as a party to this litigation, we decline to resolve issues that might affect its rights.

The Jackson Brothers' arguments on appeal are succinctly summarized in the following paragraph from their brief:

> The sign at issue is not governed by the City's sign ordinance but is controlled exclusively by the contract between the State and Jackson Brothers, Inc. for two reasons. First, the City cannot regulate the sign because to do so would, under the circumstances of this case, encroach upon the State's exercise of its sovereign powers. Second, the Agreement has preemptive effect over the City's sign ordinance.

These arguments might have validity if the encroachment agreement purported to control the entire sign. We do not believe it does. First, the agreement covers an encroachment which, by definition, means an illegal intrusion upon the lands of another. *See Black's Law Dictionary* 473 (5th ed. 1979). The agreement makes that intrusion legal. Second, the recitals make clear that the sign is located only on a portion of the SHTD's right-of-way; "the parties have settled the * * * condemnation to which a portion of the sign (its footings and overhang) are located on SHTD right-of-way." The agreement also

recites that, "[a]s a condition of the settlement, the parties have agreed to a permit that would allow the sign to remain in its present location * * *." After stating conditions for the encroachment, the agreement provides that Jackson Brothers, "as consideration for the license to have said encroachment remain within the right-of-way" agree to the conditions enumerated.

Read as a whole, we do not believe that the agreement evinces an intent on the part of the SHTD to exercise control beyond its right-of-way. In fact, the agreement is carefully worded to avoid doing so. *See Martinez v. Universal Constructors, Inc.*, 83 N.M. 283, 284, 491 P.2d 171, 172 (Ct. App.1971) (where evidence is documentary, reviewing court is in as good a position as trial court to interpret).

Having determined that the encroachment agreement does not affect that portion of the sign located on private property, we hold the City had regulatory control over that portion. In reaching this result, we recognize that Jackson Brothers, after removing or lowering the height of its sign on the portion located on private property, may be able to leave intact the portion located on the SHTD'S right-of-way. This "splitting the baby" resolution may seem unsatisfactory; nevertheless, we will not interfere with the State's sovereign powers. Our case law is clear on that subject. *Robert E. McKee, Gen. Contractor, Inc. v. Bureau of Revenue,* 80 N.M. 453, 455, 457 P.2d 701, 703 (1969) ("[t]he relationship between the State and [a] municipality is not one between sovereigns"; the City's authority is derived from the State); *City of Santa Fe v. Armijo,* 96 N.M. 663, 664, 634 P.2d 685, 686 (1981) (subject to certain exceptions, "[a] state governmental body is not subject to local zoning regulations or restrictions"; "[a] city has no inherent right to exercise control over state land"). *But cf. City of Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque,* 111 N.M. 608, 613, 808 P.2d 58, 63 (Ct.App.) (purpose of N.M. Const. art. X, § 6(D) is to provide maximum local self-government; powers of home rule municipalities shall be given liberal construction), *cert. denied,* 113 N.M. 524, 828 P.2d 957 (1992).

In arguing for the right to regulate the entire sign, the City contends that the supreme court in *Armijo* adopted a modified immunity rule. We do not read *Armijo* to say that, but rather that the State is immune from any municipal regulations. *See Armijo,* 96 N.M. at 664, 634 P.2d at 686. As we understand modified immunity, it would distinguish between government and private functions. If a use furthers a private purpose, there is no immunity. *See* 6 Patrick J. Rohan, *Zoning on Land Use Controls* § 40.03[2](a) (1978). This principle finds support in case law. *See, e.g., Tovrea v. Trails & Improvement Ass'n,* 130 Ariz. 108, 634 P.2d 396, 397 (Ct.App.1981) (governmental body bound by local zoning ordinances when acting in proprietary capacity rather than governmental capacity); *Youngstown Cartage Co. v. North Point Peninsula Community Co-Ordinating Council,* 24 Md.App. 624, 332 A.2d 718, 721 (1975) (state land leased for private use is subject to local zoning ordinances).

In response to the City's argument for adoption of modified immunity, Jackson Brothers contend that, even if that rule were to apply, the sign would be immunized. Jackson Brothers remind us that the State has an undeniable right to regulate its right-of-way on which the sign is partially located, and the power to contract with respect to the use of its land. Moreover, says Jackson Brothers, to allow the City to regulate the sign, would reverse the State's decision to allow the sign to remain, interfere with the State's powers of eminent domain, and undermine the State's ability to protect the public treasury through settlement.

While it is difficult to see how permitting a private outdoor advertising sign to remain in part on the SHTD's right-of-way furthers governmental interests, we will not address that question absent either the State as a party or findings of fact. Here, the parties' stipulated facts did not address governmental versus private interests, and the district court was not requested to

make findings. Therefore, we do not resolve that question.

Both sides argue that *Armijo* controls this case. While we follow the principles laid down in *Armijo,* the facts are clearly distinguishable. The oil field rig the city attempted to regulate in that case was situated on State land. Here, we do not disturb the permitted encroachment of the sign on the SHTD's right-of-way. We hold only that the City may regulate the portion located on private land. *Armijo* does not apply to private land.

We affirm the judgment insofar as it directs compliance with and abates the violation of the City ordinance with respect to that portion of the sign located on Jackson Brothers' private property. The remainder of the judgment is set aside. The judgment shall be modified accordingly. The case is remanded. No costs are awarded.

IT IS SO ORDERED.

DONNELLY and FLORES, JJ., concur.

824 P.2d 293

Nancy J. KLOPP, Petitioner,

v.

The WACKENHUT CORPORATION and Trans World Airlines, Inc., Respondents.

No. 19318.

Supreme Court of New Mexico.

Jan. 8, 1992.

Duhigg, Cronin & Spring, David Duhigg, Helena Gorochow, Albuquerque, for petitioner.

William H. Carpenter, Michael B. Browde, Albuquerque, for amicus curiae NM Trial Lawyers Ass'n.

Rodey, Dickason, Sloan, Akin & Robb, Susan L. Snyder, Albuquerque, for respondent TWA.

Sager, Curran, Sturges & Tepper, P.C., D. Michael Johanson, C. Kristine Osnes, Albuquerque, for respondent Wackenhut.

Weinbrenner, Richards, Paulowsky, Sandenaw & Ramirez, Thomas A. Sandenaw, Jr., Las Cruces, Montgomery & Andrews, Bruce Herr, Catherine E. Pope, Santa Fe, for amicus curiae NM Defense Lawyers Ass'n.

OPINION

RANSOM, Chief Justice.

Nancy Klopp appealed to the court of appeals from a directed verdict rendered at the conclusion of her case against Trans World Airlines, Inc. and Wackenhut Corpo-

ration. Klopp had sued for personal injuries sustained when she tripped over the stanchion base of a metal detector at an airport security station. Wackenhut operated the security station for TWA. Deferring to this Court to resolve whether the open and obvious danger doctrine has been abrogated by comparative negligence, the court of appeals affirmed the directed verdict.

We issued a writ of certiorari to review, with respect to an obvious danger, the duty owed business visitors by TWA as the occupier of the premises, and by Wackenhut as the operator of the station. We also consider whether it may be inferred from the evidence that either defendant reasonably should have anticipated that persons passing through the station would be distracted from the dangerous condition. We are aided in this appeal by the able amicus curiae briefs of the New Mexico Defense Lawyers Association and the New Mexico Trial Lawyers Association.

Standard of review. Just as the trial court must consider all of the evidence in ruling upon a motion for directed verdict, this Court must do likewise on appeal from a judgment entered pursuant to a directed verdict; both courts must resolve in favor of the party resisting the motion any conflicts or contradictions in the evidence, and the interpretation most favorable to such party must be accepted in the face of reasonable but conflicting inferences deducible from uncontradicted evidence. *Melnick v. State Farm Mut. Auto. Ins. Co.,* 106 N.M. 726, 728–29, 749 P.2d 1105, 1107–08 (adopting, inter alia, the standard announced in *Skyhook Corp. v. Jasper,* 90 N.M. 143, 146, 560 P.2d 934, 937 (1977)), *cert. denied,* 488 U.S. 822, 109 S.Ct. 67, 102 L.Ed.2d 44 (1988). In applying this standard of review, the principal consideration is to minimize interference with the jury function so as not to erode a litigant's right to trial by jury. *Melnick,* 106 N.M. at 729, 749 P.2d at 1108. A plaintiff may not be deprived of a jury determination simply because the possibility of a recovery may appear remote; rather, a directed verdict is proper only when there is no pretense of a prima facie case. There must be no substantial evidence supporting one or more essential elements of the case. *Id.*

Most favorable facts. Accordingly, Klopp summarizes the evidence adduced at trial as follows. On February 27, 1988, she was proceeding through the Albuquerque International Airport to board an airplane when she passed through an airport security station. The station consisted of an upright metal detector, to the side of which was a baggage table. The station was operated by Wackenhut under contract with TWA. The latter owned the equipment and had arranged its particular configuration. The alarm sounded as Klopp stepped through the metal detector. Having activated the alarm, Klopp removed her bracelets, placed them on a tray on the table, and stepped through the detector again. The alarm was not triggered, and she moved to the left to retrieve her bracelets. In so doing, she tripped over the protruding stanchion base of the metal detector. She fell, injuring her left leg and right knee. The stanchion base protruded approximately eighteen inches. Preoccupied with retrieving her belongings, Klopp's attention was distracted from this base.

The issues. In their motions for directed verdict, TWA and Wackenhut argued that the stanchion base of the metal detector was open and obvious and, because there was no reason to believe it constituted a danger, no duty of care was owed to Klopp. TWA relied upon the rule of law set forth in Uniform Jury Instruction (UJI) 13–1310:

> An [owner] [occupant] owes a duty to a business visitor, with respect to known or obvious dangers, if and only if:
>
> (1) The [owner] [occupant] knows or has reason to know of a dangerous condition on his premises involving an unreasonable risk of danger to a business visitor; and
>
> (2) The [owner] [occupant] should reasonably anticipate that the business visitor will not discover or realize the danger [or that harm will result to the business visitor, even though the business visitor knows or has reason to know of the danger].

> If both of these conditions are found to exist, then the [owner] [occupant] had a duty to use ordinary care to protect the business visitor from harm.

SCRA 1986, 13–1310.

Klopp contends that, under the evidence as recited, fact questions existed whether the protruding stanchion base involved an unreasonable risk of danger, and whether TWA reasonably could have anticipated that a passenger's attention may be distracted from that danger, or that such person would forget the danger she had discovered. Klopp also argues that the open and obvious danger rule as set forth in UJI 13–1310 is, in essence, a contributory negligence bar to her cause of action, and thus, the instruction is incompatible with the doctrine of comparative negligence adopted in *Scott v. Rizzo,* 96 N.M. 682, 634 P.2d 1234 (1981). Klopp submits that since abrogation of the open and obvious danger rule would impose no significant new duties and conditions, or take away previously existing rights, retrospective disapproval of the doctrine is appropriate. *See Lopez v. Maez,* 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982). TWA takes issue with Klopp's statement of the evidence and argues that the open and obvious danger rule is strictly one of duty without regard to any fault of the business visitor.

TWA submits, further, that Klopp failed to preserve a claim of error in regard to the incompatibility of the open and obvious danger rule with comparative negligence. The record reflects to the contrary that, at the conclusion of Klopp's case in chief and in response to the motion for directed verdict, Klopp argued that any negligence on her part in the face of an open and obvious danger should not eliminate the duty of care owed by the occupier of the premises. "[New Mexico is] a comparative negligence state, so consequently whether or not plaintiff may or may not have been negligent does not eliminate ... the duty the defendant was talking about [in relation to an open and obvious danger]." We agree with Klopp that she raised the question of the jury's role in comparing negligence and apportioning liability and that the issue of the open and obvious danger rule under comparative negligence is properly before this Court.

Duty to warn distinguished. The Defense Lawyers Association argues that, in both premises liability and products liability cases, New Mexico courts long have considered that the open and obvious danger rule applies to that portion of the negligence formula concerning the duty of the landowner or supplier *to warn* of known, or open and obvious dangers. *Skyhook Corp. v. Jasper,* 90 N.M. 143, 560 P.2d 934 (1977); *Proctor v. Waxler,* 84 N.M. 361, 503 P.2d 644 (1972); *Garrett v. Nissen Corp.,* 84 N.M. 16, 498 P.2d 1359 (1972); *Villanueva v. Nowlin,* 77 N.M. 174, 420 P.2d 764 (1966); *Romero v. Kendricks,* 74 N.M. 24, 390 P.2d 269 (1964); *Burgi v. Acid Eng'g, Inc.,* 104 N.M. 557, 724 P.2d 765 (Ct.App.), *cert. denied,* 104 N.M. 460, 722 P.2d 1182 (1986); *Jones v. Minnesota Mining & Mfg. Co.,* 100 N.M. 268, 669 P.2d 744 (Ct.App.1983); *Arenivas v. Continental Oil Co.,* 102 N.M. 106, 692 P.2d 31 (Ct.App.1983), *cert. quashed,* 102 N.M. 88, 691 P.2d 881 (1984); *Michael v. Warner/Chilcott,* 91 N.M. 651, 579 P.2d 183 (Ct.App.), *cert. denied,* 91 N.M. 610, 577 P.2d 1256 (1978); *Perry v. Color Tile of New Mexico,* 81 N.M. 143, 464 P.2d 562 (Ct.App.1970).[1] In this case, however, we address the duty issue irrespective of a specific duty to warn. If the nature of the risk would not be made more obvious through the giving of additional warning, then the giving of a warning would be a false issue. But this is not dispositive of whether ordinary care has been exercised to keep the premises safe.

Duty to exercise ordinary care without regard to whether persons invited on

1. The Defense Lawyers also acknowledge the few New Mexico cases that have held, in fact situations in which plaintiff encountered a known and obvious danger, that plaintiff assumed the risk, *Dempsey v. Alamo Hotels, Inc.,* 76 N.M. 712, 418 P.2d 58 (1966); *Bogart v. Hester,* 66 N.M. 311, 347 P.2d 327 (1959), or that plaintiff was contributorily negligent. *Boyce v. Brewington,* 49 N.M. 107, 158 P.2d 124 (1945); *Wood v. Southwestern Pub. Serv. Co.,* 80 N.M. 164, 452 P.2d 692 (Ct.App.1969).

premises are themselves negligent in some way. Since deciding the case before us, the court of appeals has filed an opinion in *Davis v. Gabriel,* 111 N.M. 289, 804 P.2d 1108 (Ct.App.1990), addressing whether recovery against a contractor was barred by a business visitor's knowledge of the risk of injury from debris left in a hallway by the contractor who was remodeling an office building. Initially, the court correctly applied the rule that one who, on behalf of the possessor of realty, creates a dangerous condition is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the realty. *Id.* at 291, 804 P.2d at 1110; *see also Tipton v. Texaco, Inc.,* 103 N.M. 689, 695–96, 712 P.2d 1351, 1357–58 (1985) (approving *Restatement (Second) of Torts* § 384 (1964)). However, in applying the rule of liability for a possessor of land, the court of appeals stated that the possessor of land has no duty to take steps that are necessary only to protect business visitors who are negligent. *Davis,* 111 N.M. at 291, 804 P.2d at 1110.

In *Davis* the court of appeals conditioned the duty owed invitees upon whether (1) the possessor of land reasonably could have foreseen that invitees *exercising due care* would be injured by the condition of the land, and (2) such risk made it unreasonable for the possessor not to take certain precautions. *Id.* at 292, 804 P.2d at 1111. Following a similar rationale, in oral argument in the case before us, TWA contended it had no duty to design the security station "for klutzes and total idiots." We disagree with this analysis and with the inferences drawn from the recent opinion of the court of appeals in *Davis.* We hold that, in a place of public accommodation, an occupier of the premises owes a duty to safeguard each business visitor whom the occupier reasonably may foresee could be injured by a danger avoidable through reasonable precautions available to the occupier of the premises.

In *Davis* the court of appeals held that "the scope of the duty is determined by reference to the foreseeable behavior of reasonably careful invitees, considered as a class." *Id.* If we were to accept that no duty is owed to invitees foreseeably injured only through contributory negligence, we would vitiate the ameliorating effect of comparative fault. While we fully understand that, absent a breach of duty, in logic there can be no fault to compare, the fallacy in that argument is that it is premised not on the foreseeable behavior of business visitors, but on the foreseeable behavior of reasonably careful visitors. On that premise, the negligence of a particular visitor is preclusive if outside the ambit of the foreseeable behavior of reasonably careful visitors.

Simply by making hazards obvious to reasonably prudent persons, the occupier of premises cannot avoid liability to a business visitor for injuries caused by dangers that otherwise may be made safe through reasonable means. A risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care. *See Fabian v. E.W. Bliss Co.,* 582 F.2d 1257, 1263 (10th Cir.1978) (manufacturer has duty to use reasonable care in design of its products, and that duty is not changed because any risk from use of products might be obvious). Cases that appear to have held the duty to avoid unreasonable risk of injury to others is satisfied by an adequate warning are overruled by us today. *E.g., Skyhook Corp. v. Jasper,* 90 N.M. at 148, 560 P.2d at 939 (no duty to make product safe when risk is obvious, known, and specifically warned against); *Garrett v. Nissen Corp.,* 84 N.M. at 20, 498 P.2d at 1363 (if duty to warn is satisfied, then there is no defect in product). Moreover, we think that some degree of negligence on the part of all persons is foreseeable, just like the inquisitive propensities of children, and thus, should be taken into account by the occupant in the exercise of ordinary care.[2]

2. The Defense Lawyers Association points out that UJI 13–1310 (open and obvious danger rule) does not define the term "dangerous condition." The Defense Lawyers submit that the definition of that term given in UJI 13–1319 (duty of occupant to keep premises free from "dangerous condition") could apply to UJI 13–1310. A dangerous condition is defined in UJI

■ *Unforeseeable encounter with a known danger.* If the contributory negligence of a business visitor has been so extraordinary as to have been unforeseeable, then it would not have been a breach of duty for the occupier not to have taken precautions against an open and obvious risk. We do not read UJI 13-1310 to say anything to the contrary. There is no duty in relation to known or obvious dangers if the occupier of the premises has no reason to know of an unreasonable risk of danger to a business visitor. " 'If people who are likely to encounter a condition may be expected to take perfectly good care of themselves without further precautions, then the condition is not unreasonably dangerous because the likelihood of harm is slight.' " *Proctor v. Waxler,* 84 N.M. 361, 364, 503 P.2d 644, 647 (1972) (quoting 2 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 27.13, at 1489-90 (1956)).

Court rarely decides existence of unreasonable risk. Recently, in *Calkins v. Cox Estates,* 110 N.M. 59, 792 P.2d 36 (1990), we explored the duty of a landowner to maintain a common area:

> A duty to an individual is closely intertwined with the foreseeability of injury to *that individual* resulting from an activity conducted with less than reasonable care by the alleged tort-feasor. *See [Ramirez v. Armstrong,* 100 N.M. 538, 541, 673 P.2d 822, 825 (1983)]; *Palsgraf v. Long Island R.R.,* 248 N.Y. 339, 162 N.E. 99 (1928). "If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant." *Ramirez,* 100 N.M. at 541, 673 P.2d at 825.
>
> A plaintiff must show that defendant's actions constituted a wrong against him, not merely that defendant acted beneath a required standard of care and that plaintiff was injured thereby. He must show that a relationship existed by which defendant was legally obliged to protect the interest of plaintiff. This concept limits liability for negligent conduct—a potential plaintiff must be reasonably foreseeable to the defendant because of defendant's actions. *See Palsgraf,* 248 N.Y. at 342, 162 N.E. at 100.

Id. at 62, 792 P.2d at 39. Further:

> In New Mexico, as stated in the majority opinion, we define negligence as an act foreseeably involving an unreasonable risk to that individual who complains of injury. *See also* SCRA 1986, 13-1601. Foreseeability is most often a question of fact and only rarely, as in *Palsgraf,* may foreseeability be considered a false jury issue.

Id. at 67, 792 P.2d at 44 (Ransom, J., dissenting).

■ *Jury to decide whether risk is unreasonable.* We hold that it is for the jury to decide in virtually every case whether a dangerous condition on the premises involved "an unreasonable risk of danger to a business visitor" and whether the occupier "should reasonably anticipate that the business visitor will not discover or realize the [obvious] danger." *Accord Harrison v. Taylor,* 115 Idaho 588, 768 P.2d 1321 (1989) (abolishing open and obvious danger doctrine in light of adoption of comparative negligence); *Riddle v. McLouth Steel Prods. Corp.,* 182 Mich.App. 259, 451 N.W.2d 590 (1990) (same); *Cox v. J.C. Penney Co.,* 741 S.W.2d 28 (Mo.1987) (en banc) (same); *Woolston v. Wells,* 297 Or. 548, 687 P.2d 144 (1984) (en banc) (same); *Parker v. Highland Park, Inc.,* 565 S.W.2d 512 (Tex.1978) (same); *Donahue v. Durfee,* 780 P.2d 1275 (Utah Ct.App.1989) (same), *cert. denied,* 789 P.2d 33 (Utah 1990); *O'Don-*

13-1319 as "a condition which a person exercising ordinary care would foresee as likely to cause injury to one exercising ordinary care for his own safety." SCRA 1986, 13-1319. Thus, as the Defense Lawyers argue, when UJI 13-1310(1) is read in light of the definition in UJI 13-1319 and in light of our earlier New Mexico cases involving the open and obvious danger rule, the person in possession of premises owes a duty to invitees where the proprietor should foresee that the danger is one that is likely to cause injury to persons *exercising ordinary care* for their own safety. Suffice to say that we see the same problem with the definition of dangerous condition in UJI 13-1319 (and UJI 13-1318) after the adoption of comparative negligence that we see with the approach taken in *Davis* limiting duty by the foreseeable behavior of reasonably careful visitors.

nell v. City of Casper, 696 P.2d 1278 (Wyo. 1985) (same).

UJI 13–1310 disapproved. Here, as we discuss below, the trial court could not have determined that the contributory negligence of the business visitor was so extraordinary as to be unforeseeable and to obviate any duty owed by the occupier of the premises with respect to known or obvious dangers.[3] Therefore, we now must decide a policy question specifically put to us in this appeal. Should we continue under UJI 13–1310 also to have the jury decide whether the occupier of the premises owed a duty to the business visitor based upon the jury's decision whether the occupier knew or had reason to know that the risk of the obvious danger was unreasonable to that business visitor?

Because "the court must determine *as a matter of law* whether a particular defendant owes a duty to a particular plaintiff," *Calkins*, 110 N.M. at 62, 792 P.2d at 39, we believe it becomes apparent under principles of comparative fault that it is inappropriate that a case like this be submitted to the jury under the present UJI 13–1310. Once the court has decided that the contributory negligence of the business visitor was foreseeable in the face of known or obvious dangers, the jury should be instructed that, with respect to an obviously dangerous condition of which the occupier of the premises has knowledge, or has reason to know, the occupier has a duty to use ordinary care to keep the premises safe for use by the business visitor. SCRA 1986, 13–1309 (duty to business visitor). Ordinary care will be defined for the jury as the care that a reasonably prudent person would use in the conduct of his own affairs, and the jury will be instructed that what constitutes ordinary care varies with the nature of what is being done.

> As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.

SCRA 1986, 13–1603 (ordinary care). Further, the jury will be instructed that to rise to the level of negligence an act must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to another. SCRA 1986, 13–1601 (negligence). These simple instructions will give the occupier of the premises an ample basis on which to argue that the known or obvious nature of a condition on the premises did not involve an unreasonable risk of danger to a business visitor, or that the occupier reasonably should not have anticipated either that the business visitor would not discover the danger or that the danger could not be encountered with reasonable safety even when known and appreciated.

Genuine issues of material fact under the evidence. On whether the trial court properly could have directed a verdict because the contributory negligence of Klopp was so extraordinary as to have obviated any duty on the part of the occupier to take precautions against the open and obvious danger, one that was appreciable and in plain sight, TWA argues that it neither knew nor had reason to know that the particular condition of the stanchion base on the metal detector created or involved an unreasonable risk of danger to a business visitor passing through it. In 1987 and again in 1988, at least 540,000 persons passed through that metal detector set up in that specific configuration without any incident whatsoever. The particular equipment at the security station and the configuration of the security station

3. Considerations for the trial court include, among others, whether the hazardous condition was such that it could not be encountered safely even if the visitor was warned or otherwise was aware of and appreciated the danger, serious bodily injury or death was possible, the attention of the visitor may be distracted or diverted as he or she approached the dangerous condition, the condition was in a place where the visitor may not find it, or whether the visitor may have a lapse of memory. *See, e.g., Greiser v. Brown*, 102 N.M. 11, 690 P.2d 454 (Ct.App. 1984) (lapse of memory); *see also* 5 Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, *The Law of Torts* § 27.13, at 244–49 (2d ed. 1986) (listing factors to be considered in determining whether an obvious condition is unreasonably dangerous).

had been approved and certified by the Federal Aviation Authority. Other airlines used the same type of metal detector and the same configuration at other areas in the airport. Prior to Klopp's accident, no one ever had fallen, slipped, or tripped while passing through the metal detectors.

While the facts recited by TWA well may have persuaded the jury that TWA did not breach its duty or that any fault to be apportioned to TWA should be minimal, we believe the trial court erred when, in essence, it found no substantial evidence to support the foreseeability of harm to a business visitor. The eighteen-inch extension of the stanchion base of the metal detector created a danger of tripping as obvious to us as TWA argues it to have been obvious to Klopp. Like TWA, we have had considerably more time to contemplate this danger and to study the security station's configuration than did Nancy Klopp.

In response to the alarm that sounded when she stepped through the metal detector, Klopp was required to remove her jewelry and place it in a tray on a table open to the public. As Klopp reentered the metal detector her jewelry was most readily accessible to her on a line across the stanchion base. Despite the safety record, the fact that Klopp was distracted from the presence of the stanchion base appears to us not so extraordinary as to be unforeseeable. We conclude that TWA owed Klopp a duty to use ordinary care to protect her from tripping over the stanchion base while preoccupied with recovering her jewelry. For exactly the same reasons that the court erred in finding no duty, as this case has been postured by the parties, the court erred in not allowing the jury to decide under all the circumstances whether TWA breached the duty to use ordinary care to protect Klopp from harm. Negligence, proximate cause, and comparative fault are issues to be decided by the jury whenever reasonable minds may differ. *See City of Belen v. Harrell,* 93 N.M. 601, 604, 603 P.2d 711, 714 (1979); *Gilbert v. New Mexico Constr. Co.,* 39 N.M. 216, 224, 44 P.2d 489, 494 (1935); *Guitard v. Gulf Oil Co.,* 100 N.M. 358, 363, 670 P.2d 969, 974 (Ct.App.), *cert. denied,* 100 N.M. 327, 670 P.2d 581 (1983).

Liability of Wackenhut. TWA hired Wackenhut to provide security personnel to operate the airport security station. TWA provided all necessary equipment and positioned that equipment. Once the equipment was positioned, and after the FAA had certified its proper operation, the equipment could not be repositioned without first obtaining recertification. Wackenhut was forbidden to make any alterations to the configuration.

Wackenhut states that in ruling in its favor the trial judge found it unnecessary to consider the open and obvious danger rule. Wackenhut asserts that the court properly ruled that its only duty to Klopp was a duty to prevent deadly or dangerous weapons from being carried aboard an airliner, and that, as a matter of law, Wackenhut owed no duty to Klopp regarding the positioning, operation, or maintenance of the security station. The relevant statements of the trial court on this matter are:

> [T]here is just no prima facie case that there has been established with reference to Wackenhut.... In this case, we don't have a standard of care which is imposed upon Wackenhut that was a security agent for doing anything more than managing the equipment that was given to the company and to its agents. There's no testimony or evidence that Wackenhut breached any of the duties imposed upon them for maintaining that security.

The rationale of the trial court seems to confuse duties imposed on an employee or agent by contract (*e.g.,* to provide airport security) and duties imposed by the law of negligence.

-Liability of an agent for injuries caused by dangerous condition of premises or chattels. The tort liability of an employee or an agent for an omission is determined by the law of negligence and is not limited to the affirmative obligations of the contract of service. *See S.H. Kress & Co. v. Selph,* 250 S.W.2d 883, 892 (Tex.Civ. App.1952). Nevertheless, the liability of an

employee or agent for injuries caused by dangerous conditions on occupied premises is directly related to actual control over the premises. The *Restatement (Second) of Agency* states the rule as follows:

> An agent who has the custody of land or chattels and who should realize that there is an undue risk that their condition will cause harm to the person, land, or chattels of others is subject to liability for such harm caused during the continuance of his custody, by his failure to use care to take such reasonable precautions as he is authorized to take.

Restatement (Second) of Agency § 355 (1957). Comment (b) of that section reads in part: "If an agent has only a limited control over land or chattels, he is subject to liability only to the extent that he is authorized to exercise such control." *Restatement (Second) of Agency* § 355 comment b (1957); *see also Restatement (Second) of Torts* § 387 (1964) (liability of independent contractor or servant taking over entire charge of land); 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 1474 (2d ed. 1914) (liability of an agent for condition of premises over which he has control); *Richland County v. Anderson*, 129 Mont. 559, 291 P.2d 267 (1955) (husband, who on occasion acted as the agent of his wife in connection with a certain dam and reservoir, had no liability for damages caused by flooding where wife was responsible for maintenance and repair and husband had no control over dam and reservoir); *Jacobs v. Mutual Mort. & Invest. Co.*, 6 Ohio St.2d 92, 216 N.E.2d 49 (1966) (manager of rental premises found to have sufficient control of premises to fix liability upon manager for unsafe condition in hallway; finding by lower appellate court that contract with owner did not invest management company with exclusive control not determinative).

[redacted] *-Wackenhut had no liability for injuries caused by configuration of equipment when it lacked authority to rearrange the station.* The above authorities would suggest that although Wackenhut's duty and liability in many respects may have paralleled that of the owner or person in possession of the commercial premises (TWA in this case), with regard to liability for harm caused by the configuration of the table and screening device, Wackenhut has no liability due to its limited control over those chattels. Wackenhut had no control over the configuration that was to be employed and, in point of fact, was forbidden to change the configuration of the station. Klopp does not take issue with that assertion, but argues that Wackenhut on several occasions placed a wastebasket alongside the metal detector, forcing persons to go around the protrusion.[4] We believe, however, that while Wackenhut certainly had a greater duty to passengers than merely to search for weapons,[5] that duty was limited by the extent of its control over the chattels in its custody or over the area that it occupied. For this reason, we hold that Wackenhut was relieved of liability for harm caused by the configuration of equipment that it lacked authority to rearrange.[6]

4. Klopp submits that the testimony of Wackenhut's security guard, that a trash bin had been placed on several occasions adjacent to the protruding stanchion base, was proof that Wackenhut was aware of the unreasonably dangerous condition of the protruding base. Klopp's interpretation of that testimony is strained, but giving that evidence its most beneficial interpretation, the issue remains not whether a person with limited control has knowledge of a risk, but whether such person has a duty to ameliorate a risk from the configuration of premises which that person is not authorized to control. Evidence of Wackenhut's knowledge of the risk may be relevant to determining whether Wackenhut owed a duty to warn or to otherwise ameliorate the known risk. As discussed below in footnote six, we offer no opinion on those issues.

5. For example, Wackenhut might breach a duty of ordinary care owed to the public if it allowed its employees to leave suitcases where passengers might trip and fall over them.

6. We leave open the question whether an agent with limited control over occupied premises should take, in the exercise of ordinary care, measures other than to directly correct a dangerous condition existing on the premises. For instance, it could be argued that the fact that Wackenhut had no authority to change the configuration should not relieve it of a duty to guard against the harm by warning persons of the protruding base, by placing a barrier forcing persons around the protrusion, or by notifying TWA of any dangerous condition of which it was aware. However, given the posture of this

Conclusion. For the above reasons, we reverse the judgment of the court of appeals and the directed verdict in favor of TWA. We affirm the directed verdict in favor of Wackenhut. The cause shall be remanded to the district court for trial on the merits and further proceedings consistent with this opinion.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

824 P.2d 302

FEDERAL INSURANCE COMPANY,
Plaintiff–Appellee,

v.

CENTURY FEDERAL SAVINGS & LOAN ASSOCIATION,
Defendant–Appellant.

No. 19409.

Supreme Court of New Mexico.

Jan. 10, 1992.

case, we do not reach those questions. Klopp argues only that both TWA and Wackenhut were responsible for the unsafe design and configuration of the security station. Due to Wackenhut's undisputed lack of control over the choice of equipment and its configuration at the checkpoint, it is relieved of any liability for harm caused by the design and configuration of that equipment. Moreover, in this appeal, Klopp for the most part has directed her argument to the incompatibility between the open and obvious danger rule and comparative negligence. Without the benefit and guidance of briefing on these other issues, we hesitate to consider any changes in established common-law principles.

Carpenter, Crout & Olmsted, Michael R. Comeau, Stephen J. Lauer, and Jones, Snead, Wertheim, Rodriguez & Wentworth, James E. Snead, III and Francis J. Mathew, Santa Fe, for defendant-appellant.

Bosson & Canepa, Richard C. Bosson and Brian E. Fitzgerald, Santa Fe, for plaintiff-appellee.

OPINION

MONTGOMERY, Justice.

This is an insurance coverage dispute between a bank and an insurance company. The bank, Century Federal Savings & Loan Association ("Century") in Santa Fe, New Mexico, was the insured under a "Financial Institutions Insurance Coverage" policy ("the policy") issued by Federal Insurance Company ("Federal"). The dispute centers primarily around the portion of the policy entitled "Mortgage Holder's Insurance," which insured against loss by Century, as a mortgage holder, resulting from damage or destruction to mortgaged property. Century claimed to have suffered such a loss when property on which it held a mortgage was destroyed by fire. Century demanded that Federal assume coverage, and Federal filed suit for a declaratory judgment that the policy did not afford coverage under the facts surrounding the particular loss. The trial court granted Federal's motion for summary judgment and denied Century's cross-motion, construing the policy as affording no coverage. We reverse and remand with instructions to enter judgment in favor of Century.

I.

The loss in question arose from a fire on January 11, 1989, in which a house under construction by its owner and Century's mortgagor, William Shepherd, was destroyed. Century and Shepherd had entered into a construction loan agreement in May of 1988, under which Century was to lend Shepherd $225,000 for construction of the residence. The agreement required Shepherd to provide builder's risk insurance and include Century as a loss payee. The loan closing, which included Shepherd's execution of the agreement and a mortgage on the property to Century, took place on May 27, 1988, though no actual disbursements of money were made at the time. Contrary to the requirement in the loan agreement, Shepherd failed to provide hazard insurance on the property, and no employee of Century checked to be sure that such insurance was in fact provided. Century thereafter made disbursements of construction loan funds totaling $196,525.

After the fire, Century discovered that Shepherd had failed to provide the insurance required by the loan agreement, and Shepherd discovered that Century had disbursed funds without establishing that insurance was in place. So Shepherd sued Century for breach of contract, negligent disbursement of loan funds, constructive fraud, and breach of fiduciary duty. Century tendered defense of this suit to Federal, and Federal assumed the defense under a reservation of rights. Federal then commenced the present lawsuit, seeking a declaratory judgment that it was not obligated to defend the suit or reimburse Century for the loss of its interest in the mortgaged property.

The policy consisted of several sections providing different forms of insurance: a section insuring Century against loss from damage to its own property; a section, entitled "General Liability Insurance," insuring against various forms of liability to which Century might be exposed; the section referred to above entitled "Mortgage Holder's Insurance"; and other sections not pertinent to this appeal. Included within the Mortgage Holder's Insurance, as we read the policy, is a form entitled "Mortgaged Property Covered Causes of Loss"; the parties disagree over whether this form provides an independent source of coverage or merely defines the causes of loss insured against in the Mortgage Holder's Insurance section.

The principal issue on this appeal relates to the scope of coverage under the Mort-

gage Holder's Insurance section of the policy. That section contains four insuring clauses, three of which—Coverage A, Coverage B, and Coverage D—are at issue in this appeal.[1] The basic insuring agreement preceding these three coverage clauses reads:

> We will pay for loss of your mortgage holder's interest resulting from a direct physical loss or damage to mortgaged property by a Covered Cause of Loss. The loss you incur must be due to:[2]

This insuring clause is then completed by a clause defining each of the three coverages, respectively entitled "Mortgage Errors and Omissions" (Coverage A), "Mortgage Impairment" (Coverage B), and "Mortgage Holder's Liability" (Coverage D).

Coverage A (Mortgage Errors and Omissions) is defined as follows:

> An accidental error or omission by you or your representative in the operation of your customary procedure in procuring and maintaining valid insurance on mortgaged property when you obtain, retain and/or make premium payments on insurance policies to protect your mortgage holder's interest[.]

Coverage B (Mortgage Impairment) covers:

> Failure of the mortgagor to provide valid insurance as described in the mortgage agreement on mortgaged property to protect your mortgage holder's interest.
>
> This insurance applies only:
>
> * * * when insurance to protect your mortgage holder's interest is non-existent, invalid, insufficient or uncollectible * * * *

Coverage D (Mortgage Holder's Liability) insures against:

> Damages you are legally obligated to pay due to your accidental error or omission in the operation of your customary procedure in procuring and maintaining insurance for the benefit of the mortgagor as required by the mortgage agreement against the Covered Causes of Loss. We will have the right and duty to defend any suit seeking such damages and may investigate and settle any claim or suit at our discretion.

Each of these coverage provisions is qualified by the following "Additional Conditions" appearing shortly after the coverage provisions:

> You agree to institute and maintain the following procedures in connection with mortgaged property covered by this insurance. Coverage does not apply on any mortgaged property for which you fail to follow these procedures.

There then follow statements of the five Additional Conditions. The first makes coverage conditional on Century's including in its

> mortgage agreement a requirement that at least fire and extended coverage insurance shall [be] maintained by the mortgagor in which you are named as the mortgagee for the amount of the mortgage balance * * * *

The second Additional Condition reads in its entirety:

> VERIFY THE MORTGAGOR'S COMPLIANCE.
>
> You will at the mortgage closing when you pay on behalf of the mortgagor, verify the actual existence of valid insurance and record the amount, name of insurance company, policy number, and agent.

1. The fourth insuring clause in the Mortgage Holder's Insurance section of the policy is Coverage C, entitled "Real Estate Tax Liability." It provides coverage for "[d]amages for which you are legally liable due to an accidental error or omission by you in paying real estate taxes, as agreed, on behalf of the mortgagor." This provision, while not directly applicable to the issues on this appeal, is relevant, as discussed later in this opinion, because of its reference to an accidental error or omission.

2. The policy defines the term "mortgage holder's interest" as "the amount of the unpaid principal on the * * * mortgage and accrued interest on that amount from the date of default by the mortgagor to the date agreement is reached on the amount of loss * * * * Mortgage holder's interest includes only your interest in mortgaged property * * * [a]s mortgagee * * * *" The policy also defines the term "mortgaged property"; there is no dispute that Shepherd's house fell within the definition.

The remaining three Additional Conditions require Century to notify Federal of a change of escrow procedures; to send its mortgagors, at least annually, written reminders of their obligation to keep the required insurance in force; and to prevent insurance from lapsing by procuring insurance if Century receives information that a mortgagor's insurance is about to terminate.

Federal's primary basis for declining coverage was Century's failure to verify, at the mortgage closing, Shepherd's compliance with the requirement in the loan agreement that he obtain hazard insurance on the property. There is no dispute that Century did not "verify the actual existence of valid insurance[,]" either at the closing or at any time thereafter, when making disbursements.

As noted previously, the trial court granted summary judgment to Federal. Its primary reason for doing so was: "A fair reading of the policy is that Federal agreed to insure Century in the event of a loss because of a loss or lapse of insurance and not in the event a loss occurred because of the failure to obtain insurance in the first place." As for the condition that Century verify Shepherd's compliance with the requirement that he obtain hazard insurance, the court said in its order: "The condition corroborates the court's view that the failure of Century to obtain or confirm insurance coverage on the mortgaged premises was not a risk to be covered by Federal but a fundamental premise for insurance coverage."

On appeal, Century attacks these conclusions, arguing that the verification condition irreconcilably conflicts with the insuring clauses or at least creates such an ambiguity that the policy should be construed in favor of the insured so as to afford coverage for the loss of its "mortgage holder's interest." Century also asserts (though its briefs are not clear whether this is an additional or an alternative contention) that the policy, either through Coverage D quoted above or through the "General Liability" provisions, obligates Federal to defend the Shepherd lawsuit and indemnify Century for any damages ultimately imposed in that lawsuit. We consider first the availability of coverage for Century's loss of its mortgage holder's interest due to the perils described in Coverages A and B of the Mortgage Holder's Insurance section of the policy.

II.

We agree with Century that Coverage B is applicable and affords coverage for Century's loss of its mortgage holder's interest. This conclusion makes it unnecessary to decide the applicability of Coverage A, although, for the reasons stated in connection with Coverage D discussed below, we are inclined to doubt that Coverage A applies.

If one parses the wording in the insuring clause of the Mortgage Holder's Insurance, focusing on Coverage B and relating it to the facts of this case, the clause may be paraphrased as follows: "We will pay for loss of your interest in the mortgage resulting from fire, due to Shepherd's failure to provide valid insurance as described in the loan agreement, when insurance to protect your interest is nonexistent." As so paraphrased, this clause is in irreconcilable conflict with the verification condition, which reads: "You will at the mortgage closing when you pay on behalf of the mortgagor, verify the actual existence of valid insurance * * * *" The insuring clause, in other words, insures against the mortgagor's failure to provide valid insurance and states that the clause applies when hazard insurance is nonexistent, but the condition requires Century to verify that valid insurance actually exists. This is the kind of "irreconcilable conflict," as discussed in *King v. Travelers Insurance Co.*, 84 N.M. 550, 555, 505 P.2d 1226, 1231 (1973), that leads to the conclusion that both clauses cannot stand and that, therefore, the excepting or exclusionary clause must be stricken (*i.e.*, not enforced).

In *King*, we relied heavily on *World Fire & Marine Insurance Co. v. Carolina Mills Distributing Co.*, 169 F.2d 826 (8th Cir. 1948), to support our conclusion that the insuring clause would be given effect de-

spite a conflicting exclusionary clause. The insuring clause in *King* insured against loss caused by accidental discharge of water from a plumbing system, whereas the exclusion provided that the insurer would not be liable for damage due to water below the surface of the ground. We noted that substantial parts of many plumbing systems are installed below the surface of the ground, *id.* at 556, 505 P.2d at 1232, and held that either the clauses were in irreconcilable conflict or they created an ambiguity that would be resolved in favor of the insured. *Id.* at 555, 505 P.2d at 1231. We relied on the *World Fire* case, which recognized the same two alternatives—"that the excepting clause was either in irreconcilable conflict with and repugnant to the insurance clause, or that it must be so construed that its meaning will be harmonized with the insuring clause"—and said that both alternatives would lead to the same result, namely, judgment in favor of the insured. *See id.* (citing *World Fire,* 169 F.2d at 829).

The same two alternatives are presented in this case. We have already described the irreconcilable conflict that arises when the insuring clause, Coverage B, is juxtaposed with the verification condition. To avoid such a conflict, Federal argues that the clauses should be construed in order to harmonize them with one another, as *King* indicates should be done whenever possible. Federal first relies on the construction given the insuring clause by the trial court, arguing that the court was correct in interpreting the clause to mean that there would be coverage for a loss occurring "because of a loss or lapse of insurance," but not for one occurring "because of the failure to obtain insurance in the first place." But this reading flies in the face of the wording in Coverage B that the policy insures against "[f]ailure of the mortgagor to *provide* valid insurance" (emphasis added) and applies when such insurance is nonexistent. We think it unreasonable to construe this language to mean that the only peril insured against is a loss or lapse in insurance coverage once insurance is initially obtained and that it has no application to the mortgagor's failure to obtain it at the outset.

Federal next attempts to harmonize the insuring clause and the condition by interpreting the word "verify" to mean that the insured is required only to take such steps at the loan closing as are reasonably necessary to ascertain that the mortgagor has the required insurance. If the mortgagee takes such reasonable steps, says Federal, then the possibility that the mortgagor does not have the insurance after all will not mean a loss in coverage.

We find this argument unpersuasive. It rewrites the policy to contain language which is not there: "take reasonable steps to verify insurance" rather than "verify the actual existence of valid insurance." We agree with Century's reply to Federal's argument: The term "verify" requires the insured "to confirm or substantiate * * * to prove to be true * * * [or] conclusively demonstrate * * *" the actual existence of valid insurance. *Webster's Third New International Dictionary* 2543 (13th ed. 1976). Thus, Federal's strained interpretation does not assist in resolving the conflict. Reduced to its essentials, the policy provides on one page that it covers a loss when hazard insurance does not exist and, four pages later, requires the insured to verify that valid insurance actually exists. We believe that this is one of those "extreme situations," as contemplated by *King* and *World Fire,* in which a policy provision excluding liability should be disregarded or stricken because it is repugnant to—*i.e.,* contradicts—a provision extending coverage to certain losses. *See King,* 84 N.M. at 555, 505 P.2d at 1231; *World Fire,* 169 F.2d at 829–30.[3]

3. *See also Commercial Union Assurance Cos. v. Gollan,* 118 N.H. 744, 747–48, 394 A.2d 839, 842 (1978) (provision which preserved coverage for liability arising from defects in work warranted by insured as workmanlike conflicted with exclusion for property damage to work performed by insured arising out of work or materials furnished in connection therewith; "[A]ny reconciliation of contradictory clauses must result in a policy which reflects the insured's reasonable expectations."); *Standard Mut. Ins. Co. v. General Casualty Cos.,* 171 Ill.App.3d 758, 764, 121 Ill.Dec. 658, 662, 525 N.E.2d 965, 969 (policy provision providing coverage for use of automo-

As in *King* and *World Fire*, it is possible to construe the exclusionary condition so as to harmonize it with the insuring clause, although doing so necessarily results in the conclusion that the condition is ambiguous and so must be construed against the insurer. One such construction is to read the condition literally and apply it when the insured (the mortgagee—Century in this case) "pays" some amount at closing, either a construction loan disbursement or, perhaps, the premium on the hazard insurance contemplated by Coverage B.[4] Since no payments were made at closing, the condition, under this narrow construction, would not apply.

This literal interpretation of the wording of the condition, argued for by Century, does not strike us as plausible; we resist the temptation to adopt it simply because it is consistent with the result we reach in this case. Nothing in the wording of either Coverage B or the condition suggests that the payment at closing contemplated by the condition is payment of an insurance premium, and the concept of "paying" at the closing easily embraces the obligation Century assumed to fund the construction loan by making periodic payments under the loan agreement.

Another possible interpretation of the condition which would harmonize it with the insuring clause is that it is satisfied when the mortgagee establishes the procedures described in the "Additional Conditions" clauses and that failure to follow an established procedure in an individual case would not vitiate coverage in that case. It is undisputed that Century had in fact established a routine procedure for verifying that its mortgagors provided hazard insurance on any property securing a mortgage by the time the mortgage loan was closed and that Century employees simply failed to follow the procedure in this particular instance. This construction seems somewhat reasonable in light of the apparent purpose of all of the insuring clauses to insure against accidental errors and omissions in following the prescribed procedures, although it seems inconsistent with the sentence preceding the five Additional Conditions: "Coverage does not apply on *any* mortgaged property for which you fail to follow these procedures." (Emphasis added.)

The upshot is that there are at least three constructions of the condition that would avoid an "irreconcilable conflict" with the insuring clause in Coverage B. When the language in an insurance policy is susceptible of more than one meaning, it is ambiguous and must be construed in favor of the insured. *Safeco Ins. Co. of Am. v. McKenna*, 90 N.M. 516, 520, 565 P.2d 1033, 1037 (1977); *Ivy Nelson Grain Co. v. Commercial Union Ins. Co.*, 80 N.M. 224, 226, 453 P.2d 587, 589 (1969). Following this rule, we could construe the condition in the rather strained ways de-

bile in Canada conflicted with provision in rental agreement requiring written permission before automobile could be used out of state; "[I]f an insurance contract contains inconsistent or conflicting clauses, the clause which affords greater or more inclusive benefit for the insured will govern."), *appeal denied*, 122 Ill.2d 594, 125 Ill.Dec. 237, 530 N.E.2d 265 (1988); *Tire Kingdom, Inc. v. First S. Ins. Co.*, 573 So.2d 885, 887 (Fla.Dist.Ct.App.1990) (provision providing coverage for claims of defamation and unfair competition conflicted with provisions excluding same activities; "An insurance policy cannot grant rights in one paragraph and then retract the very same right in another paragraph called an 'exclusion.' "), *review denied*, 589 So.2d 290 (Fla.1991); *Southeast Airmotive Corp. v. United States Fire Ins. Co.*, 78 N.C.App. 418, 420, 337 S.E.2d 167, 169 (1985) (provision providing coverage for damages because of injury to or destruction of property conflicted with exclusion for loss of or damage to property in custody of insured; "When the coverage provisions of a policy include a particular activity, but that activity is later excluded, the policy is ambiguous, and the apparent conflict between coverage and exclusion must be resolved in favor of the insured."), *review denied*, 316 N.C. 196, 341 S.E.2d 583 (1986).

4. Federal's local agent, who issued the policy on Federal's behalf, testified by deposition that the payment referred to in the condition was the insurance premium and that the condition only applied when Century had the responsibility as mortgagee to pay the premium—*i.e.*, when Century was itself obtaining hazard insurance on the mortgaged property, as contemplated by Coverage A. Century argues that, if this interpretation is correct, the verification condition would not apply to Coverage B.

scribed immediately above and hold that it was inoperative to exclude this loss from coverage under Federal's policy.

We prefer, however, to rest our decision on the ground stated previously—namely, that the condition, read straightforwardly and without a strained interpretation, is simply repugnant to the insuring clause and therefore will not be given effect. As in *Gollan, supra* note 3:

> The question before us is whether the ordinary layman in the position of the insured could reasonably be expected to understand that certain exclusions qualified the policy's grants of coverage * * * *
>
> Insurance policies have long been under attack in this jurisdiction for their confusing language. We recently noted that:
>
>> Although insurers have had over one hundred years to hone their policies into forms that would not ferry the unwary reader on a trip into Wonderland, they regrettably often fully merit the criticism that Chief Justice Doe [deploring the prolixity of complex verbiage in policies, *DeLancey v. Insurance Co.*, 52 N.H. 581 (1873)] levelled at their predecessors. Moreover, as we have recognized, these policies usually are imposed on the consumer on a take-or-leave-it basis * * * * The pretense that the parties had bargained for the resulting contract of insurance is an absurdity.

118 N.H. at 745–46, 394 A.2d at 841 (quoting *Storms v. United States Fidelity & Guar. Co.*, 118 N.H. 427, 429–30, 388 A.2d 578, 580 (1978) (alterations in original)). *See also Pribble v. Aetna Life Ins. Co.*, 84 N.M. 211, 215, 501 P.2d 255, 259 (1972) (recognition is given to insured's reliance on an insurance agent because insurance policies are "complex contracts of adhesion" that are "quite unintelligible to the insured even were he to attempt to read and understand their unfamiliar and technical language and awkward and unclear arrangement" (quoting *Harr v. Allstate Ins. Co.*, 54 N.J. 287, 303, 255 A.2d 208, 217 (1969))).

The understanding of Federal's local agent in Santa Fe, Daniel T. Kelly, Jr., illustrates how "the ordinary layman in the position of the insured" could reasonably be expected to understand that there was coverage for this loss, although Mr. Kelly was not an "ordinary layman" but a professional insurance agent with thirty-five years of experience in the field. He stated, after the fire, that it was his opinion that the loss was covered. He believed that the Mortgage Holder's Insurance was designed to protect Century in case "somebody forgot to obtain insurance" on mortgaged property. Opining that this was "the sort of loss that should have been covered" by the policy, he described Federal's position as "evasive" and the language of the verification condition as "pretty tricky." Once again, reasoning in the *King* case is applicable. There, in holding that the policy was ambiguous, we relied in part on our understanding that the insurer's agents were in doubt as to the applicability of the pertinent provisions of the policy. The conduct of the agents, we said, was "persuasive evidence of the policy's ambiguity." *King*, 84 N.M. at 556, 505 P.2d at 1232.

The placement of Coverage B with three other coverage clauses insuring against an "accidental error or omission" fortifies Kelly's impression that the entire Mortgage Holder's Insurance section of the policy was intended to provide coverage in the event of an error or omission—in Kelly's words, in case "somebody forgot to obtain insurance" on mortgaged property. Century's reasonable expectations as Federal's insured would be eviscerated if the condition were allowed to swallow up the insuring clause—if the insurer were permitted to take away with its left hand what it gave with the right. *See Insurance Co. of N. Am. v. Wylie Corp.*, 105 N.M. 406, 410, 733 P.2d 854, 858 (1987) (giving coverage with right hand and taking away with left is not favored in construing insurance policies).

Giving effect to the insured's reasonable expectations, in cases of policy ambiguity, is of course a well-settled approach to construing and applying language in insurance policies. *See, e.g., Sanchez v.*

Herrera, 109 N.M. 155, 159–60, 783 P.2d 465, 469–70 (1989) ("The reasonable expectations of the insured * * * 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."); *CC Housing Corp. v. Ryder Truck Rental, Inc.,* 106 N.M. 577, 580, 746 P.2d 1109, 1112 (1987) ("The critical analysis * * * should focus primarily on protecting the one for whose benefits premiums have been paid for insurance coverage, and construing the policies liberally in favor of the insured and strictly against the insurers."); *Ivy Nelson,* 80 N.M. at 225, 453 P.2d at 588 ("[W]here there is ambiguity, the test is not what insurer intended its words to mean, but what a reasonable person in the position of the insured would understand them to mean.").

Despite this well-settled rule of construction, however, we are not really construing the policy in deciding this case; we are simply refusing to give effect to a provision in the policy that contradicts another provision. Construction of policy language is appropriate when there are two or more meanings to be ascribed to the language (which is thereby deemed ambiguous), but no construction is required when one policy provision is repugnant to another. That is the situation when, rather than creating a specific exception to a broad grant of coverage, an exclusionary clause simply nullifies the grant. In that situation, a court may and indeed should, as the authorities cited earlier in this opinion demonstrate, refuse to apply the clause that deprives the insured of the insurance coverage which the insured reasonably understood was afforded by the policy for which premiums were paid. We hold that situation is present in this case, and we therefore find Coverage B to be applicable and reverse the trial court's conclusion to the contrary.

III.

The foregoing holding disposes of the basic coverage issue debated by the parties in this case. Somewhat surprisingly, Federal does not raise the possibility that the trial court's summary judgment, if erroneous on the issue of coverage for the loss to Century's "mortgage holder's interest," was nevertheless correct in ruling that Federal was not obligated to assume Century's defense of the Shepherd lawsuit. The obligation to defend is distinct from the obligation to indemnify, *Wylie Corp.,* 105 N.M. at 409, 733 P.2d at 857 (citing *Foundation Reserve Ins. Co. v. Mullenix,* 97 N.M. 618, 619, 642 P.2d 604, 605 (1982)), and the former obligation must be found in a policy clause promising to defend against liability, *see id.* (quoting *American Employers' Ins. Co. v. Continental Casualty Co.,* 85 N.M. 346, 348, 512 P.2d 674, 676 (1973)). Here, the only sources of Federal's putative duty to defend are Coverage D ("Mortgage Holder's Liability"), quoted above, and the "General Liability Insurance" section of the policy. Federal argues vigorously, and fairly persuasively, that the General Liability provisions were not invoked by the Shepherd lawsuit; but Federal does not even attempt to argue that Coverage D does not apply if either Coverage A or Coverage B does apply.

Federal does maintain, briefly, that Coverage D is not implicated under the facts in this case. It argues, in essence, that Coverage A and Coverage D are congruent and that both apply to the situation in which the mortgagee (Century) obtains insurance, paying the premiums itself, for its own and the mortgagor's benefit. While we are inclined to agree that this is the nature of the coverage contemplated by Coverage A, we see an important distinction between Coverage A and Coverage D: The former refers to the mortgagee's obtaining, retaining, and/or making premium payments on insurance policies; this phrase is absent from the wording of Coverage D.

Thus, it appears probable that the design of the Mortgage Holder's Insurance is something like the following: If an accidental error or omission in the operation of the mortgagee's customary procedure for procuring insurance when the *mortgagee* obtains insurance policies to protect its interest in the mortgaged property results in

loss to the mortgagee's interest (because of physical loss to the property), Federal will pay for the loss under Coverage A. Conversely, when the loss occurs by reason of the *mortgagor's* failure to provide insurance, Federal will cover the loss under Coverage B. And *in either situation,* if a claim is asserted against the insured for its error or omission and resulting failure to see that insurance for the benefit of the mortgagor is in place, Federal will (under Coverage D) indemnify the insured from liability for the mortgagor's loss and will defend any suit in which the claim is asserted.

This, in any event, seems to be the view of the policy taken by the parties, and we are not inclined to depart from that view when neither party requests us to do so. While we might be inclined to agree with Federal that the wording of Coverage D parallels more closely that in Coverage A than that in Coverage B, we at least would be compelled to conclude that the scope of the insurer's duty to defend under Coverage D is ambiguous; and, following the authorities cited previously concerning construction of ambiguous policy language, we would hold that Coverage D is to be construed in favor of the insured and in this case requires Federal to defend Century against the claims asserted in the Shepherd lawsuit.

It follows that the trial court's summary judgment in favor of Federal was incorrect and that the court should have entered judgment in favor of Century, on the duty to defend as well as on the duty to indemnify Century for loss or damage to its mortgage holder's interest.

The judgment is reversed and the cause remanded with instructions to enter judgment in Century's favor.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

824 P.2d 310

Lawrence BACA, Petitioner,

v.

HIGHLANDS UNIVERSITY, STATE OF NEW MEXICO, Respondent.

No. 20050.

Supreme Court of New Mexico.

Jan. 10, 1992.

Benito Sanchez, Albuquerque, for petitioner.

Herrera, Baird & Ares, Nancy R. Long, Santa Fe, for respondent.

OPINION

FRANCHINI, Justice.

We granted certiorari to review one issue addressed by the court of appeals in *Highlands University v. Baca,* 113 N.M. 175, 824 P.2d 315 (App.1991). This issue concerns the calculation of an award of attorney fees pursuant to Section 52-1-54 of the New Mexico Workers' Compensation Act, NMSA 1978, Sections 52-1-1 to -69 (Orig. Pamp.). The court of appeals held that the worker's past benefits were not in jeopardy and, therefore, the workers' compensation judge erred when he computed attorney fees based in part on past benefits. We reverse the court of appeals and affirm the decision of the workers' compensation judge.

Lawrence Baca (worker) injured his lower back at work on November 18, 1985. His employer, Highlands University (Highlands), voluntarily paid total temporary disability benefits from the date of injury. On May 9, 1990, Highlands filed a claim to decrease or suspend worker's benefits. Other issues, including payment of medical bills and whether worker's temporomandibular joint condition was causally related to his injury, were to be addressed at a hearing. On the claim form, in answer to the question "What Are You Claiming?" (in addition to "Decrease or Suspend Workers' Compensation Benefits"), Highlands checked "Credit for Benefits Paid." Thus, based on the original application, Highlands sought without limitation a credit for past compensation against future compensation. Additionally, throughout the ensuing months and until the day before the hearing, Highlands took the position that all of worker's benefits were in jeopardy.

The day prior to the hearing, the parties stipulated and the workers' compensation judge ordered in a pretrial order that a contested issue was whether the employer was entitled to an offset against future compensation benefits for past benefits paid "from the date of maximum medical improvement." The parties stipulated as an uncontested fact that the date of maximum medical improvement was *no later* than January 26, 1990. This stipulation left the door open for Highlands to argue for an earlier date of maximum medical improvement and for getting a substantial portion of the benefits paid thereafter repaid through offsets against future benefits. After the hearing, the workers' compensation judge found worker to have been fifty percent permanently partially disabled as of March 1, 1990, and granted Highlands credit for excess benefits paid after that date.

Worker was awarded attorney fees in the amount of $12,000 pursuant to Section 52-1-54. The workers' compensation judge based his award in part on a finding that all of worker's benefits, including his past benefits, were in jeopardy because Highlands was requesting credit for benefits paid. The court of appeals held that worker's past benefits were not in jeopardy and stated that "no action at all was required to insure retention of the past benefits."

Attorneys are entitled to adequate compensation for work necessarily performed in workers' compensation cases. *See Sanchez v. Siemens Transmission Sys.,* 112 N.M. 533, 817 P.2d 726 (1991). The determination of what attorney fees are reasonable and proper in workers' compensation cases lies within the sound discretion of the workers' compensation judge. *Genuine Parts Co. v. Garcia,* 92 N.M. 57, 62, 582 P.2d 1270, 1275 (1978). "Only where the workers' compensation judge exceeds his or her discretion will an appellate court upset a fee award." *San-*

chez, 112 N.M. at 535, 817 P.2d at 728. The issue of how preservation of past benefits voluntarily paid by the employer should be treated in awarding attorney fees has not been specifically addressed by statute or case law. Therefore, we should be guided by principles of fundamental fairness. *Transport Indem. Co. v. Garcia,* 89 N.M. 342, 552 P.2d 473 (Ct.App.), *cert. denied,* 90 N.M. 9, 558 P.2d 621 (1976).

We agree with the court of appeals that in determining whether the attorney fees were reasonable, the answer turns on whether the past benefits should be included in calculating the present value of the award. Under Section 52–1–54(D)(1), when determining what would be a reasonable attorney fee, the present value of the award made in worker's favor must be taken into account. It is true that Highlands was successful in establishing that worker's disability had diminished. Thus, if that was the only issue raised by Highlands, attorney fees should not have been awarded under the limitation in Section 52–1–54(E), which provides that attorney fees are awarded only if claimant is successful in establishing increased disability or the employer is unsuccessful in establishing that the claimant's disability has diminished. However, the jurisdiction of the workers' compensation division was invoked not only to determine whether worker's disability had diminished, but also to determine whether Highlands was entitled to credit for benefits already paid. This invocation by Highlands of the workers' compensation division's jurisdiction opened up the question of worker's disability from the date of injury forward and the question of whether worker was entitled to retain any benefits previously paid.

Section 52–1–54(D) states in relevant part:

> [I]n all cases where compensation to which any person shall be entitled under the provisions of the Workmen's Compensation Act shall be refused and the claimant shall thereafter collect compensation through court proceedings in an amount in excess of the amount offered in writing by an employer thirty days or more prior to the trial by the court of the cause, then the compensation to be paid the attorney for the claimant shall be fixed by the court ... in such amount as the court may deem reasonable and proper....

We consider Highlands' request for credit for benefits paid, along with its denial of causation in worker's request for admissions, tantamount to a refusal under this section. Essentially, worker was required to justify prior compensation payments as well as his entitlement to future benefits. This is comparable to the refusal in *Paternoster v. La Cuesta Cabinets, Inc.,* 101 N.M. 773, 689 P.2d 289 (Ct.App.1984). In *Paternoster,* the court of appeals found a refusal where the employer was not paying all of the benefits to which the worker was entitled. *Id.* at 782, 689 P.2d at 298. In addition, the second requirement of Section 52–1–54(D) was met. The workers' compensation judge found that the only offer of settlement made by Highlands was made five days before trial, and the amount was substantially less than the benefits awarded to worker after trial.

We agree with the workers' compensation judge that Highlands' request for credit for benefits paid placed all past benefits in jeopardy. In its opinion, the court of appeals implies that the reason worker's past benefits were not in jeopardy was because a refund of past benefits (as opposed to a credit) was not sought by Highlands. This ignores the possibility that a worker could be required to refund past benefits by offsets against future benefits. In such a case, the past benefits would be in jeopardy every bit as much as they would be if a refund was sought, and a worker would be entitled to a fee award for the services of his attorney in preserving the past benefits.

Furthermore, the stipulated pretrial order filed the day before trial did not limit the issue to benefits worker was entitled to from and after the date of maximum medical improvement, January 26, 1990. Essentially, the pretrial order listed the date of maximum medical improvement as "no later than January 26, 1990." The date of

maximum medical improvement was disputed and tried to the workers' compensation judge, who found it to be March 1, 1990. More importantly, throughout discovery Highlands denied the issue of causation and disability for any time following the injury on November 18, 1985. As late as October 1990, Highlands denied requests for admission on these issues. In its rejection of the mediator's recommended resolution, Highlands accused worker of committing fraud upon the workers' compensation division by working while collecting disability benefits. The workers' compensation judge was in the best position to determine whether the past benefits were in jeopardy, and he found that they were. In reviewing an award of attorney fees for abuse of discretion, the reviewing court should view, as it does in substantial evidence questions, the evidence in a light most favorable to support the trial court's determination. *See Sanchez v. Homestake Mining Co.,* 102 N.M. 473, 697 P.2d 156 (Ct.App.1985). We find substantial evidence to support the findings of the workers' compensation judge. Because the past benefits were being challenged, the workers' compensation judge properly considered them in arriving at the amount of attorney fees.

Finally, this opinion should not be interpreted as creating a disincentive against an employer's voluntary payment of benefits. We agree with the court of appeals that " 'voluntary payment of compensation benefits during the pendency of [compensation] proceedings ... is a matter of great importance to an injured worker and should not be discouraged.' " *Paternoster,* 101 N.M. at 777, 689 P.2d at 298 (quoting *Western Casualty & Sur. Co. v. Adkins,* 619 S.W.2d 502, 503–04 (Ky.Ct.App.1981)). The solution to this problem would have been for Highlands to limit its claim for credit, something that was not done in this case.

Based on the foregoing, we reverse the court of appeals and affirm the decision of the workers' compensation judge.

IT IS SO ORDERED.

RANSOM, Chief Judge and MONTGOMERY, J., concur.

824 P.2d 315

HIGHLANDS UNIVERSITY, STATE OF NEW MEXICO, Claimant-Appellant,

v.

Lawrence BACA, Respondent-Appellee.

No. 12996.

Court of Appeals of New Mexico.

Aug. 1, 1991.

Certiorari Granted Sept. 11, 1991.

Nancy R. Long, Herrera, Baird & Long, P.A., Santa Fe, for claimant-appellant.

Benito Sanchez, Benito Sanchez, P.A., Albuquerque, for respondent-appellee.

OPINION

HARTZ, Judge.

Highlands University (Highlands) appeals from an attorney fee award in a worker's compensation case. Our third calendar notice proposed summary reversal. Appellee Lawrence Baca (worker) filed a memorandum in opposition. We are not persuaded and reverse.

Highlands began paying worker total temporary disability benefits in November 1985. While continuing to pay the same benefits, Highlands filed a claim in May 1990 to decrease or suspend worker's benefits and to receive a credit for benefits paid. After a hearing, the worker's compensation judge (WCJ) found worker to have been fifty percent permanently partially disabled as of March 1, 1990, and granted Highlands a credit for excess benefits paid since that date. Worker also recovered some medical expenses. Pursuant to NMSA 1978, Section 52-1-54(E) (Orig. Pamp.), worker was awarded $12,000 in attorney fees. The WCJ explicitly based the award in part on a finding that Highlands' claim placed worker's past benefits in jeopardy.

Highlands has abandoned two issues originally raised on appeal. *See State v. Martinez,* 97 N.M. 585, 642 P.2d 188 (Ct.App.1982). The remaining question is whether the attorney fee award was excessive in view of the present value of the award to worker. *See* NMSA 1978, § 52-1-54(D)(2) (in determining what would be a reasonable attorney fee, decisionmaker must take into account the present value of the award made in the worker's favor). The answer turns on whether the past benefits should be included in calculating the present value of the award.

Because Highlands' payment of temporary disability benefits over a four-year period was voluntary and preceded any involvement by worker's attorney, worker's attorney cannot be credited with recovery of those past benefits. Nevertheless, if counsel preserved past benefits for worker, those benefits may be included in determining the present value of the award

for the purpose of computing attorney fees. *See Jaramillo v. Kaufman Plumbing & Heating Co.*, 103 N.M. 400, 406, 708 P.2d 312, 318 (1985).

Worker contends that even though Highlands was seeking a credit for overpayments as opposed to a refund, his past benefits were placed in jeopardy because preservation of past benefits is essential to preservation of future benefits. He points out that if, for example, the WCJ decided that the amount of past overpayments and the amount of future benefits were equal, he would not receive any future benefits. We disagree with worker's analysis.

In the present case absolutely no action at all was required to ensure retention of the past benefits. If worker had acquiesced entirely in Highlands' claim, his past benefits would not have been affected. When litigating leads to no better result for worker than if he had capitulated at the outset, the services provided by counsel do not render any financial benefit to worker. *See Montoya v. Anaconda Mining Co.*, 97 N.M. 1, 635 P.2d 1323 (Ct.App.1981). The financial benefit to worker is the improvement in the award above what he would have received if he had capitulated. That benefit here is the medical fees awarded plus the disability benefits for the period after Highlands filed its claim.

Since the WCJ miscomputed the present value of the amount that worker benefitted by his counsel's efforts, we hold that he abused his discretion in determining the amount of the award. *Cf. Escobedo v. Agriculture Prods. Co.*, 86 N.M. 466, 525 P.2d 393 (Ct.App.1974) (no abuse of discretion where mandatory statutory provisions are considered). We do not know, however, the weight that the WCJ gave to the value of the award in setting the attorney fee. Accordingly, we reverse the amount of the reward and remand for redetermination of worker's attorney fee.

IT IS SO ORDERED.

BIVINS and MINZNER, JJ., concur.

824 P.2d 316

Joe ARAGON, Claimant–Appellant,

v.

STATE of New Mexico CORRECTIONS DEPARTMENT, Health & Environment Department, and the Travelers Insurance Company, Respondents–Appellees.

No. 12616.

Court of Appeals of New Mexico.

Sept. 24, 1991.

Certiorari Quashed Dec. 12, 1991.

E. Justin Pennington, Law Offices of E. Justin Pennington, Albuquerque, for claimant-appellant.

Robert P. McNeill, Albuquerque, for respondent-appellee State of New Mexico.

Bonnie M. Stepleton, Law Offices of Helen L. Stirling, Albuquerque, for respondent-appellee Travelers Ins. Co.

OPINION

HARTZ, Judge.

In February 1983 appellant Joe Aragon (worker) suffered a herniation of the L5–S1 disk as the result of an accident while employed by the State of New Mexico Corrections Department (employer). He received medical and disability benefits under the Workers' Compensation Act. After corrective surgery he returned to full duty without any work restrictions until he left his employment in March 1987. In January 1988 worker suffered a herniation of the L3–4 disk and aggravation of the herniation at L5–S1 while attempting a repair on his personal truck at home. As he was lying underneath the vehicle, the transmission slipped out of place, requiring him to catch the transmission to avoid being struck in the head. Worker sought disability, medical, and rehabilitation benefits for his back condition after the 1988 accident, contending that he had a disability caused by the 1983 work accident.

The workers' compensation division (WCD) denied worker's claim. It rejected worker's proposed conclusion that his 1988 injury was a natural and direct consequence of the 1983 accident. It found that the 1988 accident "was an independent intervening event, which was not the direct or natural progression of any condition which resulted from the February 1983 accident," and that worker's disability and impairment were the direct and proximate result of the 1988 accident. We affirm.

Worker contends that he is entitled to the benefits sought if he can establish simply that the 1983 work accident was a contributing cause of his disability after the 1988 accident. In his view, as we understand it, he would be entitled to benefits if, for example, (1) the 1983 accident created a condition that was aggravated by the 1988 accident to create a disability or

(2) the injury caused by the 1983 accident combined with the injury caused by the 1988 accident to create the disability. He relies on a number of out-of-state cases and the following quotation from 1 A. Larson, *Workmen's Compensation Law* § 13.00 (1990) [hereinafter Larson]:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.

We disagree with worker's statement of the law and hold that the record before us supports the decision of the WCD to deny benefits to worker. Although the language quoted from Larson, *supra,* and language in several opinions cited by worker can be read to support worker's view, that broad view is inconsistent with the language of the New Mexico statute. Our more restricted view of what can satisfy the statutory requirements for recovery of benefits also finds support in Larson, *supra,* and is inconsistent with the holdings in at most only a very few reported decisions.

As stated by worker in his brief-in-chief, "[W]hether a disability resulting from the concurrence of a work related injury and *subsequent* non-work related injuries is compensable, is apparently a question of first impression in New Mexico." Therefore, we begin our analysis with the statutory language. Two sections of the Workers' Compensation Act deal with the causal relationship that must be established between an accident and a disability for the worker to recover benefits. NMSA 1978, Section 52–1–9 states:

> The right to the compensation provided for in this act [52–1–1 to 52–1–69 NMSA 1978], in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:
>
> A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;
>
> B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and
>
> C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

For the sake of simplicity, throughout this opinion we refer to an "accident arising out and in the course of his employment" as a "work-related accident." There is no controversy here that the 1983 accident was work-related and the 1988 accident was not. Section 52–1–9 states, in essence, that the injury must be "proximately caused" by a work-related accident. The language of Section 52–1–9 has not been changed in any way material to this case since the original enactment of the statute in 1937.

In 1959, however, at the next regular session of the legislature after our supreme court struck down as unconstitutional the 1957 revamping of the Workmen's Compensation Act, *State v. Mechem,* 63 N.M. 250, 316 P.2d 1069 (1957) (establishment of commission to administer Workmen's Compensation Act constituted unlawful delegation of judicial power), the legislature enacted what is now NMSA 1978, Section 52–1–28 (Orig.Pamp.), which reads:

> A. Claims for workmen's compensation shall be allowed only:
>
> (1) when the workman has sustained an accidental injury arising out of, and in the course of, his employment;
>
> (2) when the accident was reasonably incident to his employment; and
>
> (3) when the disability is a natural and direct result of the accident.
>
> B. In all cases where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a medical probability by expert medical testimony. No award of compensation shall be based on speculation or on expert testimony that as a

medical possibility the causal connection exists.

This section supplements the proximate-cause requirement of Section 52-1-9(C) with a natural-and-direct-result requirement. We infer that there is a difference between the natural-and-direct-result requirement and the proximate-cause requirement. Otherwise, there would be no reason for the legislature not to use the "proximate cause" language in Section 52-1-28 that it used in Section 52-1-9. The legislature was undoubtedly aware of the language of Section 52-1-9 and could have repeated the proximate-cause test if it did not intend to impose a further condition on recovery. We note that Section 52-1-28 did repeat other language of Section 52-1-9; it tracked Section 52-1-9 in using the phrase "arising out of, and in the course of, his employment." *See T.W.I.W., Inc. v. Rhudy,* 96 N.M. 354, 630 P.2d 753 (1981) (courts should avoid construing statute so as to render part of it surplusage).

To say that the natural-and-direct-result test adds to the proximate-cause test does not, however, fully define the meaning of the additional test. In *Stuckey v. Furr Food Cafeteria,* 72 N.M. 15, 16, 380 P.2d 172, 173 (1963), our supreme court construed the words "natural and direct" to "signify an understandable and reasonable proximity of cause and effect as distinguished from remote and doubtful consequences resulting from a given occurrence." The court's language, although useful in the case in which it appeared, provides little guidance for the present situation, in which we must consider the significance under our statute of a non-work-related accident subsequent to a work-related accident. For further guidance, we turn to the dictionary. "Direct" is defined as "without intervening persons, influences, factors, etc." *The Random House Dictionary of the English Language* 407 (unabridged ed. 1971). Drawing on this definition, we construe "a natural and direct result" to mean a result that occurs in the natural course of life without intervening events.

This definition not only fits the ordinary meaning of the language used by the legislature, *see Orcutt v. S & L Paint Contractors, Ltd.,* 109 N.M. 796, 791 P.2d 71 (Ct.App.1990) (words of statute should be interpreted as having their ordinary meaning, absent indication of contrary legislative intent), but also makes sense as a rational limitation on the benefits provided under the Act. Under our interpretation of the statute, a worker is entitled to benefits for disability arising immediately from a work-related accident and for disability that develops later as a result of the normal activities of life. The worker is not, however, provided an insurance policy of indefinite duration to cover every non-work-related accident that magnifies the original injury. *See Brackett v. A.C. Lawrence Leather Co.,* 559 A.2d 776, 778 (Me. 1989) (Glassman, J., dissenting) ("Nothing in the Workers' Compensation Act indicates that the Legislature intended that employers be general disability insurers for non-work-related injuries suffered by an employee.").

The full meaning of "natural and direct result" in the context of a non-work-related injury subsequent to a work-related injury will need to be developed case by case. To avoid misunderstanding, we emphasize two limitations on our present holding.

First, there is no contention by worker that the fall of the transmission was in some way caused by his earlier work-related back injury. Our holding here is not inconsistent with *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo.Ct.App. 1985), in which benefits were awarded when worker fell in her driveway due to ankle weakness caused by a work-related injury. *See* Larson, *supra,* § 13.12. We need not resolve that issue in this opinion.

Second, our holding today would not bar recovery for disability resulting from aggravation of a work-related injury by the normal physical stresses of everyday life. In *Rich v. Vail Ballou Press, Inc.,* 33 A.D.2d 1088, 307 N.Y.S.2d 943 (1970), the worker was cutting plywood with a saw when he experienced an injury that proved to be disabling. There was testimony that

what happened while worker was using the saw was "one of a series of insignificant strains" since his work-related injury. The court affirmed the award of benefits. In *Di Simone v. Underwriters Adjusting Co.*, 91 A.D.2d 782, 457 N.Y.S.2d 1009 (1982), the worker felt pain after placing a package in his car six years after his initial work-related injury. A doctor testified that this was a recurrence or a re-exacerbation of the earlier injury, not a new accident. In *Doty v. Aetna Life & Casualty*, 217 Neb. 428, 350 N.W.2d 7 (1984), the worker suffered a recurrence of back pain when he bent over to kiss his two-year-old daughter. Our holding is not inconsistent with the holdings in those cases. We need not decide here whether, or in what circumstances, an aggravation of a preexisting work-related injury caused by the ordinary physical stresses of daily life is a "natural and direct result" of the work-related injury.

As we read Larson, *supra*, our holding is consistent with the view of that treatise. Although the quotation in Section 13.00 upon which worker relies may appear to be contrary to our view, we attribute the apparent discrepancy to the fact that the statement in Section 13.00 was an attempt to condense the variety of rules discussed in the numerous subsections of Section 13. When the treatise addresses more specifically the issue before us, it supports our view. Professor Larson writes:

> [O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.

Larson, *supra*, § 13.11(a), at 3–510. This sentence states the general proposition upon which our holding is based: recovery is not permitted when the worsening of the condition is produced by an independent nonindustrial cause.

The author then goes on to indicate that the routine physical stresses of daily life are not an "independent nonindustrial cause." In other words, aggravation of work-related injuries that flow from such stresses are "natural and direct results" of the original injury. He writes:

> In a Utah case, claimant had suffered a compensable accident in 1966, injuring his back. Several years later, this condition was triggered by a sneeze into a disc herniation, for which claimant required surgery. The medical testimony was that because of the back condition, it was probable that had claimant not had the sneezing episode, some other major or minor event would have eventually necessitated surgery. The finding that the sneezing episode was the independent cause of claimant's disability, and the resultant denial of compensation, were held to be error, and benefits were awarded on appeal. This result is clearly correct. The presence of the sneezing incident should not obscure the true nature of the case, which is nothing more than that of a further medical complication flowing from a compensable injury. If the herniation had occurred while claimant was asleep in bed, [its] characterization as a mere sequel to the compensable injury would have seemed obvious. The case should be no different if the triggering episode is some nonemployment exertion like raising a window or hanging up a suit, *so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.* A different question is presented, of course, when the triggering activity is itself rash in the light of claimant's knowledge of his condition.

Id. at 3–515 to –517 (emphasis added and footnotes omitted).

Worker appears to interpret Larson, *supra*, as saying that the subsequent accident is not an intervening cause barring benefits so long as it occurred while the employee was engaged in reasonable activity. He points out that it was reasonable for him to work under his vehicle and to catch the transmission when it was about to fall on him. We do not share this interpretation of Larson, *supra*. In the examples given in the above-quoted passage the

new injury was triggered by the normal movements themselves. It is reasonable to say that an injury resulting from the concurrence of a preexisting injury and the normal movements of everyday life is a "direct and natural result" of the original injury. It strains the meaning of "natural and direct result," however, to say that the phrase encompasses a subsequent injury precipitated by a severe and uncommon trauma.

The distinction we are making is illustrated in *Wilson v. Workers' Compensation Commissioner,* 174 W.Va. 611, 328 S.E.2d 485 (1984). *See* Larson, *supra,* § 13.11, at 3–502 to –503 n. 1.1. The West Virginia court considered three consolidated cases. A comparison of two of them is instructive. In one the worker reinjured his back while playing with his child on the floor. The court referred to the incident as a routine event and held that the worker's compensation case could be reopened. In a second case, however, the recurrence of disability was precipitated by an automobile accident. The court held that the case should not be reopened because "the automobile accident was an independent cause" and "an independent intervening cause not attributable to the claimant's customary activity cannot be related back to the original occupational injury." 328 S.E.2d at 491. Of course, riding in an automobile is as routine an activity as playing with a child, but the physical stress from the accident was not routine, whereas the stress of playing with the child was routine.

Returning to the case at hand, worker could not establish his entitlement to benefits simply by showing that his present disability was a consequence of aggravation of his 1983 injury. Nor could he establish his entitlement to benefits solely by showing that the 1983 injury contributes to his present disability.[1] To recover benefits, worker needed to convince the WCD that his 1988 disability was a direct and natural result of the 1983 injury—that is, a disability that arose from a combination of his 1983 injury and the normal physical strains of daily life.

Yet the WCD rejected worker's proposed conclusion (which could have been labelled as a finding) that his 1988 injury was a natural and direct result of his 1983 accident. On the record before us it was rational for the WCD to do so. *See Sosa v. Empire Roofing Co.,* 110 N.M. 614, 798 P.2d 215 (Ct.App.1990) (when a finding is made against the party bearing the burden of persuasion, the reviewing court will affirm if the fact-finder acted rationally). The WCD found (and worker does not challenge the finding) that worker had suffered no disability for more than four years prior to the 1988 accident. Dr. Barry Diskant testified that the force on worker's disks from abdominal pressure as he caught a transmission would be "tremendous," [2] and that worker would probably not have herniated a disk if he had continued on his normal course from 1983, with no injuries such as the 1988 injury. He also testified that worker's present pain was due to instability at L3–4, which was not a natural and direct consequence of the 1983 injury. Dr. Robert Turner testified that the transmission incident caused the symptoms worker was experiencing. Dr. Steven

1. In any event, we read the WCD's findings as denying this possibility. It apparently was undisputed that part of worker's physical impairment at L5–S1 was caused by the 1983 accident. Yet the WCD found that worker's "disability and impairment are the direct and proximate result, to a medically reasonable probability, of the accident of January 6, 1988." Given the evidence at the hearing, we assume that the "impairment" referred to in the finding is the impairment causing worker's disability, from which it follows that any preexisting impairment caused by the 1983 accident was not contributing to the 1988 disability. *See Roybal v. Morris,* 100 N.M. 305, 669 P.2d 1100 (Ct.App. 1983) (findings should be construed so as to uphold rather than defeat the judgment). The evidence would support such a finding, since Dr. Barry Diskant testified that worker's pain arose at L3–4, and worker was not disabled by the L5–S1 impairment for several years prior to the 1988 accident.

2. Dr. Diskant spoke in terms of a transmission weighing 200 to 300 pounds. The source of that figure has not been brought to our attention, but worker's counsel did not dispute reference to the figure throughout several depositions of expert witnesses and the figure does not seem unreasonable.

Feagler testified that the stress of catching the transmission probably caused the L3–L4 disk herniation, and that he did not know whether worker would have continued without pain if there had been no 1988 incident.

Perhaps the record would have supported findings by the WCD that the physical stress from the transmission incident was no greater than the ordinary stress of normal daily activities and that worker's disability was a natural and direct result of the 1983 accident. But the record does not compel such findings. *See id.* Therefore, we affirm the judgment of the WCD.

IT IS SO ORDERED.

MINZNER, J., concurs.

CHAVEZ, J., dissents.

CHAVEZ, Judge (dissenting).

I respectfully dissent from the majority opinion. I believe the WCJ used an erroneous legal basis to make a finding of fact. Worker argues that, as a matter of law, if a disability is the concurrent result of a work-related accident and a non-work-related accident, the disability is compensable. Employer argues that the 1988 accident was an independent intervening (or precipitating) cause of worker's disability. Because the disability was due to a non-work-related accident, employer states that it should not compensate worker. This issue is resolved by first looking at NMSA 1978, Section 52–1–28(A)(3) (Repl.Pamp.1987), which defines causation of a disability as being "a natural and direct result of the accident." Nothing in the statute suggests the disability has to be the sole result, or may not be a concurrent result, of a work-related accident. Worker seems to suggest further, and I agree, that the plain words of the statute are ambiguous. I can find nothing, after searching New Mexico precedent, that addresses the exact question at hand.

To give meaning to the statute, worker cites many cases from other jurisdictions that have required compensation from an employer when its worker has suffered a non-work-related aggravation of a previous disability. Employer distinguishes these cases on the fact that the reinjury occurred while the worker was still disabled from the prior injury. *See, e.g., GTE Sylvania v. Workers' Compensation App. Bd.,* 73 Pa.Commw. 618, 458 A.2d 1050 (1983); *Di Simone v. Underwriters Adjusting Co.,* 91 A.D.2d 782, 457 N.Y.S.2d 1009 (1982). Worker's condition in this case had evidently stabilized long before the 1988 accident. However, that is a difference that does not necessarily matter. As one court put it, medical stabilization is evidence that a later reinjury is the sole cause of a later disability. That evidence does not, however, conclusively exclude the possibility that a prior accident was a part of the cause of a subsequent disability. *Town of Hudson v. Wynott,* 128 N.H. 478, 522 A.2d 974 (1986) (awarding compensation even though back injury stabilized prior to second injury).

Finding no guidance from New Mexico precedent or the cases in the briefs, I relied on Professor Larson for insight. He has analyzed the precedents on the subject of exacerbated pre-existing conditions. *See generally* 1 A. Larson, *The Law of Workmens' Compensation* § 13 (1990). More specifically with respect to aggravation of an originally compensable injury, he states:

> [O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.... The case should be no different if the triggering episode is some nonemployment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.

Id. § 13.11(a), at 3–510 to –517 (footnote omitted).

The following cases, cited in the margin of Larson's work, are analogous to this one. In *Brackett v. A.C. Lawrence Leather Co.,* 559 A.2d 776 (Me.1989), the worker injured his back at work in January 1978,

but returned to full duty in January 1979. In July 1985, he was involved in an automobile accident and sneezed the next day, reinjuring his back. The court stated that even though it was likely the auto accident was the major contributing factor to the worker's 1985 disability, the 1978 employer was liable for compensation because the evidence was that the 1978 accident was part of the cause of the 1985 disability. *Id.* In *In re Compensation of Grable,* 291 Or. 387, 631 P.2d 768 (1981), the worker injured his back in February 1978. He was released to full duties, but reinjured his back at home pulling steel pipe onto his roof. Because the evidence was that the prior injury was part of the cause of the later disability, the court reversed the denial of compensation. *Id.* In *Town of Hudson v. Wynott,* the worker injured his back in June 1976. He received medical treatment until September 1980. Between September 1980 and July 1983, the worker did not seek medical treatment for his back. In July 1983, the worker, at his own bait shop, lifted a styrofoam bait pail containing about a gallon of water and reinjured his back. The court held that, despite the three-year stabilization, the worker was entitled to benefits because the work-related incident was part of the cause of the subsequent disability and thus the direct and natural result of the work-related injury. *Id.* Finally, in *Rich v. Vail Ballou Press, Inc.,* 33 A.D.2d 1088, 307 N.Y.S.2d 943 (1970), the worker sustained a back injury in May 1962. In May 1966, he did not receive benefits and did not incur lost time, so the insurer closed his case. He suffered reinjury in August 1967. The evidence was that part of the cause of the 1967 disability was the 1962 injury. Therefore, the court concluded that the 1962 employer should have compensated the worker. *Id.*

In the *Brackett, Grable, Wynott* and *Rich* cases, there was an apparent end to a worker's back difficulties, much like the situation in this case. In each case, there was a non-work-related reinjury that occurred after the worker was apparently fully able to continue work, as in this case. In each case, the evidence was that part of the cause of the latter disability was the prior work-related injury, as in this case. There is nothing about the causation formulas in these cases that make their reasoning somehow inapplicable to the case at hand. Moreover, they support the view that Professor Larson's treatise concludes that, if worker's 1983 accident was in part the cause of his 1988 disability, that disability is compensable.

In sum, I believe that there may have been substantial evidence that there was no causal connection between the 1983 accident and the 1988 disability. Yet the record reflects a decision by the WCJ that, whether or not there was evidence of a causal connection, he was going to rule that there would be no compensation. He did so without considering whether the exertion leading to the 1988 accident was unreasonable under the circumstances of worker's condition. *See* 1 A. Larson, *supra* p. 3–517, § 13.11(a). There is no express finding that the 1983 accident was not part of the cause of the 1988 disability. Whether the 1983 accident was part of the cause was a central issue in the case. In fact, the WCJ's "benefits analysis" findings deal exclusively with the 1988 accident and disability. It is incongruous that the WCJ left such findings to inference from his rejection of all tendered findings not expressly adopted, unless he misunderstood the legal significance of the 1983 accident. On the peculiar state of this record, I think it manifestly just to remand for a rehearing, based on the evidence already in the record, in accordance with the legal principles described above. *See Garcia v. Mora Painting & Decorating,* 112 N.M. 596, 817 P.2d 1238 (Ct.App.1991).

824 P.2d 324

Glenda Fay WINEMAN, Claimant–Appellant,

v.

KELLY'S RESTAURANT, and Mountain States Mutual Casualty Company, Respondents–Appellees.

No. 12674.

Court of Appeals of New Mexico.

Nov. 12, 1991.

Curtis R. Gurley, Victor A. Titus, P.C., Farmington, for claimant-appellant.

Alice Tomlinson Lorenz, Miller, Stratvert, Torgerson, & Schlenker, P.A., Albuquerque, for respondents-appellees.

OPINION

CHAVEZ, Judge.

Worker appeals an order of the Workers' Compensation Administration (WCA) granting employer's motion for summary judgment and dismissing her compensation claim with prejudice. Worker maintains the WCA erroneously refused to give effect to her peremptory challenge of Judge Wiltgen, the judge assigned to decide her claim. In addition, worker raises several other issues. We hold the WCA should have honored worker's peremptory challenge, and reverse on that basis. We need not address worker's other issues.

This case was originally assigned to Judge Gregory D. Griego. Employer peremptorily challenged Judge Griego within ten days of the assignment. On February 27, 1990, the WCA issued a notice of reassignment to Judge Wiltgen. Worker filed a peremptory challenge to Judge Wiltgen on March 8, 1990. Judge Wiltgen, however, refused to honor the challenge, based on his interpretation of Rule XXIII of the WCA's formal hearing rules. Formal Hearing Rule XXIII, New Mexico Dep't of Labor, Workers' Compensation Administration (June 1989).

Rule XXIII(C) provides, in pertinent part, as follows:

> (1) The right to excuse a Workers' Compensation Judge shall be exercised not later than ten (10) days from the date that the Notice of Judge Assignment is issued by the Clerk. The failure to exercise the right within ten (10) days shall constitute a waiver of the right. Any party who is joined after the initial Notice of Judge Assignment shall exercise

the statutory right to excuse not later than ten (10) days after entry of the order joining that party.

(2) A provisional challenge to excuse a Workers' Compensation Judge is permitted. Provisional challenge would excuse a judge who may be assigned to the case in the event that any other party disqualifies the previously assigned Workers' Compensation Judge in a timely fashion. Any provisional challenge to excuse a Workers' Compensation Judge shall be exercised within ten (10) days from the date the initial Notice of Judge Assignment is issued by the Clerk.

* * * * * *

(4) Failure to exercise a peremptory challenge or provisional challenge consistent with the terms of this rule shall constitute a waiver of the right to exercise a peremptory challenge or provisional challenge.

This rule was applied in the following fashion: Employer challenged the assigned judge within ten days of the initial notice of judge assignment. Worker did not file a provisional challenge to any judge. Instead, worker waited for another judge to be assigned, and then within ten days of the second notice of judge assignment, worker challenged Judge Wiltgen, the subsequently-assigned judge. The WCA did not recognize the challenge to Judge Wiltgen because, according to the WCA, the rule required worker to file a provisional challenge to exercise worker's peremptory challenge. In other words, according to the WCA, there are only two ways for parties to peremptorily challenge a workers' compensation judge. A party may challenge the first judge assigned within ten days of the notice of judge assignment. In the alternative, if the party does not wish to challenge the first judge, the party may file a provisional challenge to a different judge, anticipating the possibility that the opposing party will challenge the first judge. This provisional challenge must be filed within ten days of the initial notice of judge assignment, whether or not the first judge has already been challenged and whether or not the party has reason to believe the first judge will be challenged. The WCA's position is that a party may not wait to find out that the first judge has been challenged and until a different judge is assigned, and then challenge the second judge. Failure to challenge the first judge or to provisionally challenge any other judge, according to the WCA, constitutes waiver of the right to challenge one judge.

Worker argues that the rule does not mandate a provisional challenge as the only means of challenging a subsequently-assigned judge. Worker maintains a party may choose to exercise a provisional challenge or may wait until a new judge is assigned and then peremptorily challenge that judge. In the alternative, worker argues that if the rule requires a provisional challenge as the only means of challenging a subsequently-assigned judge, the rule violates the statutory mandate that each party to a workers' compensation proceeding be allowed to peremptorily challenge one judge. NMSA 1978, § 52–5–5(D) (Cum. Supp.1990). Because we agree with worker's interpretation that the rule does not require a provisional challenge as the sole means of challenging a subsequently-assigned judge, we need not address the latter argument.

The WCA is authorized to adopt reasonable rules and regulations governing the conduct of its proceedings. NMSA 1978, § 52–5–4 (Cum.Supp.1990). These procedural rules should be definite and certain so the parties know what is expected of them. *See Milosevich v. Board of County Comm'rs,* 46 N.M. 234, 239, 126 P.2d 298, 301 (1942) (rules of practice should be definite and certain so that all litigants may be assured of the same treatment). In interpreting Rule XXIII, we apply a canon of construction used to interpret statutes, and give effect to the plain meaning of the words used in the rule. *See State v. Eden,* 108 N.M. 737, 741, 779 P.2d 114, 118 (Ct.App.1989) (we apply same canons of construction to rules of procedure as those applied to statutes, and read the procedural rules in accordance with their plain meaning).

According to the plain words of Rule XXIII, a provisional challenge is *permitted.* Rule XXIII(C)(2). Nowhere in the rule does it state that such a challenge is *required* in order to assert a party's right to peremptorily challenge a judge. The first paragraph of the rule states that a party may exercise the right to challenge a judge within ten days of the notice of judge assignment. Rule XXIII(C)(1). It does not indicate that the notice of judge assignment referred to is solely the initial one, but seems to allow a challenge after any notice of judge assignment, whether an initial notice or a subsequent notice following disqualification or recusal of the originally assigned judge. Furthermore, the waiver section of the rule does not clearly state that a party failing to utilize a provisional challenge waives the right to peremptorily challenge a judge. Instead, it states only that failure to properly exercise a peremptory challenge or provisional challenge constitutes a waiver of the right to file a peremptory or provisional challenge. Rule XXIII(C)(4). As the rule stands, the most reasonable interpretation of it is that each party has a right to exercise a peremptory challenge within ten days of the initial notice of judge assignment or a subsequent notice of judge assignment, if the first judge is excused or recuses himself or herself. A party is permitted, however, to move things along by not waiting to find out whether the first judge is challenged, but instead filing a provisional challenge to a different judge within ten days of the initial notice of judge assignment. The rule simply does not make it clear that the only way to exercise a peremptory challenge, if a party does not wish to challenge the judge originally assigned, is to file a provisional challenge.

By this holding, we express no opinion regarding the WCA's authority to require litigants to file a provisional challenge in order to preserve their right to peremptorily excuse a subsequently-assigned judge. We hold only that if the WCA wishes to regulate litigants' ability to excuse a judge by requiring them to file provisional challenges even before they know whether the first judge will be excused, it must use clearer language than that contained in Rule XXIII. *See, e.g.,* former Rule 88.1, N.M.R.Civ.P. (Supp.1985) (if one party has excused the judge first assigned to a case, any other party who wishes to excuse a judge *must* file a provisional notice of election to excuse such judge).

Based on the foregoing, we hold Judge Wiltgen should have honored worker's peremptory challenge and excused himself from this case. All actions taken by Judge Wiltgen subsequent to the challenge, therefore, are void. We reverse and remand this case to the WCA for further proceedings in accordance with this opinion.

IT IS SO ORDERED.

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

824 P.2d 326

STATE of New Mexico, Plaintiff–Appellee,

v.

Oscar MURILLO, Defendant–Appellant.

No. 12757.

Court of Appeals of New Mexico.

Nov. 20, 1991.

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

Tom Udall, Atty. Gen. and Mary Catherine McCulloch, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

BLACK, Judge.

Defendant appeals from his conviction for one count of possession of cocaine. He argues the Fourth Amendment should apply to an off-duty investigator for the district attorney's office acting as a private security officer, and that the trial court therefore erred in denying his motion to suppress the cocaine. For the reasons discussed below, we reverse and remand.

FACTS

Mike Gonzales is an investigator for the Third Judicial District Attorney's Office and the owner of a private security company. Shortly after midnight on February 20, 1990, he received a telephone call at his

security firm. The unidentified caller informed Gonzales that defendant, Oscar Murillo, was at the Welcome Inn and was carrying a gun. Because his private security firm provided service to the Welcome Inn, Gonzales attempted to contact his other security unit to respond to the call. When he determined the other unit was unavailable, Gonzales went to the Welcome Inn himself. In case defendant actually was carrying a weapon, Gonzales called for the assistance of the local police at some point prior to his initial contact with defendant.

Gonzales testified that he was acquainted with defendant and recognized him upon entering the Welcome Inn. Gonzales then asked defendant to accompany him outside, and defendant did so. Defendant testified that since he knew Gonzales was a security guard, he "respected him." Gonzales told defendant that he had information defendant was armed and requested permission to conduct a protective patdown. Defendant testified that he had "nothing to hide" so he "opened up." Gonzales testified that he found no evidence of a weapon, but because defendant's shirt was untucked and covered his belt, Gonzales requested defendant to open up his pants. Defendant complied with the request.

At this point, the testimony diverges somewhat. Defendant testified that Gonzales questioned him about some involvement with an "incident at a bowling alley." Gonzales denies this. Defendant states that, after finding no weapon, Gonzales patted his shirt pocket four times and asked, "What's this?" Gonzales testified that when he got to defendant's shirt pocket, he felt some small packets and defendant volunteered, "That's my personal stash." Gonzales further testified that when he requested the contents of defendant's shirt pocket, defendant voluntarily removed a tissue containing three "bindles" and handed them to Gonzales. There is no dispute that the bindles contained cocaine.

The Las Cruces police arrived shortly after this exchange, and Gonzales turned the packets of white powder over to them. At the suppression hearing defendant argued that the Fourth Amendment, U.S. Const. amend. IV, applied to the encounter because Gonzales was a full-time, commissioned law enforcement officer investigating a potential felony offense. Defendant contended that law enforcement officers, held to Fourth Amendment standards in their police work, should not be allowed to violate those standards while working for private security firms. In addition, defendant argued that the Fourth Amendment was violated here because Gonzales did not have articulable facts giving rise to reasonable suspicion to support the stop. *State v. Cobbs,* 103 N.M. 623, 711 P.2d 900 (Ct.App. 1985).

The district judge did not hear argument from the state, but ruled from the bench at the close of defendant's argument. The district court ruled that since Gonzales was acting as a private citizen, the search was not subject to the Fourth Amendment. The motion to suppress was denied. Defendant later entered a plea of guilty, reserving appeal on this issue.

APPLICABILITY OF THE FOURTH AMENDMENT TO "SPECIAL POLICE"

From the record it appears the district court concluded that since Gonzales was working for a private security firm at the time of the search, the Fourth Amendment did not apply. We think a more particularized inquiry is required and remand for findings of fact pursuant to the guidelines set forth in this opinion.

The courts of New Mexico, like other jurisdictions, have accepted the longstanding rule that the protections of the Fourth Amendment[1] do not apply to private individuals acting for their own purposes. *State v. Johnston,* 108 N.M. 778, 780–81, 779 P.2d 556, 558–59 (Ct.App.),

1. Defendant did not raise or preserve any claim resting on New Mexico's constitutional provisions and thus the scope of New Mexico constitutional protections will not be considered in this appeal. *See State v. Vasquez,* 109 N.M. 720, 723, 790 P.2d 517, 520 (Ct.App.), *cert. denied,* 109 N.M. 751, 790 P.2d 1032 (1990).

cert. denied, 108 N.M. 771, 779 P.2d 549 (1989); *State v. Perea,* 95 N.M. 777, 779, 626 P.2d 851, 853 (Ct.App.), *cert. denied,* 96 N.M. 17, 627 P.2d 412 (1981); *see Burdeau v. McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921). The Fourth Amendment does, however, apply to searches effected by a private party who is acting "as an instrument or agent of the Government." *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 614, 109 S.Ct. 1402, 1411, 103 L.Ed.2d 639 (1989); *accord State v. Cox,* 100 N.M. 667, 670, 674 P.2d 1127, 1130 (Ct.App.1983); *State v. Doe,* 93 N.M. 143, 145–46, 597 P.2d 1183, 1185–86 (Ct.App.1979).

Security personnel hired to protect private business premises are performing traditional police functions when they arrest, question, and search for evidence against criminal suspects. Steven Euller, *Private Security and the Exclusionary Rule,* 15 Harv.C.R.–C.L.L.Rev. 649, 657–58 (1980); Michael A. Braun & David J. Lee, Comment, *Private Police Forces: Legal Powers and Limitations,* 38 U.Chi.L.Rev. 555, 557 (1971). Like the public police, then, such private security personnel have the potential to invade defendants' constitutional rights in many situations. *City of Grand Rapids v. Impens,* 414 Mich. 667, 327 N.W.2d 278 (1982) (Kavanagh, J., dissenting); John M. Burkoff, *Not So Private Searches and the Constitution,* 66 Cornell L.Rev. 627 (1981). The Pennsylvania Supreme Court recognized this danger when it said:

> [I]f detectives and private intermeddlers may, without legal responsibility, peer through keyholes, eavesdrop at the table, listen at the transom and over the telephone, and crawl under the bed, then all constitutional guarantees become meaningless aggregation of words, as disconnected as a broken necklace whose beads have scattered on the floor.

Commonwealth v. Murray, 423 Pa. 37, 223 A.2d 102, 110 (1966).

Numerous legal commentators have also acknowledged this danger and recommended that the Fourth Amendment be applied uniformly to all private security police. *See, e.g.,* Burkoff, *supra;* David L. DeNinno, Note, *Private Searches and Seizures: An Application of the Public Function Theory,* 48 Geo.Wash.L.Rev. 433 (1980); Stanley R. Steinberg, Comment, *Private Police Practices and Problems,* 1972 Law & Soc.Ord. 585; Note, *Regulation of Private Police,* 40 S.Cal.L.Rev. 540 (1967). Since the primary motivation for the adoption of the Fourth Amendment was the fear of arbitrary government action,[2] however, most courts have refused to apply the Fourth Amendment uniformly to private security guards. *See, e.g., United States v. Francoeur,* 547 F.2d 891 (5th Cir.), *cert. denied,* 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed.2d 228, 431 U.S. 923, 97 S.Ct. 2197, 53 L.Ed.2d 238, 431 U.S. 932, 97 S.Ct. 2640, 53 L.Ed.2d 249 (1977); *State v. Buswell,* 460 N.W.2d 614 (Minn.1990), *cert. denied,* — U.S. —, 111 S.Ct. 1107, 113 L.Ed.2d 216 (1991); *State v. McDaniel,* 44 Ohio App.2d 163, 337 N.E.2d 173 (1975); Paul G. Reiter, Annotation, *Admissibility, in Criminal Case, of Evidence Obtained by Search by Private Individual,* 36 A.L.R.3d 553 (1971 & Supp.1991). Indeed, the rationale behind the exclusionary rule has little applicability to private security guards when they are acting exclusively to foster the interests of their private employers. *People v. Scott,* 43 Cal.App.3d 723, 117 Cal.Rptr. 925 (1974); *State v. Keyser,* 117 N.H. 45, 369 A.2d 224 (1977); *City of Univ. Heights v. Conley,* 20 Ohio Misc. 112, 252 N.E.2d 198 (1969).

In many instances, however, private security police serve a public purpose. When they perform a public function or act as agents of a government investigation, their activities may therefore become state action for constitutional purposes. *See, e.g., Griffin v. Maryland,* 378 U.S. 130, 135, 84 S.Ct. 1770, 1772, 12 L.Ed.2d 754 (1964) (amusement park security guard deputized

2. *New Jersey v. T.L.O.,* 469 U.S. 325, 335, 105 S.Ct. 733, 739, 83 L.Ed.2d 720 (1985); *Harris v. United States,* 331 U.S. 145, 157–58 n. 3, 67 S.Ct. 1098, 1104–05 n. 3, 91 L.Ed. 1399 (1947) (Frankfurter, J., dissenting); *Boyd v. United States,* 116 U.S. 616, 625, 6 S.Ct. 524, 529, 29 L.Ed. 746 (1886).

as a sheriff was a law enforcement officer); *Pratt v. State,* 9 Md.App. 220, 263 A.2d 247, 250 (1970) (store detective's commission as a state officer required giving *Miranda* warnings); *cf. Marsh v. Alabama,* 326 U.S. 501, 502–03, 66 S.Ct. 276, 276–77, 90 L.Ed. 265 (1946) (deputy sheriff, paid by the company, patrolled a company town and performed services of municipal police).

How, then, should the Fourth Amendment be applied when a private security guard is also a publicly commissioned police officer? Such an individual has an additional motivation for seeking criminal convictions and may be more inclined to transgress the bounds of the Fourth Amendment if given immunity while acting in his "private" capacity. 1 Wayne R. LaFave, *Search and Seizure* § 1.8(d), at 201 (2d ed.1987); *cf.* Harvey L. Ziff, Note, *Seizures by Private Parties: Exclusion in Criminal Cases,* 19 Stan.L.Rev. 608, 614 (1967) (exclusionary rule not an effective deterrent since private guards have no reason to seek convictions).

This issue is arising with increased frequency with the expansion of private security forces and the escalating employment of former and moonlighting public police officers. *See generally* NMSA 1978, § 61–16–10 (Repl.Pamp.1987) (encouraging "so far as possible regularly employed police officers or deputy sheriffs" be hired as auction inspectors); *Traver v. Meshriy,* 627 F.2d 934 (9th Cir.1980) (police department encouraged bank to employ off-duty police officers). In this capacity,

> The police have no sense of "crossing over" to the other side when they join private security systems. The cause, crimefighting, is largely the same; only the employer has changed. Communication is maintained between the departing government employee who becomes a private security professional and his former colleagues remaining with the public agency.

Euller, *supra,* at 668 (footnote omitted).

For this reason some courts have held that where a private security guard is also commissioned as a special police officer, the Fourth Amendment automatically applies. *United States v. Dansberry,* 500 F.Supp. 140, 143 (N.D.Ill.1980); *State v. Wilkerson,* 367 So.2d 319, 321 (La.1979); *People v. Eastway,* 67 Mich.App. 464, 241 N.W.2d 249, 250 (1976) (dictum); *People v. Diaz,* 85 Misc.2d 41, 376 N.Y.S.2d 849, 851–52 (1975); *cf. Williams v. United States,* 341 U.S. 97, 99–100, 71 S.Ct. 576, 578–79, 95 L.Ed. 774 (1951) (beating of suspects by "commissioned" private detective was under color of state law). Other courts, while refusing to apply the Fourth Amendment to purely private security guards, have recognized that the result might be otherwise if the guards were also specially commissioned by a public authority. *Waters v. State,* 320 Md. 52, 575 A.2d 1244, 1246–47 (dictum), *cert. denied,* — U.S. —, 111 S.Ct. 529, 112 L.Ed.2d 539 (1990); *State v. Hutson,* 649 S.W.2d 6, 8 (Tenn.Crim.App. 1982).

The general rule appears to be that whether a "private" person is acting as an agent of the government is determined as a question of fact in light of all the circumstances. *Pleasant v. Lovell,* 876 F.2d 787, 796 (10th Cir.1989); *United States v. Donnes,* 752 F.Supp. 411, 418 (D.Wyo. 1990). We believe "as with much of the law of the fourth amendment, only the specific facts of each case will determine when the line between private and governmental searches has been crossed." 8B James W. Moore *et al., Moore's Federal Practice* ¶ 41.21[1], at 41–346 (2d ed.1991); *accord Ex parte Kennedy,* 486 So.2d 493 (Ala.1986); *Lucas v. United States,* 411 A.2d 360 (D.C.App.1980); *State v. Roccasecca,* 130 N.J.Super. 585, 328 A.2d 35 (1974); *Moore v. State,* 562 S.W.2d 484 (Tex.Crim.App.1978). *Compare United States v. McGreevy,* 652 F.2d 849 (9th Cir. 1981) (action not under color of state law when off-duty policeman working as Federal Express security officer opened package) *with Traver v. Meshriy,* 627 F.2d 934 (9th Cir.1980) (action under color of state law when off-duty policeman working as bank "security teller" detained customer).

The burden of establishing government involvement in a search by a privately

employed individual rests with the defendant. *United States v. Feffer,* 831 F.2d 734, 739 (7th Cir.1987); *State v. Watts,* 750 P.2d 1219, 1221 (Utah 1988). However, since we recognize that a commissioned officer may have additional incentive to obtain a conviction by ignoring a suspect's constitutional rights,[3] once it is determined that the search at issue was conducted by a publicly commissioned official, the burden must shift to the state to show the officer was acting in a truly private capacity. *Cf. United States v. Maez,* 872 F.2d 1444, 1452 (10th Cir.1989) (warrantless search of home presumptively unreasonable and state has burden of showing exigency).

The Supreme Judicial Court of Massachusetts set forth useful criteria for determining when a publicly commissioned officer is acting in a private capacity in *Commonwealth v. Leone,* 386 Mass. 329, 435 N.E.2d 1036 (1982). The *Leone* court applied the Fourth Amendment to a search conducted by a special police officer privately employed as a plant security guard, but in so doing the court recognized that the exclusionary rule serves a different purpose as applied to a special police officer employed in a private capacity. The court reasoned that "[t]he action he takes on behalf of his employer may be a lawful and necessary means of protecting the employer's property, although it would be impermissible if taken on behalf of the State in pursuit of evidence." *Id.* 435 N.E.2d at 1041. The *Leone* court therefore set forth four issues to be addressed in applying the Fourth Amendment in such settings: (1) whether the guard acted under the control of his private employer; (2) whether the guard's actions clearly related to his private employer's private purposes; (3) whether the search was conducted as a legitimate means of protecting the employer's private property; and (4) whether the methods and manner of the search were reasonable and no more intrusive than necessary. *Id.* at 1041–42.

While it may be that the district court would be able to apply the *Leone* test to the present record, neither the court nor the parties could have anticipated the requirements of our decision and therefore we remand for a fact-finding consistent with these criteria. *Cf. State ex rel. Human Servs. Dep't v. Coleman,* 104 N.M. 500, 723 P.2d 971 (Ct.App.1986) (remand where record unclear as to whether trial court properly considered certain evidence).

ARTICULABLE SUSPICION

Defendant also argues that Gonzales made an investigatory stop without "articulable suspicion." This of course assumes the Fourth Amendment applies to the Gonzales investigation. If the trial court determines the constitutional limitations apply, defendant will certainly have the opportunity to renew this argument.

CONSENT

The state relies upon *State v. Hadley,* 108 N.M. 255, 258, 771 P.2d 188, 191 (Ct.App.1989), to support its contention that, even if we were to find the Fourth Amendment applied, defendant voluntarily consented to the search and produced the cocaine without any compulsion. *But cf. State v. Bedolla,* 111 N.M. 448, 806 P.2d 588 (Ct.App.) (partially overruling *Hadley*), *cert. denied,* 111 N.M. 416, 806 P.2d 65 (1991). While this may be true, the issue of whether a defendant consented to a search is one of fact, *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973), and the state must establish the voluntary nature of the consent by clear and positive evidence. *State v. Goss,* 111 N.M. 530, 534, 807 P.2d 228, 232 (Ct.App.), *cert. denied,* 111 N.M. 416, 806 P.2d 65 (1991). Moreover, the issue of consent may be intertwined with whether Gonzales was acting as a private security guard or a public peace officer when he requested the contents of defendant's pocket; for example, would defen-

3. While we recognize NMSA 1978, Section 29–1–1 (Repl.Pamp.1990), makes it "the duty of every sheriff, deputy sheriff, constable and every other peace officer to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware," we do not think the intent of this statute was to authorize or require peace officers to act in their official capacity at all times, even though employed by private parties.

dant voluntarily produce his "personal stash" to someone who identified himself as an investigator for the district attorney? *See People v. Taylor*, 222 Cal.App.3d 612, 271 Cal.Rptr. 785 (1990); Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J.Crim.L. & Criminology 437, 439 (1988) (citizens almost never feel free to end an encounter initiated by actual police officer). Since we find it necessary to remand and the parties did not develop the facts as related to consent or even present the issue to the district court, we will not address this issue.

CONCLUSION

We remand this case for further findings consistent with this opinion. The district court may make such findings upon the existing record or, in its discretion, receive such additional evidence as appears relevant.

IT IS SO ORDERED.

BIVINS and MINZNER, JJ., concur.

824 P.2d 332

STATE of New Mexico, Plaintiff–Appellant,

v.

Robert JOHNSON, Defendant–Appellee.

No. 11852.

Court of Appeals of New Mexico.

Nov. 21, 1991.

Tom Udall, Atty. Gen., William McEuen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Robert R. Cooper, Albuquerque, for defendant-appellee.

OPINION

ALARID, Chief Judge.

The state appeals the order of the district court dismissing the indictment against defendant on speedy trial grounds. We affirm the decision of the trial court.

BACKGROUND

On September 30, 1986, defendant and his codefendant were arrested and charged with murder stemming from an incident that had occurred during the previous month. Defendant was released on his own recognizance after six and one-half hours of incarceration. This release included restrictions placed on defendant's liberty.

Defendant was subsequently indicted for manslaughter and aggravated battery on September 4, 1987. Defendant filed a motion to dismiss the charges on November 30, 1987. A hearing on this motion was held on February 3, 1988. The trial court dismissed the manslaughter charge but refused to dismiss the aggravated battery charge. At the hearing, defendant presented evidence to show that, due to the preindictment delay, he was suspended from his job, suffered stress and depression, and suffered marital difficulties and financial difficulties that affected his children. Defendant's motion to dismiss was later granted by a different judge who was subsequently assigned to the case. This appeal followed that decision.

SPEEDY TRIAL

This case is related to the recent case of *State v. Garcia,* 110 N.M. 419, 796 P.2d 1115 (Ct.App.1990), in that the defendant in *Garcia* and this defendant were arrested at the same time for the same activity. Speedy trial analysis involves application of the balancing test in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Under the *Barker* test, we consider four factors, namely, the length of the delay, the reason for the delay, defendant's assertion of his speedy trial right, and prejudice to the defendant caused by the delay.

For purposes of speedy trial analysis, the facts in *Garcia* relating to the first three factors in the *Barker* test are identical to the facts in this case. The delay in the instant case was over nineteen months and was presumptively prejudicial. *See Salandre v. State,* 111 N.M. 422, 806 P.2d 562 (1991). The reason for delay, as observed in *Garcia,* was attributable to further investigation of the case, inadequate staffing, a busy trial schedule on the part of the prosecutor, and attempts of the prosecutor to meet with defense counsel to discuss a possible plea bargain. We weigh this factor against the state, but not heavily. Defendant asserted his right to a speedy trial by filing a motion to dismiss for delay on November 30, 1987. This factor is also weighed in favor of defendant, but not heavily. *See Work v. State,* 111 N.M. 145, 803 P.2d 234 (1990). In weighing the length of the delay, the reason for the delay, and the assertion of the right to a speedy trial, similar to the weighing of these factors by the court in *Garcia,* we determine that the first three factors should be balanced in defendant's favor, but not heavily. *See id.* 110 N.M. at 423–24, 796 P.2d at 1119–20.

However, in weighing the prejudice factor of the *Barker* test, we find that the balance tips substantially in favor of defendant. In reference to this factor, this court in *Garcia* stated that the defendant had shown minimal prejudice caused by the delay. The defendant in *Garcia* claimed that she had lost visitation time with her daughter and the esteem of her co-workers; that she had endured emotional suffering and lost weight; that she was unable to plan her future; and that she lived in fear. This showing was held to be not sufficiently different from the showing any criminal defendant could make to justify dismissal on speedy trial grounds. *Id. Garcia* concluded that the defendant's minimal showing of prejudice was insufficient to support her claim that the state had denied her the right to a speedy trial.

Many of the reasons cited by defendant to show prejudice fall in the same category as those claimed by the defendant in *Garcia.* However, unlike the result in *Garcia,* considering the problems suffered by defendant herein, which were similar to those suffered by the co-defendant, plus the suspensions of defendant from his employment, the problems attending such suspensions, and the psychological stress resulting therefrom, we are persuaded that defendant has established that he suffered substantial prejudice as a result of the de-

lay herein. *See, e.g., State v. Kilpatrick,* 104 N.M. 441, 722 P.2d 692 (Ct.App.1986) (defendant who suffered restrictions on his liberty and was impaired in his defense by loss of a witness satisfied the prejudice prong of the test for speedy trial violation). *See also State v. Lujan,* 112 N.M. 346, 815 P.2d 642 (Ct.App.1991). In the instant case, defendant was employed as a juvenile probation officer for the state. After his arrest, defendant was suspended without pay for two and one-half months and then reinstated to a position behind a desk. Upon reassignment to the desk job, defendant's employee benefits were different than those available to him prior to his arrest. During the initial suspension, defendant was forced to work on a part-time basis, creating financial difficulties for defendant and his family. Restrictions on defendant's travel prevented him from leaving the state, and as a result of the pending charges, defendant was required to seek help for psychological problems and marital difficulties, and he was suspended from his job on two occasions.

The state does not rebut defendant's claim of prejudice resulting from his suspensions. The state merely suggests that the anxiety described by defendant be given little weight. Defendant has the burden of production in showing that he was prejudiced by the delay, but the state has the burden of persuasion to show that defendant's right to a speedy trial was not violated. *See Zurla v. State,* 109 N.M. 640, 789 P.2d 588 (1990). The state has not met its burden in this case. Weighing each of the speedy trial factors, we determine defendant's right to a speedy trial was violated.

For the foregoing reasons, the decision of the trial court is affirmed.

IT IS SO ORDERED.

DONNELLY, J., concurs.

HARTZ, Judge (Dissenting).

I would reverse the district court's ruling that Defendant's right to a speedy trial was violated.

The remedy for a violation of the constitutional right to a speedy trial is dismissal of the charges. *Strunk v. United States,* 412 U.S. 434, 440, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56 (1973). We should heed the warning that "overzealous application of this remedy [will] infringe 'the societal interest in trying people accused of crime, rather than granting them immunization because of legal error * * * *.'" *Barker v. Wingo,* 407 U.S. 514, 522 n. 16, 92 S.Ct. 2182, 2188 n. 16, 33 L.Ed.2d 101 (1972), quoting *United States v. Ewell,* 383 U.S. 116, 121, 86 S.Ct. 773, 777, 15 L.Ed.2d 627 (1966).

Defendant suffered no prejudice to his defense and no significant restraint on his liberty; he made no effort to seek a speedy resolution of the charges against him; and the sole cause of any improper delay was lack of prosecutorial resources. In these circumstances the delay here was not long enough to deprive the state of the right to try Defendant on the charge against him. The result reached by the majority is not compelled by controlling New Mexico precedent and ignores some of the central teachings of *Barker.*

To explain my views requires a more expansive summary of the facts and procedural posture of this case than the majority opinion provides. After summarizing the background, I will discuss the four factors set forth in *Barker* and what I believe is the proper analysis of the speedy trial claim.

I. BACKGROUND

On August 9, 1986, Defendant and his Co-defendant, Bernice Johnson Garcia, had an altercation with Alfred H. Garcia. Mr. Garcia suffered a fractured leg. On September 28 Mr. Garcia died, perhaps as a result of his August injuries.

Two days later, Defendant and Co-defendant were arrested on warrants charging murder. Both were released on their own recognizance, with conditions. They were not indicted by a grand jury until September 4, 1987. The indictment charged them with voluntary manslaughter and aggravated battery inflicting great bodily harm.

On October 27 the court set trial for March 7, 1988. A month later, on November 30, Defendant and Co-defendant moved to dismiss the charges on the ground that they had been denied their right to a speedy trial. The court conducted a hearing on February 3, 1988. Judge James Blackmer orally granted the motion to dismiss the manslaughter charges but not the battery charges. The oral ruling was followed by a written order with findings and conclusions filed on May 25, 1988, the date trial began on the battery charges.

Co-defendant was convicted of aggravated battery with great bodily harm. The jury was unable to reach a verdict on the charge against Defendant. The state appealed the dismissal of the manslaughter charges. This court dismissed the appeal after the state failed to respond to our calendar notice proposing to dismiss the appeal on double-jeopardy grounds. On December 28, 1988, Judge Blackmer vacated his dismissal of the voluntary manslaughter charges. (Because of double-jeopardy concerns, Co-defendant has not been tried on the manslaughter charge.)

Thereafter, Judge Joe Castellano was assigned to the case. On Defendant's oral motion, Judge Castellano reconsidered Defendant's speedy-trial claim. He did not take any further testimony but relied on the record from the hearing before Judge Blackmer. On October 18, 1989, Judge Castellano entered an order dismissing the battery charge. (Although the state appears to assume that Judge Castellano also dismissed the manslaughter charge, the order specifically dismisses only Count III, the battery charge against Defendant.) On June 5, 1990, this court affirmed Co-defendant's battery conviction, denying her claim of violation of her right to a speedy trial. *State v. Garcia,* 110 N.M. 419, 796 P.2d 1115 (Ct.App.1990).

II. THE BARKER FACTORS

A. *Length of the Delay*

The first question that must be resolved is whether the delay was sufficiently long to trigger review of a speedy trial claim. A delay that triggers review is termed "presumptively prejudicial." In *Salandre v. State,* 111 N.M. 422, 428, 806 P.2d 562, 568 (1991), the New Mexico Supreme Court held that a delay of less than nine months cannot be presumptively prejudicial. A nine-month delay is, however, presumptively prejudicial for cases, such as *Salandre* itself, which involve simple charges and readily-available evidence. *Id.* Delay of more than fifteen months is always presumptively prejudicial, no matter how complex the case. *Id.* n. 3. For cases of intermediate complexity, twelve months is presumptively prejudicial. *Id.*

This case appears to be more complex than *Salandre.* The circumstances of the victim's death are unusual. Also, there are apparently conflicting witness accounts of the incident. I believe that our supreme court would find this case to fit along the spectrum somewhere between the simple and the intermediate. Therefore, I conclude that delay in this case would be presumptively prejudicial if it exceeded ten months.

I would measure the delay in this case from (1) the time at which Defendant was arrested and restraints on his liberty imposed [1] to (2) the date of trial. *See id.* n. 4. That delay was almost twenty months, which is presumptively prejudicial. Therefore, the other factors set forth in *Barker* must be analyzed.

1. Because I find no violation of Defendant's right to a speedy trial, I need not consider whether the delay with respect to the aggravated battery charge should be measured from the date of the indictment on that specific charge rather than from the date of the previous arrest on an open charge of murder. *See United States v. Reme,* 738 F.2d 1156 (11th Cir.1984); *Commonwealth v. Gove,* 366 Mass. 351, 320 N.E.2d 900 (1974) (measure delay from date of indictment for assault with deadly weapon and armed robbery, not from date of prior complaint for rape arising out of same incident); 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 18.1, at 400–01 (1984); 2 David S. Rudstein et al., *Criminal Constitutional Law* ¶ 11.01[1][b] at 11–5 to –6 (1990); *cf. McNeil v. Wisconsin,* —— U.S. ——, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) (sixth amendment right to counsel is offense-specific).

B. *Reason for the Delay*

Defendant complains only of the pre-indictment delay. At the February 3, 1988, hearing before Judge Blackmer, the state accounted for that delay as follows: Assistant district attorney Kenneth Martinez was assigned the case when he began work in the office on December 1, 1986. At the same time, he was assigned numerous other murder and violent felony cases, including a jury trial set for that month. He reviewed the case and found that it included a significant issue as to the cause of the victim's death. He also noted conflicting accounts from the witnesses to the altercation. At some unspecified time in the next several weeks Martinez encountered Defendant's attorney, who told him that he had additional evidence that might dissuade the state from prosecuting the matter. They scheduled a meeting for February 24, 1987, to review defense counsel's evidence, but defense counsel was unable to keep the appointment. The following month Martinez had to spend most of his time in Taos trying a murder case. The two attorneys met on April 1. Martinez shared his file with defense counsel; defense counsel gave Martinez the names of two witnesses. In April and May, Martinez was busy preparing for trial and trying cases. In early June, Martinez tried two murder cases.

Realizing that his trial schedule was preventing him from working on this case, Martinez arranged to turn over the prosecution to Robert Schwartz, then director of the violent crimes division in the district attorney's office. Schwartz wrote the attorneys for Defendant and Co-defendant to ask if they had any information that would dissuade him from seeking an indictment. The indictment was returned on September 4, 1987.

In his formal findings after the February 3, 1988, hearing, Judge Blackmer stated:

> The State satisfactorily explained the delay in filing the charges between the 30 September 1986 arrest of the Defendants and the 4 September 1987 Indictment: they operated diligently, in good faith, without intent to damage or prejudice the Defendants' constitutional or other rights in the State's investigation and delay in charging the offenses in the Indictment.

Judge Castellano's order of October 18, 1989, stated only: "The reason for the delay offered by the state was a heavy caseload, a neutral reason that is weighed against the state * * * * The Defendant did not cause the delay[.]" Because Judge Castellano did not take any additional testimony but relied on the prior record in the case, I assume that he was not setting aside any fact-findings made by Judge Blackmer. *Cf. Paulson v. Meinke,* 352 N.W.2d 191 (N.D.1984) (in non-jury trial, replacement judge should not alter findings made by predecessor judge who heard and observed witnesses and whose findings required evaluation of credibility of witnesses); Note, *Replacing Finders of Fact—Judge, Juror, Administrative Hearing Officer,* 68 Colum.L.Rev. 1317, 1379 (1968) (successor judge should give findings same deference as would appellate court). Inasmuch as Judge Blackmer obviously credited what the state said concerning the reasons for the delay, I would also credit those statements for purposes of this appeal.

Some delay resulted from the request by Defendant's attorney to meet with the prosecutor to discuss evidence that could persuade the prosecutor to dismiss the charges. To the extent that delay is caused by a defense attorney's indication that he can produce exculpatory evidence, the delay works to the advantage of the defendant, should be encouraged, and weighs against the defendant in the calculus. *Cf. United States v. Lovasco,* 431 U.S. 783, 793, 97 S.Ct. 2044, 2050, 52 L.Ed.2d 752 (1977) (in considering a due process challenge to pre-indictment delay, "insisting on immediate prosecution once sufficient evidence is developed to obtain a conviction would pressure prosecutors into resolving doubtful cases in favor of * * * possibly unwarranted * * * prosecutions"). I am not suggesting that the state should file charges first and ask questions later. On the contrary, when the state's investigation indicates that there is insufficient evidence to prosecute the charge successfully, the charge should not be brought

and, if already filed, should be dismissed pending further investigation. When, however, the state has a prosecutable case and the defendant requests pursuit of certain leads that may prove exculpatory, any delay created by the state's good faith response to the request is the proper responsibility of the defendant. Although *State v. Lujan,* 112 N.M. 346, 815 P.2d 642 (Ct. App.1991), recently held that plea negotiations are not ordinarily an excuse for delay in bringing the defendant to trial, the court had no occasion in that opinion to address specifically delays caused by defense requests made in the course of plea negotiations.

The remaining cause of excessive delay was inadequate resources for the district attorney's office. The staff could not promptly prepare for trial every case that was presented to it by a law enforcement agency, even when the charge was quite serious. Nevertheless, "[u]nintentional delays caused by overcrowded court dockets or understaffed prosecutors" must be considered against the state. *Strunk v. United States,* 412 U.S. 434, 436, 93 S.Ct. 2260, 2262, 37 L.Ed.2d 56 (1973). They are, however, "to be weighed less heavily than intentional delay, calculated to hamper the defense," *id.;* nor is case overload as negative a reason for delay as "bureaucratic indifference." *Zurla v. State,* 109 N.M. 640, 644, 789 P.2d 588, 592 (1990). *See State v. Garcia,* 110 N.M. 419, 796 P.2d 1115 (Ct.App.1990) (rejecting speedy-trial claims of Co-defendant in this case); *Flowers v. Warden, Connecticut Correctional Inst.,* 853 F.2d 131 (2d Cir.), *cert. denied,* 488 U.S. 995, 109 S.Ct. 563, 102 L.Ed.2d 588 (1988) (no violation of right to speedy trial despite seventeen-month incarceration caused by congested courts); *United States v. Askew,* 584 F.2d 960, 962 (10th Cir.1978) (delay caused by conflicting obligations of prosecutor not weighed against government); *Taylor v. United States,* 471 A.2d 999, 1002 (D.C.1983) (institutional delays may be easily outweighed by inadequate assertion of the right or low threshold of prejudice).

C. *Prejudice*

Defendant testified at length before Judge Blackmer concerning the impact of the proceedings against him: When the incident occurred, Defendant was employed as a juvenile probation officer. Upon his arrest on September 30, 1986, he was immediately suspended without pay. He felt humiliated at being arrested and handcuffed at his place of work. After his arrest he was detained for about six and one-half hours before being released on his own recognizance. The conditions of his release required that he not leave Albuquerque, that he report to his lawyer once a week, and that he not contact the victim's family. The travel restrictions prevented him from going to California for his brother's wedding and from joining his sisters for an apparent vacation in Arizona or Utah. While on suspension, he received gifts of money from his former fellow employees and obtained a job with a friend in the appliance business. Yet he was unable to meet his child support obligations, lost his insurance coverage, and felt degraded.

On December 18, 1986, Defendant was reinstated at work because nothing had come of the charges against him. His duties, however, were changed. He no longer supervised children but handled paperwork. He had enjoyed working with children. Although he had established a good relationship with law enforcement personnel prior to the incident, he felt ostracized after he returned to work.

Upon Defendant's indictment in September 1987, he was again suspended from his job without pay. He had been told that he would be suspended if he was indicted. His only work since the indictment had been repairing cars, apparently for former fellow employees. He felt trapped in his home and was distressed that he could not support his family.

Defendant cried almost every day. At one time he had thought of suicide. He suffered from headaches, tension, nervousness, and nightmares. He had fought more with his wife, especially early on, when he almost got a divorce. He sought help for his psychological problems. He

met for an average of about one hour every two weeks with a counselor who apparently worked upstairs from him. The counselor moved out of state in November 1987. Defendant obtained the services of another professional the following month.

Thus, Defendant's claims of prejudice relate to loss of liberty, economic damage, and psychological harm. His brief also refers to injury to members of his family, but the right involved is a personal right; he supplies no authority to suggest that he can rely on injury to others to support *his* claim of denial of the right to a speedy trial. (Of course, his knowledge of that collateral harm can affect him emotionally, which is a proper consideration.)

The restrictions on Defendant's liberty were not oppressive for purposes of speedy trial analysis. His six-and-one-half-hour incarceration immediately upon his arrest was not a consequence of any delay in the indictment or trial. The constraints imposed by his bond, although sufficient to start the speedy trial clock, were minor. The initial limitation to Albuquerque was relaxed to allow him to go throughout New Mexico after he told his attorney of his need to go to Santa Fe for work. His inability to attend his brother's wedding or to join his sisters for an out-of-state vacation is not entitled to substantial weight, particularly in the absence of any indication that Defendant sought a change in his conditions of release to permit him to join his family on those occasions. The prohibition on contact with the victim's family was hardly a burden.

The economic and psychological injury to Defendant was more significant. He lost his job for approximately two and one-half months after his initial arrest and then lost it again after his indictment. He was psychologically injured by his inability to provide for his family, by the loss of a job he enjoyed (even after he was reinstated at the juvenile probation office he was not permitted to work with juveniles), and by the humiliation of being charged with a serious felony. Because I would be reluctant to hold that a defendant's constitutional right to a speedy trial depends upon how sensitive an individual the defendant is, I do not place great reliance on the testimony showing the specific psychological injury to Defendant caused by the delays in this case. *Cf. Salandre v. State,* 111 N.M. at 430–31, 806 P.2d at 570–71 (rejecting possibility of expert testimony regarding normal levels of anxiety and concern versus those suffered by the accused). Nevertheless, that testimony was consistent with what one would expect to be the consequences of a serious charge.

To assign proper weight to this prejudice suffered by Defendant, it is necessary to consider the timing of the particular elements of prejudice. For example, *Salandre* cited *State v. Grissom,* 106 N.M. 555, 563, 746 P.2d 661, 669 (Ct.App.1987), for the proposition that "when documentary evidence was destroyed before delay became inordinate, loss of evidence did not constitute prejudice." *Id.* 111 N.M. at 430, 806 P.2d at 570. Later, in finding that the defendant was prejudiced by the state's failure to deliver title documents to him, the *Salandre* court noted, "The period of time during which the delay in this case became inordinate was the period during which the State refused to release these documents." *Id.* at 431, 806 P.2d at 571. In this case the greatest injury to Defendant—both financial and psychological—occurred after the indictment and was caused specifically by the indictment; Defendant lost his job upon being indicted and one can presume that the psychological stress was greatest when Defendant was unemployed and formally charged by indictment. Consequently, the injury to Defendant may have been comparable even if the prosecution had proceeded in timely fashion—the indictment, and the resultant injury, would just have occurred sooner. (There was no evidence at the motion hearings that there had been improper post-indictment delay.) Similarly, the injury to Defendant between the time of his arrest and his reinstatement at work would very likely have occurred even if the district attorney had the resources to work up the case diligently. Two and one-half months is not an inappropriate pre-indictment period. Time is required for law enforcement officers to put

together a file for the district attorney, for the district attorney to assign an assistant to the case, and for the assistant to prepare the matter for the grand jury. In short, the most significant part of the prejudice to Defendant would probably have resulted even if there had been no improper delay.

Finally, of critical importance is Defendant's failure to assert any prejudice to his defense of the charge against him. As the United States Supreme Court has stated, prejudice of this type is "the most serious ..., because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker v. Wingo,* 407 U.S. at 532, 92 S.Ct. at 2193. The full import of that proposition is reflected in the Court's analysis of the facts in *Barker* itself. The Court wrote:

> [P]rejudice was *minimal.* Of course, Barker was prejudiced to some extent by living for over four years with a cloud of suspicion and anxiety. Moreover, although he was released on bond for most of the period, he did spend 10 months in jail before trial. But there is no claim that any of Barker's witnesses died or otherwise became unavailable owing to the delay.

Id. at 534, 92 S.Ct. at 2194 (emphasis added).

By *Barker*'s standards—which, after all, are the standards we are required to apply—the prejudice to Defendant must be termed "minimal."

D. *Assertion of the Right*

The assertion by a Defendant of the right to a speedy trial is relevant in two respects: (1) Delay by the state in the face of a defendant's demand for a speedy trial is less excusable than if the defendant has not pressed for a speedy trial. *See Zurla v. State.* (2) "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.* 109 N.M. at 644, 789 P.2d at 592. The significance in this regard of the defendant's demand for a speedy trial derives from the fact that delay may actually benefit a defendant. *See Barker v. Wingo,* 407 U.S. at 521, 92 S.Ct. at 2187 ("[D]eprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic.") A defendant's demands both establish that the defendant is not desirous of delay and serve as a fair measure of the balance of prejudice being suffered by the defendant. *See id.* at 531–32, 92 S.Ct. at 2192–93; *State v. Tartaglia,* 109 N.M. 801, 807, 791 P.2d 76, 82 (Ct.App.1990) (Hartz, J., dissenting).

In light of the reasons why assertion of the right is relevant, Defendant's motion to dismiss does not support his claim of denial of the right to a speedy trial. First, Defendant does not contend, nor is there any evidence in the record to support a contention, that there was any improper delay in the proceedings from the time that the motion was filed until the trial. The state did not delay in the face of a demand by Defendant.

Second, the motion to dismiss is not probative of prejudice being suffered by Defendant. The motion was not filed in an effort by Defendant to accelerate the proceedings in order to prevent or reduce prejudice to him. One month before Defendant filed the motion, the district court had already set the case for trial. Thus, the purpose of the motion was to *avoid* trial. Perhaps even more importantly, prior to filing the motion to dismiss, Defendant had failed to take readily available steps to bring matters to a head sooner. As noted in findings by Judge Blackmer in his order of December 28, 1988, Defendant was represented promptly after his arrest in September 1986 by counsel experienced in criminal law. An unindicted defendant is entitled to a preliminary examination within 60 days of the initial appearance. SCRA 1986, 7–202(D); *see* SCRA 1986, 7–501(A)(8) (defendant to be advised at initial appearance of right to preliminary examination). Yet Defendant's attorney made no effort to require the state to either proceed with a preliminary examination (which would have

initiated a series of time constraints for events culminating in trial, *see* SCRA 1986, 5–901) or dismiss the charge, *cf. State v. Tollardo,* 99 N.M. 115, 654 P.2d 568 (Ct. App.1982) (dismissal not the proper remedy for good-cause delay in holding a preliminary examination when prejudice to defendant not shown).

The assertion-of-the-right factor should not be weighed in favor of the Defendant whenever a motion to dismiss on speedy trial grounds is filed prior to trial. Although *Work v. State,* 111 N.M. 145, 147, 803 P.2d 234, 236 (1990), may suggest that proposition, *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973) (court of appeals must follow law established by supreme court), does not compel this court to adopt that view because (1) *Work* merely states the result (the assertion-of-right factor was weighed in favor of the defendant) rather than analyzing the law and propounding a general principle and (2) *Work* was not an opinion of the majority of our Supreme Court. Given these limitations on *Work* as a controlling precedent on this point, it is appropriate to follow the persuasive authority that Defendant's motion to dismiss does not necessarily cause the assertion-of-the-right factor to weigh in his favor.

One persuasive authority is *Barker v. Wingo* itself. Barker moved to dismiss the indictment (although it is not clear what the grounds were) when the prosecution sought a continuance some twenty months before the actual trial, objected to other continuances seven months and four months before trial, and invoked his right to a speedy trial in moving to dismiss the case at the outset of trial. But the Supreme Court noted that Barker had not objected to continuances during the 40 months prior to his motion to dismiss nor to the first two continuances following his motion to dismiss. The Court wrote, "[T]he record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried." 407 U.S. at 535, 92 S.Ct. at 2194. Indeed, at oral argument before the Supreme Court, counsel for Barker said: "I would concede that Willie Mae Barker probably—I don't know this for a fact—probably did not want to be tried. I don't think any man wants to be tried." *Id.*

The observation about human nature uttered by Barker's counsel certainly contains much truth. Few people look forward to a trial. We should not reject common sense and infer (a) a desire to advance the trial date from (b) a motion to dismiss that was filed after a trial date had been set. Such a motion, if it does not succeed in foreclosing trial altogether, is more likely to delay trial than to accelerate it. Thus, it is not surprising that courts regularly have found that the assertion-of-the-right factor weighs against the defendant despite a motion to dismiss on speedy trial grounds, particularly when the motion was filed well after arrest or indictment. *See United States v. Avalos,* 541 F.2d 1100, 1115 (5th Cir.1976) (motion to dismiss eleven months after arrest and four months before trial); *United States v. Palmer,* 537 F.2d 1287 (5th Cir.1976) (thirty months after arrest—which was one month after notice of indictment—and three months before trial); *Thompkins v. State,* 437 So.2d 634, 635 (Ala.1983) (four months before trial); *State v. Johnson,* 190 Conn. 541, 461 A.2d 981, 984 (1983) (fourteen months after arrest, seven weeks before trial); *Graves v. United States,* 490 A.2d 1086, 1098–1101 (D.C.App.1984) (ten months after arrest, fourteen months before trial); *State v. Murphy,* 496 A.2d 623, 628 (Me.1985) (one year after arrest, thirteen months before trial); *Simonsen v. State,* 662 S.W.2d 607 (Tex.Ct.App.1983) (seven months after arrest, two months before trial); *Prince v. State,* 638 S.W.2d 550, 554 (Tex.Ct.App. 1982).

III. Analysis

Barker formulates "a balancing test in which the interests and conduct of both the defendant and the prosecutor must be weighed." *The Supreme Court, 1971 Term,* 86 Harv.L.Rev. 52, 166 (1972). The purpose of the assessment of the four factors listed in *Barker* is to focus the inquiry as to whether the prejudice to the

interests of the defendant has been sufficient, in light of the conduct of the parties, to override the public interest in trying the defendant on the pending charge. Although *Barker* did not supply a mathematical formula to determine from the four factors whether the speedy trial right has been violated, at least the result in *Barker* serves as a benchmark.

Given the result in *Barker*, I conclude that the state did not violate Defendant's right to a speedy trial. Two of the factors were much more favorable to Barker than they are to Defendant, and the other two factors are toss-ups:

(1) The delay in *Barker*—more than five years—was far longer than in this case.

(2) The prejudice to Barker (which the Supreme Court termed "minimal")—ten months in jail and four years of anxiety and living under a cloud of suspicion—was substantially greater than the prejudice to Defendant, the great bulk of which would have occurred in the absence of any improper delay.

(3) Barker asserted his interest in advancing the date of his trial at least as strongly as Defendant: Barker was consistent in opposing delays for at least seven months, and his objections to continuances (regardless of the motive behind the objections) would have resulted in an earlier trial if they had been granted. Defendant, on the other hand, did nothing to indicate a desire to resolve the charges promptly, despite the opportunity to do so.

(4) The reason for the delay in *Barker*—awaiting completion of the prosecution of co-defendant Manning (whose first four trials ended in two hung juries and two convictions that were reversed on appeal), so that Manning could testify against Barker—may at first seem more justifiable than the inadequacy of prosecutorial resources here. Yet, as the *Barker* court noted, "[F]our years was too long a period [to wait for Manning], particularly since a good part of that period was attributable to the Commonwealth's failure or inability to try Manning under circumstances that comported with due process." 407 U.S. at 534, 92 S.Ct. at 2194. It would be hard to say that this factor weighs more heavily for Defendant than it did for Barker.

Thus, in light of the conduct of the parties, the prejudice to Defendant caused by improper delay was not substantial enough to override the public interest in trying him on the pending charge.

Perhaps in December 1986 the state should have dismissed the charge pending an indictment, as it became apparent that presentation of the case to the grand jury might be delayed for months. Then Defendant would have had no speedy trial claim. *See United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) (speedy trial clause does not apply to period after good faith formal dismissal of charge). But such a dismissal would not have materially benefitted Defendant, which is probably why defense counsel did not seek dismissal.

As *Barker* stated, "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." 407 U.S. at 522, 92 S.Ct. at 2188, quoting *Beavers v. Haubert*, 198 U.S. 77, 87, 25 S.Ct. 573, 576, 49 L.Ed. 950 (1905). The majority opinion improperly denies the rights of public justice. Therefore, I respectfully dissent.

824 P.2d 341

STATE of New Mexico, ex rel. HUMAN SERVICES DEPARTMENT, IN the MATTER OF the TERMINATION OF PARENTAL RIGHTS OF SHERRY C. AND JOHN M., Respondents, With Respect to the Minor Children, Jane Doe, John Doe, and Mary Doe.

No. 12444.

Court of Appeals of New Mexico.

Nov. 26, 1991.

Richard Griscom, General Counsel, Bridget A. Jacober, Children's Court Atty., New Mexico Human Services Dept., Santa Fe, for Human Services Dept.

Michael L. Gregory, Las Vegas, for appellant Sherry C.

Arthur L. Bustos, Las Vegas, for minor children.

E. James Hardgrave, Las Vegas, for appellee John M.

OPINION

MINZNER, Judge.

Mother appeals the children's court's termination of her parental rights. Father's appeal was previously dismissed while this case was assigned to the summary calendar, and he is not a party to this appeal. Mother contends on appeal that the children's court erred in allowing testimony from Dr. Herman Brock, mother's treating psychologist, because the information was protected under the psychotherapist-patient privilege contained in SCRA 1986, 11-504. The Human Services Department (HSD) argues that mother failed to preserve the issues argued on appeal. We agree with HSD that mother failed to preserve for appellate review all of the issues that her appeal involves. We address her issues, however, to the extent she fairly invoked a ruling by the children's court and to explain why we do not find it necessary to address the remaining issues. We affirm.

BACKGROUND.

Mother is the natural parent of three children, to whom we refer in this opinion as Jane, John, and Mary Doe. Jane was born in 1984 and at the time of the termination proceeding was six years old. John was born in 1987 and was three years old at the time of the proceeding. Mary Doe, whom mother never had in her custody, was born in 1988 and was two years old when mother's parental rights were terminated.

In August 1985, Jane was removed from her mother's custody and placed in foster care by HSD after HSD received reports that Jane was abused and neglected by mother. After mother and the child's father received counseling and parenting training, Jane was returned to their care in late 1986.

In May 1987, when John was approximately four months old, HSD received multiple referrals that both children were being abused and neglected. Jane and John were removed from their parents' care in June 1987. In January 1988, the children's court determined that the two children were abused and neglected. The court stated in the judgment that mother suffered from the developmental disability of mental retardation and that she was not capable of independent parenting. The court's findings were in part based on psychological evaluations conducted by Dr. Edward Siegel pursuant to the children's court's order. The court determined that, because of mother's limitations, she was not able to provide adequate care for the children. The court also found that father was limited in his ability to care for the children due to limited intellectual capacity and emotional difficulties. Physical and legal custody of the children remained with HSD.

HSD sought reunification of the family through a treatment plan that required mother and father to attend parenting classes and counseling sessions. HSD also provided homemaker assistance in basic living skills. According to HSD, the treatment plan was unsuccessful due to the parents' lack of cooperation and the difficulty they experienced in learning new skills.

In August 1988, while the other children were still in foster care, mother gave birth to Mary. HSD immediately filed an abuse and neglect petition regarding Mary, and she too was placed in foster care. Mother and father moved to Portales, New Mexico, in September 1988 to be near extended family members and to find suitable employment. The children remained in foster care in Las Vegas.

In September, pursuant to a custody order placing Mary in HSD's care, the court ordered that both mother and father undergo "such psychological diagnostic evaluations and assessments as, in the discretion of the Department, are deemed necessary." A home study was also ordered at that time for the purpose of determining the parents' suitability to care for Mary. In December 1988, a judgment was entered adjudicating Mary to be a neglected child based in part on admissions by mother and father. She was placed in HSD's care, and HSD was instructed to find foster care for all three children.

The judgment also ordered that "the Respondents continue to receive treatment from Psychologist Herman Brock." In April 1989, the court approved a treatment plan, which required the respondents to "attend parenting classes with Dr. Brock" and "participate in family therapy to help them with their identified problems." The court also ordered HSD to "make a written report to the Court and counsel regarding the progress with respect to the implementation of this Treatment Plan[.]"

HSD filed a petition to terminate both mother's and father's parental rights in July 1989. Trial on the petition occurred in December 1989. Over mother's objection, Dr. Brock testified about his evaluation and treatment of both parents. Dr. Brock stated that he was asked by HSD to conduct a psychological evaluation of both parents, which he completed in October 1988. Subsequently, he conducted parenting training and counseling for both parents. Dr. Brock diagnosed mother as being at borderline intellectual functioning with no associated personality disorder. He testified that mother's parenting skills would not improve due to her limited abilities. According to Dr. Brock, mother was unable to generalize and apply the information she obtained from counseling and parenting classes. Dr. Brock stated that he knew that mother was not learning what she should when he observed her on a home visit with the children. During the visit, mother ignored the youngest child, fed the children what she later determined was spoiled bologna, and tried to feed the youngest child portions of meat that were too large for the child to ingest. In Dr. Brock's view, these incidents showed mother's continued inability to make sound parental judgments.

Dr. Brock indicated that he acquired the information on which his testimony was based in the course of rendering services arising under the court's order in the earlier abuse and neglect proceeding, and that he understood he was to assist father and mother to improve their parenting skills and then to report back to the court that they had been successful. Finally, he testified he had advised father and mother that he intended to report to the court.

Mother objected to Dr. Brock's oral testimony. She argued that the information was not admissible under Rule 11–504(D)(2) because the evaluation had been ordered in the earlier abuse and neglect proceeding rather than the present termination of parental rights proceeding, and therefore the court-ordered examination exception to the psychotherapist-patient privilege was inapplicable. The children's court judge found that none of the information that mother provided Dr. Brock was confidential or privileged.

I.

Rule 11–504(B) provides in part that "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition[.]" One of the exceptions to the privilege is found in Subsection (D)(2) of the rule. Specifically, "[i]f the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered[.]" In the present case, the children's court ordered mother to be psychologically examined and evaluated regarding her parenting ability.

Mother argued at trial that because the order was entered in the abuse and neglect

proceeding rather than the parental termination proceeding, Dr. Brock's testimony regarding the psychological evaluations he conducted was not admissible pursuant to Rule 11–504(D)(2). She has not renewed that argument on appeal, and we do not address it here.

The question raised on appeal is whether Dr. Brock's testimony regarding his psychological treatment of mother, rather than his psychological evaluation of her, was admissible at trial. That question raises a policy issue, as well as the narrower issue on which the children's court based its decision admitting the evidence.

When the present proceeding was filed and at the time of the hearing, the only limitation in New Mexico on the psychotherapist-patient privilege was Rule 11–504(D)(2), which excluded from the privilege the results of court-ordered psychological examinations. Our legislature has not enacted statutory exceptions to the privilege in cases of child neglect, as have other jurisdictions. We do note that effective July 1, 1990, Rule 11–504 was amended to add another exception to the psychotherapist-patient privilege. *See* SCRA 1986, 11–504(D)(4) (Cum.Supp.1991) (a patient's communications relevant to any information that a physician or psychotherapist is required by statute to report to a public employee or a state agency are no longer confidential). At the time the termination of parental rights proceeding was held in the present case, the new exception to Rule 11–504 was not in effect, and it is unnecessary for the purpose of this case to interpret the meaning of the new rule. There is diversity in the approaches taken elsewhere.

In some jurisdictions, statutes have been enacted that make the child's interest in abuse and neglect cases paramount. *See generally* A. Haralambie, *Handling Child Custody Cases* §§ 12.15, 13.26 (1983) (discussing state statutes abrogating certain testimonial privileges in cases involving abuse and neglect and termination proceedings). In others, courts have created exceptions for child custody disputes. *See generally* S. Stone & R. Liebman, *Testimonial Privileges* § 7.28 (1983) (discussing and criticizing rationales for the exception).

For example, in *In re Von Goyt,* 461 So.2d 821 (Ala.Civ.App.1984), the mother argued on appeal from a judgment permanently depriving her of parental rights that records from her hospitalizations for mental illness should not have been admitted into evidence. The Alabama appellate court recognized that the psychotherapist-patient privilege is an important one, and should not be easily disregarded. However, the court stated that it was convinced that where the issue of a parent's mental state is clearly in controversy, and a proper resolution of the custody issue requires disclosure of privileged medical records, the psychotherapist-patient privilege must yield to the best interest of the child. While Alabama did not have a statute abrogating the psychotherapist-patient privilege in custody or abuse and neglect cases, the court in *Von Goyt* found it significant that Alabama's termination statute allowed a court to take a parent's mental illness into consideration when deciding whether to terminate parental rights. *Cf. In re A.J.S.,* 630 P.2d 217 (Mont.1981) (trial court had discretion to consider mother's previous contacts with psychologist in a matter unrelated to court-ordered evaluation of mother to determine whether her child was abused and neglected, because in proceeding to determine custody, child's interest and welfare were to be balanced against mother's rights).

Although many states have chosen to abrogate a parent's privileged communications when a child's best interest is at issue, not all jurisdictions have done so. *See In re Petition of Catholic Charitable Bureau,* 392 Mass. 738, 467 N.E.2d 866 (1984). In *Catholic Charitable Bureau,* a social service agency sought to terminate the mother's parental rights to her child. Over the mother's objection, two of her treating psychiatrists testified at the proceeding regarding her mental state and ability to parent. The court interpreted a Massachusetts statute abrogating the psychotherapist-patient privilege in custody cases as being applicable only in those cases where the child's immediate safety is

at issue. The court reversed the judgment of the trial court and remanded the case for a new hearing in which the mother's communications to the two psychotherapists would be privileged.

Most jurisdictions have addressed the issue in the context of particular state statutes, and thus with the guidance of the legislature. *See generally* Thomas R. Malia, Annotation, *Validity, Construction, and Application of Statute Limiting Physician–Patient Privilege in Judicial Proceedings Relating to Child Abuse or Neglect,* 44 A.L.R.4th 649 (1986). In most, the statutory language has been construed in favor of admitting evidence relevant to the best interests of the child. *See, e.g., In re Welfare of Dodge,* 29 Wash.App. 486, 628 P.2d 1343, 1346 (1981) (extending statutory exception for " 'any judicial proceeding regarding a child's injuries, neglect or sexual abuse, or the cause thereof' " to a proceeding for permanent deprivation of custody); *In re Parental Rights of PP,* 648 P.2d 512, 516 (Wyo.1982) (interpreting statutory exception for " 'evidence regarding a child in any judicial proceeding resulting from a report' " of child abuse or neglect required by statute to include testimony of mother's doctor together with hospital records during time he was treating her); *In re Norwood,* 194 Neb. 595, 234 N.W.2d 601 (1975) (extending exception for proceedings under juvenile court and regarding injuries to children to proceeding to have children adjudicated neglected).

HSD contends that the question raised on appeal was not preserved below. To preserve an objection, "a ruling or decision on the question by the trial court [must be] fairly invoked." *State v. Carlton,* 83 N.M. 644, 653, 495 P.2d 1091, 1100 (Ct.App.1972). HSD relies on *State Health & Social Services Department v. Smith,* 93 N.M. 348, 600 P.2d 294 (Ct.App.1979) in support of its claim that the mother's objection below was insufficient because it went to all of Dr. Brock's testimony rather than that portion regarding his psychological treatment of mother. Although *Smith* provides some support to the state's contention, the opinion in *Smith* explicitly relied on *Carlton,* and we assume did not intend to modify the general rule. We assume that the record in *Smith* (which is summarized only very briefly in the *Smith* opinion) showed that the objection had not been fairly presented to the lower court. We therefore review the record in this case to determine whether the question mother raises on appeal was "fairly presented" to the children's court.

Immediately after Dr. Brock was qualified as an expert witness, mother objected to his testimony on the ground that he had prepared a treatment plan and his testimony would be contrary to the expectations of his clients, who thought he was acting on their behalf. When mother renewed her motion to strike the testimony at the close of direct examination, she contended that HSD should not be permitted to rely on Dr. Brock's testimony when his purpose had been to assist in developing parenting skills. At this stage in the proceedings, HSD argued that the testimony was admissible pursuant to Rule 11–504(D)(2), and mother argued it was not.

The record indicates that the children's court admitted the testimony on the basis that the communications made to Dr. Brock were not confidential. We note that mother did not expressly claim at trial that the communications were confidential and she did not make the same argument at trial that she has made on appeal. Ordinarily, we will not reverse a trial court on the basis of an argument that was not presented to that court. *See Woolwine v. Furr's, Inc.,* 106 N.M. 492, 745 P.2d 717 (Ct.App. 1987). Nevertheless, mother's argument at trial could be construed to say that testimony by Dr. Brock would breach a confidence; and since the children's court ruled that the communications were not confidential, the judge apparently understood that he had been asked to rule on confidentiality. We therefore determine that mother adequately (although just barely) preserved for appellate review the contention that her communications to Dr. Brock were intended to be confidential. Thus, we address the propriety of the ruling the children's court made.

We do not address the broader policy issue of whether and how the psychotherapist-patient privilege protects a parent's communications during treatment against disclosure in an action to adjudicate neglect or abuse and in a proceeding to terminate parental rights. Perhaps if and when the broader policy issue raised by this appeal arises again, the proper resolution will have been advanced by statute or court rule.

II.

As used in Rule 11–504, a "communication" includes: (1) a verbal communication of a patient to the psychotherapist; (2) information or knowledge gained by observation and personal examination of the patient; (3) inferences and conclusions drawn therefrom; and (4) exhibiting the body or any part thereof to the psychotherapist for an opinion, examination, or diagnosis. *State ex rel. Human Servs. Dep't v. Levario,* 98 N.M. 442, 649 P.2d 510 (Ct.App. 1982). However, communications to a psychotherapist are not per se confidential. In order for communications between a psychotherapist and a patient to be considered confidential, this court has said that the patient must intend the communications to be undisclosed, and the words or conduct of the patient must be such as would lead a psychotherapist to understand or believe that the information obtained is intended to be confidential. *Id.*

In this case, the transcript suggests that the children's court relied on *Levario* in determining that none of Dr. Brock's testimony was privileged. Thus, we understand the court to have ruled that all of his testimony was admissible because the communications were not intended to be confidential. We agree that all of his testimony was admissible if the communications were not confidential. *See generally* 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 504[05], at 504–24 (1990) ("if a patient makes a communication expecting it to be disclosed, the privilege ceases"); *cf.* SCRA 1986, 11–511 (waiver of privilege by voluntary disclosure or consent to disclosure of any significant part of the communication).

Mother consented to a treatment plan that included communications with Dr. Brock and required reports by HSD. Dr. Brock's testimony suggests that her counsel knew or should have known that her communications with him would be disclosed. Nevertheless, the order entered in this case does not provide that information obtained during treatment was subject to disclosure. Thus, the fact that mother is mentally impaired, a factor not present in *Levario,* raises issues regarding her capacity to waive the privilege and whether her participation in the court-ordered treatment should be taken as consent to disclosure.

Although the existence of an impairment would be a factor in determining as a factual matter whether there has been a waiver or consent, mother's counsel never presented to the children's court the contention that her impairment precluded a finding of waiver or consent. We cannot say on this record that mother's disclosures to Dr. Brock were involuntary as a matter of law. *See In re Adoption of Embick,* 351 Pa.Super. 491, 506 A.2d 455 (1986) (holding communications made by a mentally retarded mother to a psychologist were not made with any expectation of confidentiality, because psychologist indicated she had told her patient that the results would be shared with others); *see also In re Alvarez,* 342 So.2d 492 (Fla.1977) (holding a mentally ill patient had waived the psychiatrist-patient privilege where patient was told that the psychiatrists were going to testify at involuntary commitment proceedings). Under these circumstances, we do not have an adequate record to determine whether mother's impairment precluded a finding of waiver or consent.

Thus, on the facts of this case, we are reluctant to find that disclosure was voluntary and the communications were not confidential. One possible resolution of the appeal would be to remand for an evidentiary hearing regarding mother's impairment.

However, because there was no claim at trial that mother's impairment precluded a finding of waiver or consent, we would not

remand in the absence of plain error. *See* SCRA 1986, 11–103(D). That is because "[e]rror may not be predicated upon a ruling which admits * * * evidence unless * * * a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]" R. 11–103(A). Here, the specific ground was not stated, and it was not apparent from the context. If we were trying to decide on these facts whether plain error was committed, it would have been helpful had mother identified for the court those portions of the record that support the claim, as well as argued with supporting authority why the claim has merit. Here, she has not done so, but we need not decide on these facts whether plain error was committed because there has been no showing that any error affected the result.

III.

We note that although HSD's answer brief asserted that any error was harmless, mother's counsel did not file a reply brief or otherwise provide citations to parts of the record proper, the transcript of proceedings, or exhibits relevant to this issue. *See* SCRA 1986, 12–213(A)(3). Mother's only claim of prejudice is that, absent Dr. Brock's testimony, there was no other evidence regarding her ability to parent Mary. We disagree.

There was evidence presented that the older children were previously neglected while in mother's care. Even though Mary had not been in mother's care since birth, the children's court could use evidence of harm or neglect to the other children as a factor in whether mother could adequately care for Mary. *See In re I.N.M.*, 105 N.M. 664, 735 P.2d 1170 (Ct.App.1987). In addition, there was testimony from HSD personnel who had worked with mother for some time indicating that mother's parenting skills and her relationship with her children had not improved over a period of time. Finally, the record contains a copy of a court-ordered home study dated February 6, 1989 and a copy of a court-ordered evaluation by Dr. Brock dated November 10, 1988. Both of these documents contain evidence that mother lacked the ability to parent Mary.

Thus, evidence other than Dr. Brock's testimony supports the children's court's decision to terminate mother's parental rights regarding Mary. The other evidence was clear and convincing and supports the judgment. *See generally Reuben & Elizabeth O. v. Department of Human Servs.*, 104 N.M. 644, 725 P.2d 844 (Ct.App.1986) (district court's termination of parental rights must be supported by clear and convincing evidence).

In reviewing this case to determine whether any error affected the result, however, we do not believe it would be enough to say that independently of any testimony erroneously admitted, there was sufficient evidence to support the result. Rather, the question is whether the error itself influenced the result. *See Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946). The nature of the proceeding, the nature of the rights at stake, and the relationship of claimant's error to the decision reached are all factors to be considered. *Id.* at 760, 66 S.Ct. at 1245.

Here, mother's right is "constitutionally protected * * * and actions to terminate that right must be conducted with scrupulous fairness." *In re Ronald A.*, 110 N.M. 454, 455, 797 P.2d 243, 244 (1990) (citation omitted). We have said that the appellate standard of review parallels the burden of proof applicable at trial, requiring a greater quantum of evidence because the trial court findings must be supported by clear and convincing evidence. *See In re R.W.*, 108 N.M. 332, 772 P.2d 366 (Ct.App.1989). Under these circumstances, we think the appropriate question in this case is whether we can say with a "high degree of assurance" that the error did not affect the result. *See Mallard v. Zink*, 94 N.M. 94, 96, 607 P.2d 632, 634 (Ct.App.1979).

The termination of mother's parental rights was based on mother's inability to parent and the unlikelihood of her acquiring sufficient parenting skills, despite reasonable efforts by the department to assist her. *See* NMSA 1978, § 32–1–

54(B)(3) (Repl.Pamp.1989). That portion of Dr. Brock's testimony concerning mother's ability to parent arising out of his treatment of her was largely cumulative of other evidence in the record. The other admissible evidence is so clear and convincing on the factual issues underlying termination that we are persuaded the error, if any, in allowing Dr. Brock to testify about his treatment of mother did not influence the result. Thus, we believe we can say with a "high degree of assurance" that the error, if any, did not affect the result.

CONCLUSION.

Whether or not the children's court erred in determining that mother had waived her right to prevent Dr. Brock from testifying regarding his treatment of her, mother's only claim of prejudice is that there was no testimony other than privileged testimony on which to base a finding regarding Mary, but there was other clear and convincing evidence regarding Mary in exhibits to which no objection was made and in other testimony. Further, we are confident that any inadmissible testimony did not affect the result. Therefore, the order of termination is affirmed.

IT IS SO ORDERED.

HARTZ and CHAVEZ, JJ., concur.

824 P.2d 349

STATE of New Mexico ex rel. Cleo HUGHES, Plaintiff–Appellant,

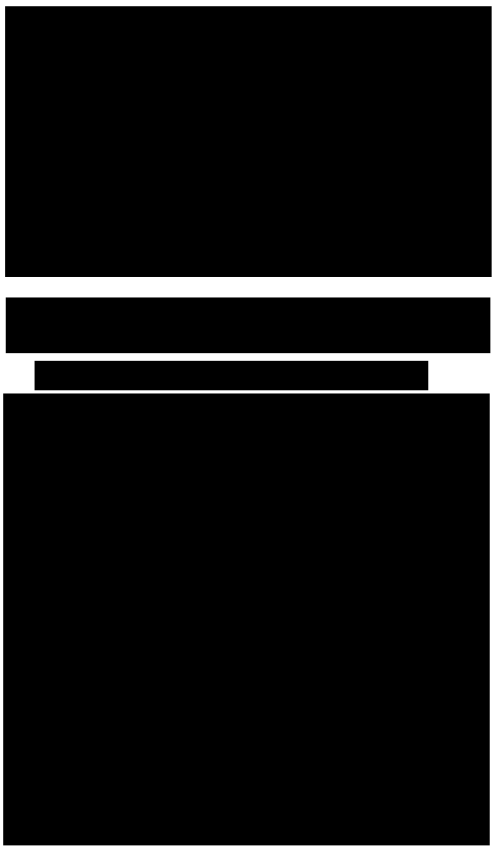
v.

CITY OF ALBUQUERQUE, Gene Romo, Chief Administrative Officer, City of Albuquerque Personnel Board, Defendants–Appellees.

No. 11624.

Court of Appeals of New Mexico.

Dec. 3, 1991.



James T. Roach, Janet Santillanes, Albuquerque, for plaintiff-appellant.

David S. Campbell, City Atty., Paula I. Forney, Asst. City Atty., Albuquerque, for defendants-appellees.

OPINION

HARTZ, Judge.

Cleo F. Hughes appeals from a judgment of the district court that affirmed the decision of the personnel board of the City of Albuquerque to uphold his termination from city employment "for gross and negligent supervising actions * * * directed at [his] subordinate." Hughes contends: (1) the termination procedure violated his right to due process and the city merit ordinance; (2) the board erred in refusing to hear evidence regarding a polygraph examination; and (3) the board did not make proper findings of fact and the findings do not support the board's conclusion that he should be terminated. We reject Hughes' first two contentions but agree that the board's findings and conclusions are sufficiently ambiguous that remand is required for amended findings and conclusions.

I. BACKGROUND

In August 1985 a female city employee (hereinafter the "complainant") submitted to the City a formal written complaint accusing Hughes of sexual harassment. Hughes was placed on administrative leave with pay while a committee appointed by the chief administrative officer of the City, Bob Stover, investigated the allegations. Hughes received notice of the allegations and was represented by counsel during the investigation. He personally testified and recommended witnesses who were interviewed. On October 3 the committee submitted a report sustaining the allegations against Hughes and gave him notice of a pre-termination hearing to be held on October 17. At the hearing Hughes and his counsel were given the opportunity again to refute or deny the allegations or justify his actions. On October 22 Stover and Carl P. Rodolph, Hughes' department director, co-signed a letter to Hughes terminating his employment as of the end of that workday. Hughes appealed his termination to the city personnel board. After hearing approximately fifteen hours of testimony and argument, the board upheld the termination by a three-to-one vote. Hughes obtained review in the district court on a petition for certiorari. The district court affirmed the board's decision.

II. DENIAL OF DUE PROCESS; VIOLATION OF GRIEVANCE PROCEDURES

Citing *Lovato v. City of Albuquerque,* 106 N.M. 287, 742 P.2d 499 (1987), Hughes contends that a city employee's due process rights are violated if the procedures set forth in the city merit ordinance are not followed. We do not read *Lovato* to stand for that proposition. On the contrary, we have recently ruled that violation of a state law requiring specific procedures does not necessarily constitute a violation of constitutional due process. *Garcia v. Las Vegas*

Medical Ctr., 112 N.M. 441, 816 P.2d 510 (Ct.App.1991); *see also Jacobs v. Meister*, 108 N.M. 488, 493–95, 775 P.2d 254, 259–61 (Ct.App.1989) (questioning whether nontenured professor had due process right to the procedures set forth in the faculty handbook). Nevertheless, Hughes may be entitled to relief if the procedures mandated by city ordinance were not followed, *see Conwell v. City of Albuquerque*, 97 N.M. 136, 637 P.2d 567 (1981), or if his right to due process was violated in the course of the proceedings against him. *See Lovato v. City of Albuquerque.* We therefore address Hughes' specific claims of procedural error.

The parties agree that the governing procedures are those relating to Class I grievances. Class I grievances are defined by city ordinance as "Management actions questioned by the employee which result in the dismissal, demotion or suspension of the employee for more than five (5) working days[.]" City of Albuquerque, City Merit Ordinance § 2–9–25(C). The pertinent portion of the grievance procedure states:

> D. Class I grievances are subject to the following Grievance Resolution Procedures:
>
> 1. When an employee believes he or she has been aggrieved by a management action which results in dismissal, demotion or suspension of the employee for more than five (5) working days, he or she shall first discuss the action with his or her immediate supervisor and then his or her department head, if necessary, with the objective of resolving the matter informally. If a satisfactory solution to the problem cannot be obtained at this level, the aggrieved employee shall make a formal written complaint of his or her grievance to the Chief Administrative Officer with a copy to his or her department head within ten (10) calendar days of the occurrence of the grievable action. Such complaint shall identify the action questioned and the reasons why the action should not have been taken.
>
> 2. Within ten (10) calendar days of the receipt of the employee's written grievance, the Chief Administrative Officer, or his designated representative, after consultation with the department head, shall render his or her decision and shall also provide written notice of his or her decision to the aggrieved employee. If the employee is unsatisfied with the decision of the Chief Administrative Officer, he or she may, within ten (10) calendar days of receipt of such notice, request that the Personnel Board provide him or her a full hearing on the matter.

§ 2–9–25(D).

The ordinance provisions for Class I grievances do not apply to pretermination proceedings. The procedures described in the ordinance concern a grievance by an employee who has already been dismissed or suspended. Therefore, to the extent that Hughes argues that mandatory grievance procedures were not followed prior to his termination, we reject his argument.

Hughes appears to argue also, however, that the manner in which his termination was handled deprived him of the procedural rights set forth above. He does not contend that after his termination he was refused the opportunity to discuss the action with his immediate supervisor or department head or was refused permission to make a formal written complaint to Chief Administrative Officer Stover. As we understand his briefs on appeal, he is contending that the manner of his termination—in particular, the fact that the termination was effected by a letter written by Stover and department director Rodolph—deprived him of the opportunity to have his contentions reviewed under the grievance procedure by a neutral person. He claims that Stover, as chief administrative officer, should have remained out of the decision-making process until Hughes filed a formal complaint under the grievance procedure.

We disagree that either the ordinance or the requirements of due process support Hughes' contention. We note that the Class I grievance procedure necessarily requires at least some reconsideration by a person who has already made a decision adverse to the employee. The first person

with whom the employee is to discuss the adverse action is the employee's immediate supervisor. Yet the immediate supervisor is the person most likely to have taken, or at least recommended, the adverse action. The next most likely person to have taken or recommended the adverse action is the department head. Yet the second stage in the grievance procedure is discussion by the employee with the department head.

We recognize that the City's chief administrative officer is unlikely to become personally involved in most decisions to terminate employees, but nothing in the City's grievance procedure suggests that the chief administrative officer is deprived of the authority to become involved in such decisions when such involvement appears advisable. When, as in this case, the controversy is one of great sensitivity, the chief administrative officer may well consider it a duty to be sure that the decision is correct *before* it is made. Perhaps Hughes had good reason to believe that he would obtain no satisfaction by pursuing the grievance procedure through the level of the chief administrative officer; after all, Stover had already reviewed the extensive investigation conducted prior to termination. But we are not inclined to interpret the grievance procedure ordinance to prohibit the City from providing an employee with a thorough review of a complaint against him at the highest levels of city government before taking adverse action against the employee.

Reinforcing our view of the ordinance is the provision in the ordinance for formal review by the city personnel board. The availability of board review ensures that every employee can obtain review of the facts by persons who had no involvement in the decision to terminate and renders it unnecessary that the chief administrative officer act as a neutral arbiter.

In short, we find no violation of the city ordinance in the proceedings relating to Hughes. Moreover, the extensive pretermination proceedings and the formal proceedings before the board after termination provided Hughes with all the procedural due process to which he was entitled. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

III. POLYGRAPH EXAM

At the hearing before the personnel board, Hughes contended that one basis for his termination was a polygraph examination taken by the complainant. To show that the examination should not have been used by the City in deciding to terminate him, he sought to introduce evidence that the results of the examination were misinterpreted and did not support the reliability of the accusations against him. The board refused to hear the evidence because the City had not offered the polygraph examination results in the board hearing. We find no error in this evidentiary ruling.

The polygraph examination results were not a separate *ground* for the termination of Hughes. The ground for his termination was the conduct about which the complainant testified. Both the city administrators and the board needed to determine whether the complainant was telling the truth. But the basis upon which the administrators determined her veracity was not material to the board. The polygraph examination in this case served the same role as a witness testifying to the complainant's character for veracity. Even if the City considered the statement of such a character witness in deciding whether to terminate an employee, the City would not therefore have to establish the reliability of the character witness at the board hearing if the character witness was not offered as a witness at the hearing. The reliability of the polygraph examination was not material to the board hearing, and the board properly refused to hear evidence on the matter.

IV. FINDINGS AND CONCLUSIONS

If the personnel board believed the complainant, it had ample cause to determine that Hughes committed sexual harassment justifying his termination. Hughes contends, however, that (1) the findings by the board do not establish that the board believed the allegations of

harassment and (2) the facts actually found by the board are insufficient to justify his termination.

Hughes points to certain findings by the board which relate what the complainant said, rather than what the board found to be true. These findings are included within finding No. 10, which reads:

On August 15, 1985, [Hughes] again took [complainant] to Santa Fe for the ostensible purpose of correcting a mailing list. On that day, the following took place:

[a] [Hughes], with [complainant], left the city office between 9:30 and 10:00 a.m. and had breakfast at Four B's Restaurant.

[b] [Hughes] went to his home, with [complainant], for the stated purpose of getting another wristwatch.

[c] [Hughes] invited [complainant] into his home because he was going to use the telephone.

[d] [Complainant] stated that [Hughes] approached her while she was near the couch and placed his arms around her. He put his hands on her cheeks and kissed her with his tongue.

[e] [Hughes] was told to stop by [complainant].

[f] [Hughes] reportedly said, "Don't we have a chance," standing in the entryway of his home.

[g] [Hughes] and [complainant] left [Hughes'] home and stopped at a nearby Safeway store to purchase two packages of gum.

[h] Enroute to Glorieta, [Hughes] told [complainant] that he originally planned to take a nap at his home, go to lunch, and take another nap. [Complainant] interpreted this as a proposition.

[i] After stopping in Glorieta, [Hughes] and [complainant] drove to Santa Fe for an appointment to Construction Industries, a state agency.

[j] [Hughes] met with David Steel, New Mexico Director of Construction Industries. [Complainant] sat in the office of Bernetta Hules, administrative supervisor to David Steele.

[k] After leaving Construction Industries, [Hughes] purchased Kentucky Fried Chicken for their lunch. Lunch was eaten enroute to Albuquerque.

[l] [Hughes] exited I–25 for a rest area where garbage was thrown out.

[m] [Complainant] said, [Hughes] told her he didn't want to have sexual intercourse with her because he didn't want to get her pregnant. He would leave that to [her] gentleman friend. [Hughes] asked [complainant] to give an old man a "blow job."

[n] [Hughes] reportedly offered money to [complainant] for her son, if she ever needed it.

[o] [Hughes] and [complainant] stopped at an auto shop in Albuquerque to have the front seat of [Hughes'] car adjusted.

[p] After arriving in downtown Albuquerque, [Hughes] dropped [complainant] at the Federal Building and proceeded to his office. Once there [complainant's] mother, called to tell [complainant] that her aunt would not be able to pick her up at the Federal Building. [Hughes] went to the Federal Building to deliver the message to [complainant]. Subsequently, [Hughes] drove [complainant] to the First National Bank to meet her mother.

Hughes relies on *Mosley v. Magnolia Petroleum Co.*, 45 N.M. 230, 240, 114 P.2d 740, 747 (1941), which "cancelled" a finding by the district court "because it is not a finding of fact, but a statement regarding the testimony of witnesses." He contends that we must likewise cancel the portions of the above finding (subparagraphs [d], [f], [m], and [n]) that merely recite the testimony.

The City distinguishes *Mosley* on the ground that it involved a district court. In this case, the City argues, we are dealing with a personnel board composed of lay people who cannot be expected to comply with the same drafting standards as district courts. We sympathize with the general proposition stated by the City. We should not overburden administrative agen-

cies with technical requirements. On the other hand, the matter before the board was one of great importance.

Balancing these considerations, we neither adopt the per se rule suggested by *Mosley,* nor do we indulge a presumption that the board believed the statements by the complainant set forth in its findings. Rather, we examine the board's decision as a whole to see if we can determine what the board actually found.

Some language in finding No. 10 suggests that the board believed the complainant's statements. For example, the finding states "On that day, the following took place:" and subparagraph [e] seems to assume the truth of the statement in subparagraph [d]. On the other hand, the bulk of the entries in the finding are simple declarations of fact, with no reference to anyone reporting or stating the fact. We find it significant that it is the findings relating to the core allegations, which were hotly disputed, that are qualified by words such as "reportedly" or "[complainant] stated."

Our concern is heightened by the conclusions stated by the board. The conclusions were:

1. Sexual harassment as used in the city administrative instruction is defined as "unwelcomed sexual advance, request for sexual favors, and other verbal or physical conduct of a sexual nature." (See Administrative Instruction # 44, Dated November 1, 1983).
2. With two female trainees, [Hughes] acted in a manner which was interpreted by the women as sexual harassment.
3. After engaging in conduct interpreted as sexual harassment by the first complaining female, [Hughes] was warned that his future conduct must preclude any behavior which could be interpreted as sexual harassment.
4. Subsequently to this warning, [Hughes] again engaged in behavior construed as sexual harassment.
5. This conduct is inappropriate for a city employee.

ACCORDINGLY, The Personnel Board of the City of Albuquerque upholds the termination of Mr. Cleo Hughes for gross and negligent supervising actions directed at his subordinate.

Rather than stating that Hughes committed sexual harassment, the board concluded that he "engaged in behavior construed as sexual harassment" by the complainant and an earlier alleged victim. Although that choice of words may be understandable in light of the fact that Hughes had been warned by his superiors to avoid behavior that could be interpreted as sexual harassment, the phrasing nonetheless raises a question as to whether the board found that the most egregious of the alleged conduct actually occurred. If the board had so found, one would expect the conclusion to recite explicitly that Hughes committed sexual harassment.

Thus, the record does not enable us to affirm Hughes' termination on the ground that the board believed the statements by the complainant set forth in the board's findings.

The City contends, however, that the board can be affirmed even if we disregard the findings challenged by Hughes, because the remaining findings suffice to support the board's conclusions. The problem with this argument is that the conclusions do not suffice to justify termination.

As already noted, the board's conclusions do not state that Hughes committed sexual harassment. The conclusions state only that the alleged victims *construed* Hughes' actions as sexual harassment. The City argues that this conclusion "falls within the definition of sexual harassment set out by the Board[.]" We disagree. The City relies on Administrative Instruction No. 44, which defines sexual harassment as "unwelcomed sexual advance, request for sexual favors, and other verbal or physical conduct of a sexual nature." Although the perception of the victim is a factor in determining whether conduct satisfies the definition, that perception must be reasonable. *See Ellison v. Brady,* 924 F.2d 872 (9th Cir.1991) (applying "reasonable woman" standard to claim of sexual harassment

under Civil Rights Act of 1964); *cf. Green v. City of Albuquerque,* 112 N.M. 784, 819 P.2d 1342 (Ct.App.1991) (employee is not entitled to benefits under Workers' Compensation Act for disability caused by *perceived* harassment). The board's conclusion does not justify Hughes' termination because it does not include the necessary language that the complainant's perception was reasonable. The reasonableness of the perception does not follow from the unchallenged findings as a matter of law; and because of our uncertainty as to which allegations the board believed, we are reluctant to presume that the board concluded that the complainant's perception of harassment was reasonable.

The City also appears to argue that we can sustain Hughes' dismissal on the ground that he failed to comply with warnings concerning his behavior. Conclusions 3 and 4 suggest that the board may have ruled against Hughes for violating a directive not to engage in conduct that could be perceived as sexual harassment. The propriety of such a ruling would depend, however, upon whether the board found that Hughes had been given simply a general warning to refrain from behavior that could be construed as sexual harassment or whether he was warned against engaging in certain specified conduct that could be so construed. Failure to comply with a specific directive might be proper grounds for discipline, even termination. On the other hand, a general directive not to engage in conduct that could be construed as sexual harassment might not provide adequate notice to refrain from particular conduct. *Cf. Chavez v. Employment Sec. Comm'n,* 98 N.M. 462, 649 P.2d 1375 (1982) (for purposes of Unemployment Compensation Law, discharge was not for misconduct because alleged misconduct was not preceded by adequate warnings). To illustrate this point, we consider the possibilities in the case before us. Shortly before the incident involving complainant, Hughes had been accused of similar conduct. To avoid the future occurrence or appearance of sexual harassment, the City might have instructed Hughes not to engage in certain particular conduct that could be perceived as sexual harassment, such as inviting a female subordinate into his home during working hours or taking a female subordinate on a business trip when her presence serves no evident business purpose. The board might then have sustained Hughes' termination if it found that Hughes had violated such a directive and that the directive was reasonable.[1] If, however, the board found that he was simply told in general terms to refrain from any conduct that might be construed as sexual harassment, the board could not sustain Hughes' termination unless it also found that he engaged in conduct that was reasonably construed as sexual harassment. Hence, we cannot affirm the board on the ground that Hughes violated a directive because on this record we cannot tell whether the board found that Hughes violated only a general directive or violated a specific directive prohibiting particular conduct.

Moreover, it is unclear whether the board referred to Hughes' failure to heed the warning as an independent basis for termination or as a justification for imposing that sanction on one who has violated Administrative Instruction No. 44. If the latter, the board's ruling stands or falls on whether it applied a correct understanding of Instruction No. 44 to the facts it found, a matter concerning which we have already expressed our uncertainty. Thus, Conclusions 3 and 4 are insufficient to sustain the board's ruling.

Therefore, we reverse the district court's judgment and remand to the district court with directions to remand to the personnel board for further proceedings consistent with this opinion. If it is possible to reconstitute the board (or at least the three-member majority) that originally heard this matter, the further proceedings before the board need be only revision of the board's findings and conclusions to clarify what allegations it believes and the basis on

1. Without knowing what specific facts were found by the board, we cannot decide whether termination on such ground would be proper in this case.

which it affirms or reverses Hughes' termination.

IT IS SO ORDERED.

MINZNER and FLORES, JJ., concur.

824 P.2d 356

Robert L. BENJAMIN, et al., Plaintiffs–Appellees,

v.

David CHAMBERLIN, Defendant–Appellant.

No. 11184.

Court of Appeals of New Mexico.

Dec. 18, 1991.

Craig T. Erickson and Judith D. Schrandt, Sheehan, Sheehan & Stelzner, P.A., Albuquerque, for plaintiffs-appellees.

Paul Livingston, Albuquerque, for defendant-appellant.

OPINION

BIVINS, Judge.

Defendant appeals a judgment, following a bench trial, awarding Plaintiffs damages based on conversion. Defendant argues that the judgment is a nullity because, at the time of the trial which led to the judgment, there was a bankruptcy stay in effect. We agree and set aside the judgment as void. Because of our disposition of this issue, we do not reach the remaining issue claiming denial of a fair trial.

During the pendency of this action, Defendant filed for bankruptcy in the United States Bankruptcy Court for the federal district of New Mexico. Notification of that fact was made to the state district court as well as to Plaintiffs on or about July 7, 1988. The filing of a bankruptcy petition operates to stay "any act to collect, assess, or recover a claim against the debtor that arose before the commencement" of the bankruptcy proceeding. 11 U.S.C. § 362(a)(6) (1988). Notwithstanding this stay, the state district court conducted a trial on the merits on August 17, 1988.

Defendant moved for a new trial based, in part, on the stay from the bankruptcy proceeding. Plaintiffs responded to the motion for new trial, indicating that the bankruptcy court judge lifted the automatic stay at a hearing held on August 5, 1988, which Defendant attended. That pleading was not under oath or supported by affidavit. Plaintiffs attached to their response a copy of an order granting relief from stay which was filed in the United States Bankruptcy Court on September 2, 1988, two

weeks after the state district court trial. The state district court denied Defendant's motion.

■ There are two questions which must be addressed: (1) whether the stay was violated; and, if it was, (2) whether the state district court judgment is void or voidable. Confining our review to the record properly before us, we hold that the stay was violated. We further hold that the district court judgment is void because of violation of the stay.

■ The parties argue the issue of whether the stay was violated by relying on transcripts of proceedings in the bankruptcy court that were never made a part of the record or brought to the trial court's attention below. These transcripts simply have been attached to the parties' briefs. We do not consider transcripts of proceedings in other courts that are attached to briefs but were not made a part of the record in the district court. *See Poorbaugh v. Mullen,* 99 N.M. 11, 16, 653 P.2d 511, 516 (Ct.App.), *cert. denied,* 99 N.M. 47, 653 P.2d 878 (1982); *State v. Rogers,* 90 N.M. 673, 675, 568 P.2d 199, 201 (Ct.App.) (transcript of federal trial), *rev'd on other grounds,* 90 N.M. 604, 566 P.2d 1142 (1977).

The record before us reveals that the district court, when it held the trial on August 17, 1988, was under the automatic stay imposed by 11 U.S.C. § 362. The record also reveals that the automatic stay was not lifted until some two weeks after the district court trial. Such being the state of the record, we are compelled to hold that the stay was violated.

■ Having determined that the judgment violated the stay, we turn to the second question of whether that violation rendered the judgment void or voidable. While there is a conflict among the courts, the weight of authority supports the general rule that an action taken in violation of an automatic stay is void and without effect. *See, e.g., Kalb v. Feuerstein,* 308 U.S. 433, 443, 60 S.Ct. 343, 348, 84 L.Ed. 370 (1940) (because of bankruptcy stay, state court was deprived of power to proceed and, therefore, its actions were without authority of law); *In re Shamblin,* 890 F.2d 123, 125 (9th Cir.1989) (judicial proceedings violating stay are void); *Borg-Warner Acceptance Corp. v. Hall,* 685 F.2d 1306, 1308 (11th Cir.1982) ("Actions taken in violation of automatic stay are void and without effect."); *In re Advent Corp.,* 24 B.R. 612, 614 (Bkrtcy.App. 1st Cir.1982) (acts done in violation of automatic stay void ab initio regardless of lack of knowledge of bankruptcy petition); *In re Pettibone Corp.,* 110 B.R. 848, 853 (Bkrtcy. N.D.Ill.1990) (automatic stay protects debtor absolutely and actions filed while stay is in effect are void and without legal effect); *In re Estate of Barefoot,* 43 B.R. 608, 609 (Bkrtcy.E.D.N.C.1984) (judgment obtained during pendency of automatic stay is not voidable but void ab initio). *See generally* 2 William M. Collier, *Collier on Bankruptcy,* ¶ 362.11 (Lawrence P. King ed., 15th ed. 1991) (actions in violation of stay are void).

Other courts have found that an action taken in violation of an automatic stay is merely voidable, rather than void. Many of these cases rely upon a bankruptcy court's power to "annul" the stay under 11 U.S.C. Section 362(d) and validate such actions retroactively. *See, e.g., Sikes v. Global Marine, Inc.,* 881 F.2d 176, 178–79 (5th Cir.1989); *In re Bresler,* 119 B.R. 400, 403 (Bkrtcy.E.D.N.Y.1990); *In re Clark,* 79 B.R. 723, 725 (Bkrtcy.S.D.Ohio 1987); *In re Oliver,* 38 B.R. 245, 248 (Bkrtcy.D.Minn. 1984) ("In light of this power to validate, violations of the stay are voidable rather than void because a *void* act could not be ratified or cured."). Other cases supporting the voidable theory discuss the fact that there are specific statutory "exceptions," such as a protection for good faith purchasers of real property, which protect certain actions despite the fact that they may technically violate the stay. *See, e.g.,* 11 U.S.C. § 549(c) (1988); *see also Sikes,* 881 F.2d at 179 ("If everything done post-petition were void in the strict sense of the word, these provisions would be * * * meaningless * * * * "); *In re Fuel Oil Supply & Terminaling, Inc.,* 30 B.R. 360, 362 (Bkrtcy.N.D.Tex.1983) (refers to good faith exceptions found in sections 542(c),

549(c) and 546 of the Code). *But see In re Garcia,* 109 B.R. 335, 339 (Bkrtcy.N.D.Ill. 1989) (fact that Code contains exceptions to automatic stay does not require conclusion that actions violating stay are merely voidable).

We find that the better approach is to follow the rule that actions, such as this one, taken in violation of an automatic stay are void. While it is true that in some instances an action taken in violation of an automatic stay can be "voidable" rather than "void," we do not believe that the present facts present such a situation. The action before this court does not fall within any of the statutory good-faith exceptions of the Bankruptcy Code, nor has the bankruptcy court chosen to annul the stay and thus breathe life into an otherwise void state district court judgment entered in violation of the automatic stay.

Although we reach this conclusion, it has not escaped our attention that Defendant appears to have employed every means at his disposal to frustrate the state district court proceeding. He changed counsel numerous times, requested continuances, and otherwise thwarted the judicial process to gain advantage. What occurred in this case is not unlike that in *Noli v. Commissioner,* 860 F.2d 1521, 1522–24 (9th Cir. 1988) (petitioners changed counsel, requested numerous continuances, and otherwise frustrated process; bankruptcy court determined that petitions were filed as a means to avoid a decision in the Tax Court). Nevertheless, we are compelled to abide by long-standing rules of appellate procedure that require we limit our review to the record below.

Therefore, we set aside the judgment and remand for further proceedings. Defendant requested oral argument; however, we do not deem it necessary. No costs are awarded.

IT IS SO ORDERED.

ALARID, C.J., and PICKARD, J., concur.

824 P.2d 358

Sheya BADER-RONDEAU, Claimant-Appellant,

v.

TRUTH OR CONSEQUENCES MUNICIPAL SCHOOLS, self-insured, Respondent-Appellee.

No. 13343.

Court of Appeals of New Mexico.

Dec. 27, 1991.

Jerald A. Valentine, Las Cruces, for claimant-appellant.

David L. Skinner, Beall, Pelton, O'Brien & Brown, Albuquerque, for respondent-appellee.

OPINION

DONNELLY, Judge.

This case requires that we consider the question of whether anonymous bomb threats made by a co-employee to Worker's employer, and which demanded that Worker be fired or the school would be bombed, provides a legal basis for Worker to recover for alleged psychological injury under the Workers' Compensation Act.

Worker appeals from an order of the workers' compensation judge (WCJ) dismissing her claim for workers' compensation benefits. Our second calendar notice proposed summary affirmance and Worker has responded with a memorandum in opposition. For the reasons stated herein and in our calendar notices, we affirm.

Our second calendar notice proposed to hold that Worker's injury was outside the scope of NMSA 1978, Section 52-1-24(B) (Repl.Pamp.1987), because the motivation for the bomb threats resulted from the personal animosity of a co-employee against Worker for reasons which were not occasioned by Worker's employment. *See Gutierrez v. Artesia Pub. Schools,* 92 N.M. 112, 583 P.2d 476 (Ct.App.1978) (where the employee's death or resulting injury was caused by the willful assault of a third person intending to injure him because of personal reasons unconnected with the employee's employment, the injury did not arise out of the employment, and the resulting death or injury was not compensable under the Workers' Compensation Act). *See also Valdez v. Glover Packing Co.,* 83 N.M. 570, 494 P.2d 983 (Ct.App.1972) (trial court's finding that the worker's injury was the result of personal animosity, and thus was not reasonably incident to his employment, held supported by substantial evidence). Although Worker in the instant case challenged the finding of the WCJ that the bomb threats were the result of personal animosity directed toward her because of events which occurred outside the scope of her employment, she does not press argument on this matter in her second memorandum in opposition. *See State v. Martinez,* 97 N.M. 585, 642 P.2d 188 (Ct.App.1982) (party may abandon an issue by failing to argue it in the memorandum in opposition). Moreover, the finding of the WCJ as to this issue was supported by substantial evidence on the record as a whole. *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct. App.1988).

Worker's main argument seeks to distinguish the decision in *Gutierrez* from the instant case on two grounds. First, Worker argues that the setting of her employment, an elementary school, increased the risk of the assault. We disagree. Even if we were to conclude that bomb threats constituted a risk incident to her position as a teacher's aide, which we decline to do, Worker is not entitled to compensation because the "positional-risk" doctrine she urges us to adopt only applies where the assault is not motivated by personal animosity toward an individual worker. *See* 1 Arthur Larson, *The Law of Workmen's Compensation* § 10.00 (1990).

Worker's second attempt to distinguish this case from *Gutierrez* is also related to her argument concerning the doctrine of "positional risk." She contends that her injuries are compensable because the assault "would not have taken place" if she had not been employed at the school.

This "but-for" theory has been adopted in a limited number of jurisdictions, *see* Arthur Larson, *supra,* § 11.16(c); however, we need not reach the issue of whether New Mexico should recognize a "but-for" theory in cases involving assaults against employees, because we determine that such a doctrine would not apply in any event in the instant case because the incident leading to her psychological condition arose out of and was rooted in personal animosity by a co-employee toward Worker involving matters unrelated to her employment. *Id.* at 3–271. When the origin of the assault arises because of private or personal reasons, and the worker's employment has not engendered or exacerbated the quarrel or facilitated the assault, Larson notes that "the assault should be held noncompensable even in states fully accepting the positional-risk test, since that test applies only when the risk is 'neutral.'" Arthur Larson, *supra,* § 11.21(c) (footnote omitted).

Worker contends that her psychological condition is compensable because the co-employee's threats were directed at Worker's employment. Thus, she reasons that the mechanism causing injury here was the employment itself, and her injury was therefore caused by a risk incident to her employment. We believe an analogous argument could have been made in *Valdez,* where the worker was injured in a fight with a co-worker when the co-worker threw several tools at him, including a butcher knife. *Valdez,* however, shows that it is not the mechanism of injury or its relationship to the employment that is dispositive; rather, it is the motivation behind the altercation or assault. Here, there was sufficient evidence upon which the WCJ could have found that the motivation leading to Worker's injury was personal and not job related. This accords with the general rule that even where the employer supplies a weapon for use in carrying out the work of the employer and the weapon is used by a co-worker to injure an employee in the course of an otherwise intentional and personal assault, the mere fact of furnishing such weapon does not provide a sufficient causal link to require a finding that the injury arose out of the employment. *See* Arthur Larson, *supra,* § 11.23(e).

We therefore affirm the denial of workers' compensation benefits for the reasons stated herein and in our second calendar notice.

IT IS SO ORDERED.

MINZNER and PICKARD, JJ., concur.

824 P.2d 1023

STATE of New Mexico, Plaintiff–Appellee,

v.

Pedro GONZALES, Sr., Defendant–Appellant.

No. 18429.

Supreme Court of New Mexico.

Jan. 6, 1992.

As Amended on Denial of Rehearings Feb. 6, 1992.

Ellen Bayard, Santa Fe, for defendant-appellant.

Tom Udall, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

BACA, Justice.

Defendant-appellant Pedro Gonzales appeals from his conviction of and sentencing on charges of first degree murder, shooting into an occupied motor vehicle, and felon in possession of a firearm. We affirm in part and reverse in part.

The incidents culminating in the death of Mike Sandoval stem from a history of animosity between Ben Rivera, and defendant and his family. Sandoval was a passenger in a truck driven by Rivera and was killed by shots fired into the truck while driving past the Gonzales residence. The fatal wound was caused by a bullet fired from a rifle belonging to Yolanda Gonzales, defendant's wife. Also charged in the shooting was defendant's son, Martin Gonzales.

Defendant raises the following issues on appeal: (1) Whether it violates double jeopardy principles (a) to enter judgment and sentence on the conviction for shooting into a motor vehicle, and (b) to enhance the sentence for felon in possession of a firearm based on the habitual offender statute; (2) whether the court erred when it admitted preliminary hearing testimony; (3) whether prosecutorial misconduct denied defendant a fair trial; and (4) whether defendant's right to effective assistance of counsel was violated.

I. DOUBLE JEOPARDY.

Defendant raises two double jeopardy arguments: (1) Whether his convictions and sentences for both shooting into an occupied motor vehicle under NMSA 1978, Section 30–3–8 (Cum.Supp.1991), and first degree murder under NMSA 1978, Section 30–2–1 (Repl.Pamp.1984), violate double jeopardy principles; and (2) whether the use of the same prior felony to prove both the crime of felon in possession of a firearm and his status as an habitual offender violates double jeopardy. We discuss these contentions separately.

A. Shooting at an Occupied Motor Vehicle.

Defendant contends that his convictions for both shooting into an occupied vehicle and first degree murder is a violation of double jeopardy principles. His initial argument was based on our decision in *State v. Pierce,* 110 N.M. 76, 792 P.2d 408 (1990), in which we vacated a conviction on lesser included offenses when the defendant's actions constituted one criminal act. In their initial briefs, defendant and the State agreed that defendant's actions constituted one criminal act and that, under *Pierce,* the conviction for the lesser offense—shooting into an occupied vehicle—merged into the greater offense and should be vacated. However, we recently clarified the law surrounding double jeopardy in *Swafford v. State,* 112 N.M. 3, 810 P.2d 1223 (1991). In response to *Swafford,* we

requested additional briefing on the double jeopardy question. The State now contends that the two offenses do not merge and that defendant may be punished for each offense.

At issue in this case is that category of double jeopardy that "protects against multiple punishments for the same offense." *Id.* at 7, 810 P.2d at 1227 (quoting *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)); *see also Pierce,* 110 N.M. at 84–85, 792 P.2d at 416–17. The question of whether convictions under several statutes constitute the same offense for double jeopardy purposes is a matter of determining the legislative intent. *Swafford,* 112 N.M. at 8, 810 P.2d at 1228 ("polestar guiding courts is the legislature's intent to authorize multiple punishments for the same offense"); *see also Herron v. State,* 111 N.M. 357, 359, 805 P.2d 624, 626 (1991); *Pierce,* 110 N.M. at 85, 792 P.2d at 417. Where a defendant "is convicted of one or more offenses which have merged into the greater offense he may be punished for only one." *Pierce,* 110 N.M. at 86–87, 792 P.2d at 418–19. Concurrent sentencing does not render multiple convictions for the same offense harmless. *Pierce,* 110 N.M. at 87, 792 P.2d at 419.

Under *Swafford,* the test to determine legislative intent to punish is: (1) "whether the conduct underlying the offenses is unitary, *i.e.,* whether the same conduct violates both statutes," and (2) if so, did the legislature "intend[ ] to create separately punishable offenses." 112 N.M. at 13, 810 P.2d at 1233. The double jeopardy clause prohibits multiple punishment only if the first part of the test is answered affirmatively and the second part of the test is answered negatively. *Id.*

In the instant case, we find that defendant's conduct leading to his multiple convictions was unitary. As we explained in *Swafford,*

> [t]he conduct question depends to a large degree on the elements of the charged offense and the facts presented at trial. * * *
>
> If two events are sufficiently separated by either time or space * * *, then it is a fairly simple task to distinguish the acts. * * * [T]he task is merely to determine whether the conduct for which there are multiple charges is discrete (unitary) or distinguishable.

Id. at 13–14, 810 P.2d at 1233–34. In defendant's case, the facts presented at trial established that defendant fired multiple gun shots into Rivera's truck in rapid succession. Because the shots were not "separated by either time or space," we agree with the trial court that defendant committed one criminal act.

Because defendant's conduct was unitary, we must examine whether the legislature intended to create two separately punishable offenses. Under *Swafford,* our first inquiry is whether the legislature has expressly provided for multiple punishment for unitary conduct. *Id.* at 14, 810 P.2d at 1234. In this case, the statutes under which defendant was convicted do not expressly provide for multiple punishment for unitary conduct. *Compare* NMSA 1978, § 30–2–1 (Repl.Pamp.1984), *with* NMSA 1978, § 30–3–8 (Cum.Supp.1991).

Where, as here, the legislature did not expressly provide for multiple punishments for unitary conduct, we must determine legislative intent by applying the test enunciated in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). *Swafford,* 112 N.M. at 14, 810 P.2d at 1234. The *Blockburger* test requires an analysis of the elements of each statute to determine "whether each provision requires proof of a fact the other does not." *Blockburger,* 284 U.S. at 304, 52 S.Ct. at 182. Clearly, each statute in question in this appeal requires proof of an element that the other statute does not require. The murder statute, NMSA 1978, Section 30–2–1, requires proof of the unlawful killing of a human being which need not be accomplished by shooting at an occupied motor vehicle. The shooting at an occupied motor vehicle statute, NMSA 1978, Section 31–3–9, requires proof of discharging a firearm at an occupied vehicle but does not require the killing of a human

being. Thus, the greater offense—murder—does not subsume the lesser offense—shooting into an occupied vehicle—because each requires proof of an element absent in the other. *See Swafford,* 112 N.M. at 14, 810 P.2d at 1234.

Because each statute requires proof of an element absent in the other, we presume that the legislature intended to punish each offense separately. *Id.* at 14, 810 P.2d at 1234. However, this presumption can be rebutted by showing that the legislature had a contrary intent. To determine legislative intent, we look to the "language, history, and subject of the statutes." *Id.* Legislative intent may be gleaned from the statutory schemes by identifying the particular evil addressed by each statute; determining whether the statutes are usually violated together; comparing the amount of punishment inflicted for a violation of each statute; and examining other relevant factors. *Id.* at 14–15, 810 P.2d at 1234–35.

In the instant case, an examination of the factors set out in *Swafford* convinces us that the legislature intended separate punishment for an act that violates both statutes. The murder statute is designed to avoid the unlawful killing of a person. In contrast, the shooting into an occupied vehicle statute is more narrowly designed to protect the public from reckless shooting into a vehicle and the possible property damage and bodily injury that may result. While death may occur as a result of shooting into an occupied vehicle, we must strictly construe the social purpose protected by each statute. *Id.* Thus, the statutes protect different social interests. In addition, while the statutes in question here may be violated together, they are not necessarily violated together. Further, although the murder statute extracts a greater penalty than the shooting into an occupied vehicle statute, the murder statute does not incorporate the same elements as the shooting into an occupied vehicle statute. Finally, punishment for a violation of either statute is not enhanced for a violation of the other statute. *See id.* at 15, 810 P.2d at 1235. Therefore, we find that the legislature intended for separate punishment for unitary conduct that violated both statutes. Thus, there is no violation of double jeopardy principles for defendant's punishment under both of the statutes in question here.

B. Enhancement of Defendant's Sentence as Felon in Possession of a Firearm.

Defendant contends that the use of the same prior felony to prove both the crime of felon in possession of a firearm and appellant's status as an habitual offender violates double jeopardy principles. Because the State conceded that this enhancement was improper under *State v. Haddenham,* 110 N.M. 149, 793 P.2d 279 (Ct.App. 1990), we vacate the enhancement provision of defendant's sentence and remand for resentencing. *See also State v. Castrillo,* 112 N.M. 766, 819 P.2d 1324 (1991).

II. ADMISSION OF PRIOR TESTIMONY.

A. Did the Admission of Carrillo's Preliminary Hearing Testimony Violate the Confrontation Clause?

Defendant contests the admission at trial of testimony made at a preliminary hearing by Judy Carrillo, Martin Gonzales's wife. At trial Carrillo exercised her privilege not to testify. U.S. Const. amend. V. The court found her unavailable and admitted the prior testimony.

There is no question that Carrillo was "unavailable" to testify under SCRA 1986, 11–804(A). *See McGuiness v. State,* 92 N.M. 441, 443–44, 589 P.2d 1032, 1034–35 (1979). Defendant contends, however, that he did not have the opportunity and motive to cross-examine Carrillo and develop her testimony. He asserts that because the relevant issues had changed between the preliminary hearing and trial, his motivation to cross-examine Carrillo had also changed. At the hearing, Carrillo's testimony was consistent with defendant's self-defense theory; however, in her absence at trial, identification became the issue. Thus, the motive to develop her testimony had changed. The admission of the prior testimony left defendant unable to cross-examine the witness regarding her identifi-

cation of him as having fired on the truck, the issue he wished to pursue at trial. In fact, no cross-examination by the defense was undertaken. The court below overruled the objection to admission of the prior testimony, deeming that any limits on cross-examination resulted from a change in trial strategy.[1]

In *State v. Massengill,* 99 N.M. 283, 657 P.2d 139 (Ct.App.1983), the court considered a similar argument by a criminal defendant. The *Massengill* court noted that one purpose of a preliminary hearing is to preserve evidence. *Id.* at 284, 657 P.2d at 140.[2] The question of whether preliminary hearing testimony should be admitted at trial when the witness was unavailable was not whether a defendant had the *same* motive to cross-examine and develop testimony at the hearing and at trial, but whether the defendant had a *similar* motive. *Id.* at 285, 657 P.2d at 141. Focusing on the defendant's decision to forego examination in certain areas, the court determined that the defendant had made a tactical choice. The motive to cross-examine the witness at the preliminary hearing was similar to the motive to cross-examine at trial because in both instances, the issues were whether a crime was committed and whether the defendant had committed the crime. *Id.* In other words, *Massengill* set forth a per se rule that absent extraordinary circumstances preliminary hearing testimony may be admitted at trial if the witness is unavailable because the motive to cross-examine is similar. *See also State v. Martinez,* 102 N.M. 94, 96, 691 P.2d 887, 889 (Ct.App.1984); *cf. State v. Slayton,* 90 N.M. 447, 564 P.2d 1329 (Ct.App.1977) (unavailable witness's prior testimony concerning insanity inadmissible as to defendant's guilt where defendant had no motive to cross-examine at first trial because of arrangement between counsel). As the following discussion indicates, the instant case does not require us to deviate from the rule articulated in *Massengill.*

The issue in the instant case is presented to us as an interplay of SCRA 1986, 11-804(B)(1), and the constitutional requirement of the confrontation clause. U.S. Const. amend. VI. If a hearsay statement fits into a well-established hearsay exception, the indicia of reliability that make an out-of-court statement trustworthy can be inferred and constitutional problems avoided. *Ohio v. Roberts,* 448 U.S. 56, 65–66, 100 S.Ct. 2531, 2538–39, 65 L.Ed.2d 597 (1980); *see Mancusi v. Stubbs,* 408 U.S. 204, 213–16, 92 S.Ct. 2308, 2313–14, 33 L.Ed.2d 293 (1972). Thus, if the testimony was admitted in accordance with Rule 11–804, the constitutional requirements of the confrontation clause have been met.

The United States Supreme Court, while not addressing the exact issue presented, has indicated that testimony from a preliminary hearing is admissible at a subsequent trial when the hearing was held under circumstances akin to a trial. The preliminary hearing is akin to a trial where the witness is under oath, the defendant is represented by counsel, and the defendant is given the opportunity to cross-examine the witness. *California v. Green,* 399 U.S. 149, 165, 90 S.Ct. 1930, 1938, 26 L.Ed.2d 489 (1970); *cf. Pointer v. Texas,* 380 U.S. 400, 407, 85 S.Ct. 1065, 1069, 13 L.Ed.2d 923 (1965) (distinguishing inadmissible prior testimony when defendant not represented at preliminary hearing from admissible prior testimony when defendant represented by counsel and given adequate opportunity to cross-examine). However, if the circumstances and facts of a particular case indicate that there was a real difference in motive or other limitation on meaningful cross-examination, the testimony should not be admitted. *See Slayton,* 90

1. In *State v. Gonzales,* 110 N.M. 166, 793 P.2d 848 (1990), we considered the appeal of Martin Gonzales, defendant's son and codefendant, and we affirmed the admission of Carrillo's testimony against Martin Gonzales.

2. The opportunity to preserve testimony through depositions, *see* SCRA 1986, 5–503, does not diminish the importance of testimony preserved at a preliminary hearing.

N.M. at 450, 564 P.2d at 1331–32 (unavailable witness's prior testimony regarding defendant's insanity not admissible at trial on defendant's guilt because similar motive to cross-examine was absent); *see also Barber v. Page,* 390 U.S. 719, 725–26, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968) (prior testimony of witness not admissible where witness was not "unavailable" and defendant had no meaningful opportunity to cross-examine witness at preliminary hearing).[3]

The distinction between admissible and inadmissible prior testimony was effectively characterized in *United States v. Allen,* 409 F.2d 611 (10th Cir.1969). In *Allen,* the court considered whether preliminary hearing testimony should be admissible at trial when the issue at the preliminary hearing is probable cause, while at trial the issue is guilt or innocence with the accompanying motivation for more probing cross-examination. As the *Allen* court explained,

> We believe that the test is the opportunity for full and complete cross-examination rather than the use which is made of that opportunity. At the [preliminary] hearing * * *, the defendant and his counsel were confronted by the witnesses who testified under oath and were subjected, without limitation, to extensive cross-examination. The extent of cross-examination, whether at a preliminary hearing or at a trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right. To paraphrase *Pointer* [380 U.S. at 407, 85 S.Ct. at 1069] the statements of the witnesses were made "at a full-fledged hearing" with accused present and represented by counsel who was given "a complete and adequate opportunity to cross-examine."

Id. at 613.

In the instant case, defendant was represented by counsel at the preliminary hearing, the rules of evidence were in force at that hearing, and defendant was given the opportunity to cross-examine Carrillo. *See* SCRA 1986, 6–202(A) (Repl.Pamp.1990). While defendant did not exercise his right to cross-examination, he did so of his own volition. No action of the State impeded his opportunity to develop or impeach Carrillo's testimony.[4] It was not until defendant decided to change his tactics that he decided that cross-examination would be necessary. Under these circumstances, we hold that the testimony was admissible under an accepted hearsay exception and that, because he was given the opportunity to cross-examine the witness at the preliminary hearing, defendant was not denied the right to confront the witness against him.

3. Cases referred to us by appellant from other jurisdictions illustrate this point. In *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), the defendant was not represented by counsel. In *State v. Magouirk,* 539 So.2d 50, 57 (La.App.1988), *withdrawn in part,* 561 So.2d 801 (1990) (withdrawn because defendant was found to have waived confrontation rights), after noting that the right to cross-examination is a primary interest secured by the confrontation clause, the court found that the objections of the prosecution that were sustained by the trial court effectively limited the defense in the scope and nature of its cross-examination, thus depriving him of the right to confront the witness. In *State v. Deskins,* 380 S.E.2d 676 (W.Va.1989), testimony from an earlier trial of a codefendant was found not to be admissible because the motive to develop testimony as against the defendant did not exist. An analysis of these cases indicates that when prior testimony was ruled inadmissible, the inadmissibility was based on structural impediments that created a different motive or removed the opportunity to cross-examine.

4. Unlike *People v. Smith,* 198 Colo. 120, 597 P.2d 204 (1979) (en banc), and *Scott v. State,* 272 Ark. 88, 612 S.W.2d 110 (1981), both cited to us by defendant, defendant was afforded a full-fledged hearing at which he could cross-examine. In *Smith,* the Colorado Supreme Court, over a vigorous dissent, determined that the scope of the preliminary hearings in Colorado is generally limited to screening purposes, with relaxed evidentiary and procedural rules. 597 P.2d at 207. The *Smith* court held that, because the defendant did not have a right to conduct broad cross-examination at the earlier hearing, the testimony could not be admitted. *Id.* at 208. In *Scott,* although the court refused to create a per se rule to prohibit the admission of prior testimony, it did not admit testimony when the transcript was not reliable and there was no evidence that the hearing was not limited. 612 S.W.2d at 113–14.

B. Foundation for Impeachment Evidence.

Regina Gonzales, defendant's daughter-in-law ("Regina"), testified three times—at Martin Gonzales's preliminary hearing, at defendant's preliminary hearing, and at trial—and offered three differing versions of events. At defendant's hearing, Regina testified that she saw defendant armed; at Martin Gonzales's hearing, she testified essentially that she did not know what happened; at trial, she testified that she had not seen weapons. At trial, the issue was whether Regina had been threatened with perjury and thus had lied at defendant's hearing to avoid charges. The State sought to show that Regina had not been asked about weapons at Martin Gonzales's hearing and thus could not have been subject to perjury charges after defendant's hearing. Regina first insisted she had been asked about weapons at Martin Gonzales's hearing; when the State offered to prove otherwise, she claimed to not remember. Martin Gonzales stipulated that the transcript could be admitted on the theory that Regina could not remember and was accordingly unavailable. SCRA 1986, 11–804(A)(3). After Regina could not remember her testimony at defendant's hearing, the transcript of that testimony was also admitted on the same theory. The prior testimony is also asserted to be relevant to assessing Regina's credibility.

Defendant argues that the court erred when it admitted Regina's prior testimony from defendant's preliminary hearing wholesale. He contends that Regina should have been confronted with each statement that she could not recall. Defendant also insists that the admission of Regina's testimony from Martin Gonzales's preliminary hearing violated his right to confront the witness.

We address defendant's second assertion first. Although testimony from Martin Gonzales's hearing was not admissible against defendant because he had had no opportunity to cross-examine, it was properly admitted as to Martin Gonzales. Defendant could have requested a limiting instruction, but he did not. *See* SCRA 1986, 11–105 (limited admissibility). Having not asserted his right to a limiting instruction at trial, defendant cannot prevail on his claim in this court. *State v. Martinez,* 102 N.M. 94, 100, 691 P.2d 887, 893 (Ct.App.1984).

Defendant's other assertion deserves more discussion. SCRA 1986, 11–613(B) states:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require.

The admission of inconsistent statements is a matter committed to the trial court's discretion; the court must balance the probative value of the evidence against its prejudicial effect. *State v. Davis,* 97 N.M. 130, 133, 637 P.2d 561, 564 (1981); SCRA 1986, 11–403 (exclusion of prejudicial evidence). Regina's forgetfulness regarding the inconsistency opened the door for the State to introduce evidence of the inconsistency. *See State v. Martinez,* 98 N.M. 27, 29, 644 P.2d 541, 543 (Ct.App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982). Regina remained available for cross-examination regarding her earlier testimony; thus, defendant's right to examine Regina regarding the alleged inconsistencies was not denied. *See United States v. Collins,* 478 F.2d 837, 838 (5th Cir.), *cert. denied,* 414 U.S. 1010, 94 S.Ct. 373, 38 L.Ed.2d 248 (1973).

Furthermore, we do not believe that Rule 613 should be interpreted as rigidly as defendant requests. Regina was asked about her prior statement made during defendant's preliminary hearing, and insisted that she could not recall the prior inconsistent statements. The court, in the interest of economy and after the prosecutor attempted to read the prior testimony to Regina without successful recollection, admitted the transcript of the previous testimony. We believe this gave Regina adequate opportunity to explain the prior statements; however, her lack of memory simply prevented further explanation.

Moreover, even if the procedure followed by the State and the court in admitting the transcript did not follow the letter of Rule 613, defendant has not demonstrated, nor have we discerned, reversible error. *See State v. Litteral,* 110 N.M. 138, 143, 793 P.2d 268, 273 (1990) (impeachment of witness, even if improper, not prejudicial error); *State v. Duran,* 107 N.M. 603, 608–09, 762 P.2d 890, 895–96 (1988) ("[T]o establish a due process violation, and thus reversible error, the defendant must demonstrate prejudice."); *State v. Hoxsie,* 101 N.M. 7, 10, 677 P.2d 620, 623 (1984) (absent prejudice, no reversible error), *rev'd on other grounds, Gallegos v. Citizens Ins. Agency,* 108 N.M. 722, 779 P.2d 99 (1989). Moreover, the evidence was cumulative. *See State v. Moore,* 94 N.M. 503, 505, 612 P.2d 1314, 1315–16 (1980). In light of the foregoing discussion, we find no abuse of the court's discretion in the way in which the transcript was admitted.

III. PROSECUTORIAL MISCONDUCT.

Except for the closing argument, defendant made no objection to the asserted misconduct. Failure to make a timely objection to alleged improper argument bars review on appeal, unless the impropriety constitutes fundamental error. *State v. Clark,* 108 N.M. 288, 296, 772 P.2d 322, 330 (1989). Our review of the record indicates that defendant was not denied a fair trial by the actions of the prosecutor; however, we review several of defendant's assertions in more detail.

A. Comments on Silence.

Defendant contends that questions regarding Martin Gonzales's and other Gonzales family members' failure to contact the police violated defendant's fifth amendment rights. *See State v. Lara,* 88 N.M. 233, 539 P.2d 623 (Ct.App.1975).

"The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial, and prevents the prosecution from commenting on the silence of a defendant who asserts the right." *Jenkins v. Anderson,* 447 U.S. 231, 235, 100 S.Ct. 2124, 2127, 65 L.Ed.2d 86 (1980). We do not perceive how defendant's fifth amendment rights were compromised by comments regarding the silence of witnesses, family members, and the codefendant. Moreover, the use of a defendant's prearrest silence to impeach is constitutional. *Id.* at 238, 100 S.Ct. at 2129. We certainly find no fundamental error here.

B. Closing Argument.

Defendant asserts that statements made during closing argument regarding members of his family constitute error. Both the prosecution and the defendant are allowed latitude in closing arguments and the trial court has wide discretion in controlling closing argument. *State v. Venegas,* 96 N.M. 61, 63, 628 P.2d 306, 308 (1981). Our review indicates that the asserted errors were either cured by instructions of the court or were not errors.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant asserts that his trial counsel's failure to move to sever the count of felon in possession of a firearm from the other counts constitutes ineffective assistance of counsel. Defendant contends that counsel's failure to sever the counts allowed the State to introduce evidence of his prior conviction for vehicular homicide that otherwise would have been inadmissible at a trial for the murder and shooting into an occupied vehicle charges because defendant did not testify. Defendant argues that this evidence was prejudicial, notwithstanding limiting instructions. Defendant concludes that had evidence of his prior conviction been excluded, the result would have been different and thus, he was denied effective assistance of counsel.

Assistance of counsel is effective when "defense counsel [has] exercise[d] the skill, judgment and diligence of a reasonably competent defense attorney." *State v. Orona,* 97 N.M. 232, 233, 638 P.2d 1077, 1078 (1982) (quoting *Dyer v. Crisp,* 613 F.2d 275, 278, (10th Cir.), *cert. denied,* 445 U.S. 945, 100 S.Ct. 1342, 63 L.Ed.2d 779 (1980)). Assistance of counsel is presumed effective unless the defendant demon-

strates both that counsel was not reasonably competent and that counsel's incompetence caused the defendant prejudice. *State v. Dean,* 105 N.M. 5, 8, 727 P.2d 944, 947 (Ct.App.), *cert. denied,* 104 N.M. 702, 726 P.2d 856 (1986). On appeal, we will not second guess the trial strategy and tactics of the defense counsel. *State v. Mares,* 112 N.M. 193, 200, 812 P.2d 1341, 1348 (Ct.App.), *cert. denied,* 112 N.M. 235, 814 P.2d 103 (1991).

To prevail on his ineffective assistance of counsel claim, defendant must first demonstrate that had his counsel moved for severance, the motion would have been granted. We note initially that joinder was appropriate here because the offenses were "based on the same conduct." SCRA 1986, 5–203(A)(1) (Cum.Supp. 1991). Properly joined offenses may be severed only if the defendant or the state is prejudiced by the joinder. SCRA 1986, 5–203(C) (Cum.Supp.1991); *State v. Pacheco,* 110 N.M. 599, 604, 798 P.2d 200, 205 (Ct. App.) *cert. denied,* 110 N.M. 533, 797 P.2d 983 (1990); *State v. Gallegos,* 109 N.M. 55, 64, 781 P.2d 783, 792 (Ct.App.1989). Defendant, as the moving party, bears the burden of proving that he suffered prejudice by the joinder. *Pacheco,* 110 N.M. at 604, 798 P.2d at 205. Denial of a motion for severance is within the sound discretion of the trial court. *Id.*

Defendant makes no showing of actual prejudice but merely states that "the proof of vehicular homicide could only have influenced the jury, notwithstanding instructions." In effect, defendant argues that joinder of the felon in possession charge with other charges arising out of the same conduct is per se prejudicial and requires severance. Because an assertion of prejudice is not equated with a showing of prejudice, *see Hoxsie,* 101 N.M. at 10, 677 P.2d at 623, we could summarily dismiss this issue. However, we address defendant's argument because it presents an important issue of first impression in New Mexico. We agree with the reasoning of those courts that have avoided adopting a per se rule requiring severance under similar circumstances. *See State v. Evans,* 235 Neb. 575, 456 N.W.2d 739, 744–46 (1990) (severance of felon in possession and robbery counts not required where defendant fails to show prejudice); *State v. Thompson,* 55 Wash.App. 888, 781 P.2d 501, 504 (1989) (failure to sever felon in possession and assualt charges not required absent prejudice to defendant); *State v. Fournier,* 554 A.2d 1184, 1186–87 (Me.1989) (severance of felon in possession and murder charges not required even in the absence of limiting instructions where defendant fails to show actual prejudice).

In the instant case, we do not feel that defendant showed prejudice that would require severance of the charges. The jury was told only that defendant had been convicted of vehicular homicide and was not given details surrounding that conviction. The prior conviction for vehicular homicide is so dissimilar from charges of either murder or shooting into an occupied vehicle that its introduction into evidence is insufficient to cause defendant undue prejudice. In addition, the jury was twice instructed to limit its use of the conviction to the felon in possession charge and not to consider the conviction on other counts. The jury is presumed to follow the court's instructions. *See State v. Case,* 100 N.M. 714, 719, 676 P.2d 241, 246 (1984). Thus, defendant has not met his burden of showing that severance of the charges would have been granted.

Even if we were convinced that severance was appropriate, we are not convinced that defendant should prevail on his ineffective assistance of counsel claim. Prior to trial, defendant's counsel asked for an instruction that limited the jury's consideration of the vehicular homicide to the felon in possession charge. At that point, defense counsel indicated that he was uncertain whether defendant would testify and failed to respond to the trial court's query regarding severance. If the defendant had testified, the State would have been permitted to introduce evidence of the vehicular homicide to impeach defendant's testimony. SCRA 1986, 11–609. Because defense counsel was still considering whether defendant would testify, we feel that the choice to refrain from seeking

severance was a tactical decision. "Bad tactics and improvident strategy do not necessarily amount to ineffective assistance of counsel." *Orona,* 97 N.M. at 234, 638 P.2d at 1079. In hindsight, defendant may be justified in questioning his counsel's trial tactics and strategies; however, the tactics and strategies of which defendant complains do not rise to the level of ineffective assistance of counsel.

In accordance with the foregoing discussion, we affirm defendant's conviction on the murder and shooting into an occupied vehicle charges. We reverse the sentence enhancement and remand with instructions to vacate this portion of defendant's sentence. With respect to the trial court's evidentiary rulings, we affirm. We also find that Mr. Gonzales's right to a fair trial was not violated by prosecutorial misconduct. Finally, we find that defendant's right to effective assistance of counsel was not violated.

IT IS SO ORDERED.

RANSOM, C.J., and MONTGOMERY, J., concur.

824 P.2d 1033

KELLY INN NO. 102, INC., Plaintiff–Appellant,

v.

Nick KAPNISON, Paul Kapnison, Personal Representative of the Estate of Natalyn Giannini, Deceased, and Robert O. Gathings, Defendants–Appellees.

KELLY INN NO. 102, INC., a corporation, and Howard T. Kelly, Plaintiffs–Appellees,

v.

Nick KAPNISON, et al., Defendants–Appellants.

Nos. 19021, 19443.

Supreme Court of New Mexico.

Jan. 7, 1992.

Sylvain Segal Albuquerque, for Kelly Inn No. 102, Inc., and Howard Kelly.

Marchiondo, Vigil & Voegler, Douglas G. Voegler, Albuquerque, for Nick Kapnison, et al.

John A. Budagher Albuquerque, for First Natl. Bank in Albuquerque, Trustee of Robert and Nedra Gathings Trust.

William C. Salmon, Albuquerque, for defendant-appellee Anna Marie Kapnison Personal Representative of the Estate of Natalyn Giannini.

OPINION

MONTGOMERY, Justice.

In this case we attempt to clarify the sometimes confusing state of the law surrounding the finality of judgments. The specific issue is whether a judgment declaring the rights and liabilities of the parties and awarding attorney's fees, but reserving for future determination the amount of the fees, is final, despite the parties and the court's recognition of the necessity for future proceedings to fix the amount of the award. We hold that it is.

This case also presents issues closely related to the finality issue: whether the trial court had jurisdiction to fix the amount of fees after more than thirty days had passed following entry of the initial judgment and after the losing party had appealed. We hold that it did.

The underlying controversy was a dispute between two lessors and their lessee over the validity of the lessors' termination of the lease because of the lessee's failure to comply with a covenant requiring construction of a motel on the leased premises. The trial court ruled that the lessors had properly terminated the lease and entered judgment to that effect, ordering that attorney's fees would be awarded to the lessors after the amount had been established in a subsequent hearing. The lessee thereupon appealed. The court then held a hearing on the amount of attorney's fees and found that the amount claimed by the lessors was reasonable, but refused to enter a further judgment for that amount on the ground that it lacked jurisdiction to do so. The lessors then appealed from this order. We consolidated the two appeals and now affirm the judgment in favor of the lessors in the first appeal and reverse the order in favor of the lessee in the second appeal, remanding for further proceedings to fix the amount of attorney's fees.

I.

On July 1, 1979, Nick Kapnison and Robert Gathings ("the lessors") signed a lease agreement with Howard Kelly ("the lessee") [1] covering a tract of land located near Interstate 40 west of Albuquerque, New Mexico. The lease was for a term of twenty-five years commencing April 1, 1980,[2] and granted the lessee three ten-year options to renew.

The lease agreement required the lessee to commence and complete construction of a motel on the leased premises "with due diligence," though it did not specify a date for commencement of such construction. The agreement also authorized the lessors to reenter and repossess the premises if the lessee defaulted in performance of any condition or covenant in the lease and if such default continued for thirty days after written notice from lessors. The agreement provided that if either party was compelled to file suit to enforce the terms of the lease, the prevailing party would be entitled to recover all expenses, court costs,

1. Through various assignments, etc., the other defendants-appellees have acquired interests in Kapnison and Gathings's position as lessors. All of these parties are referred to herein as "the lessors." Kelly transferred his interest in the leasehold to his corporation, Kelly Inn No. 2, Inc., which was formed after the lease was signed; the corporation and Kelly are referred to as "the lessee."

2. Later amended to October 1, 1980.

and reasonable attorney's fees incurred in the litigation.

As of September 16, 1986, the lessee had not commenced construction of the promised motel. On that date the lessors sent the lessee a written notice, declaring a default due to noncompliance with the provision requiring commencement and completion of a motel with due diligence. The lessee was given thirty days to cure the default.

The lessee failed to commence construction within this thirty-day period, and on November 12, 1986, the lessors filed an affidavit of default, declaring that the lessee's leasehold interest was terminated. The lessee thereupon sued the lessors for reinstatement of the lease and damages for breach of contract.[3] Lessors responded with a counterclaim requesting ejectment and damages.

After a bench trial, the district court entered findings of fact and conclusions of law, declaring that the lessee had not exercised due diligence and thus had breached the lease agreement by "failing to take any substantive steps to commence construction between January 1, 1983, and September 16, 1986, when interest rates were generally at the same level or lower than when the lease was originally signed[.]" The court accordingly entered a judgment on January 8, 1990, ejecting the lessee from the premises and declaring that the lessors had lawfully terminated the lease. The judgment further provided that, upon application to the court and after a hearing, the lessors would "recover reasonable attorney's fees and costs against [the lessee]."

The lessee filed a notice of appeal on February 6, 1990. On March 6, the lessors filed applications for attorney's fees and costs.[4] The court held a hearing on August 8, 1990, and entered an order on August 28, finding the requested fees and costs reasonable but denying the applications on the ground that it lacked jurisdiction to grant them. The lessors then appealed, and we consolidated the appeals.

The lessee's appeal[5] from the January 1990 judgment challenges the judgment primarily by asserting that the findings of fact on which it rests are not supported by substantial evidence. Although the lessors have not sought dismissal of this appeal in their response to the lessee's challenge, they do raise the issue of nonfinality of the judgment in their own appeal,[6] contending that, since the judgment was not final and appealable, the trial court retained jurisdiction and its August order refusing to fix the amount of attorney's fees for lack of jurisdiction was therefore in error. Since the lessors' appeal thus raises an issue of our jurisdiction to consider the lessee's appeal,[7] and since the issue of finality of the January judgment and the related issues of the trial court's continuing jurisdiction thereafter to fix the amount of attorney's fees are the more significant issues on this appeal, we take up first the questions raised by the lessors' appeal.

II.

In *Sacramento Valley Irrigation Co. v. Lee*, 15 N.M. 567, 571, 113 P. 834, 835 (1910), this Court, sitting as the Supreme Court of the Territory of New Mexico, said, "A determination of what is a final judgment or decree is often a close question." Relying on federal cases beginning with *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 12 L.Ed. 404 (1848), this Court continued:

> It appears, therefore, that there are two distinct lines of cases upon the question of what constitutes a final decree. The United States cases ... hold that no judgment or decree will be regarded as final within the meaning of the statutes

3. The complaint was filed on January 20, 1987. Prior to trial, the lessee abandoned the claim for reinstatement and sought only damages.

4. The total of fees and costs requested by all lessors was $34,905.98. The court found this amount to be reasonable, and no issue as to reasonableness of the figure is presented on this appeal.

5. Cause No. 19,021 in this Court.

6. Cause No. 19,443 in this Court.

7. *See, e.g., In re Quintana*, 82 N.M. 698, 487 P.2d 126 (1971) (appellate court has no jurisdiction to review judgment which is not final).

> in reference to appeals unless all issues of law and fact necessary to be determined were determined and the case completely disposed of so far as the court had power to dispose of it.
>
> This rule, however, has been qualified to the extent that the retention of the case by the court after decree for the purpose of distribution of funds, etc., even though other and incidental decrees relating to the subject matter of the original decree and involving some of the same issues may be necessary in order to finally dispose of the case, will not destroy its character as a final decree from which an appeal may be taken.

Sacramento Valley, 15 N.M. at 573, 113 P. at 836 (citations omitted).

The rule in *Forgay v. Conrad*—that a judgment or decree adjudicating the basic rights and liabilities in controversy is to be given a practical, not technical, construction and treated as final even though other, more or less ministerial actions remain to be taken by the rendering court—retains considerable vitality today. *See generally* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.11 (2d ed. 1990) [hereinafter *Moore's*] (commenting, however, that the rule "is not always a rule of easy application[,]" *id.* at 97). One of its most recent applications (although the case was not cited in the opinion) is *Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), in which the United States Supreme Court held that a judgment determining an employer's liability for employment compensation was final and appealable, even though the recoverability and amount of attorney's fees for the litigation (under a state statute providing for such fees in the kind of litigation involved) remained to be determined. Although there are certain differences between the present case and the litigation in *Budinich,* the issue before us can to some extent be characterized as whether to adopt the federal rule that a judgment on the merits is final and appealable, notwithstanding the necessity of further proceedings to determine the amount of any attorney's fees to be awarded.[8]

Other state courts considering this issue have ruled consistently with *Budinich.* Three state supreme courts—those of Connecticut, Colorado, and Kansas—have addressed the issue since *Budinich* was decided, and all three have relied on the Supreme Court's decision to hold that a judgment on the merits is final even though the recoverability or amount of attorney's fees is undetermined. *Baldwin v. Bright Mortgage Co.,* 757 P.2d 1072 (Colo.1988) (en banc); *Paranteau v. DeVita,* 208 Conn. 515, 544 A.2d 634 (1988); *Snodgrass v. State Farm Mut. Auto. Ins. Co.,* 246 Kan. 371, 789 P.2d 211 (1990). In each of these cases, the court agreed with the Supreme Court that, since the finality of a judgment and its resulting appealability when entered have jurisdictional consequences, a bright-line rule regarding the finality of a decision on the merits, regardless of the pendency of a request for attorney's fees, is preferable to a case-by-case approach focusing on the nature of the attorney's fee provision in the applicable statute. *See Budinich,* 486 U.S. at 202, 108 S.Ct. at 1721. A fourth state court has also relied on *Budinich* to hold that a judgment resolving the merits of an action under 42 U.S.C. Section 1983 is final, even though it does not resolve a claim for attorney's fees under 42 U.S.C. Section 1988. *American Civil Liberties Union Inc. v. Thompson,* 155 Wis.2d 442, 455 N.W.2d 268 (Ct.App. 1990). Without relying on *Budinich,* other state courts have ruled that the finality of a judgment disposing of the merits of a claim is not destroyed by an outstanding request for attorney's fees. *See, e.g., City of Huntsville v. Certain,* 453 So.2d 715 (Ala.1984) (judgment under 42 U.S.C. § 1983; motion for attorney's fees under

8. One difference between this case and *Budinich* is that here the January 1990 judgment expressly awarded attorney's fees and left only their amount for future determination, whereas in *Budinich* neither the recoverability nor the amount was established by the initial judgment. Although, as indicated later in this opinion, we are inclined to doubt that this distinction makes any difference, we do not expressly hold that, when the judgment makes no ruling on the recoverability of attorney's fees, it is nevertheless final.

42 U.S.C. § 1988), *cert. denied,* 472 U.S. 1027, 105 S.Ct. 3499, 87 L.Ed.2d 631 (1985); *Larche v. Car Wholesalers, Inc.,* 80 Md. App. 322, 562 A.2d 1305 (1989) (judgment and attorney's fee claim under 15 U.S.C. § 2310(d) (Magnuson–Moss Warranty—Federal Trade Commission Improvement Act)). The question is whether New Mexico should adopt a different rule.

The general rule in New Mexico for determining the finality of a judgment is that "an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible." *B.L. Goldberg & Assocs. v. Uptown, Inc.,* 103 N.M. 277, 278, 705 P.2d 683, 684 (1985). This general proposition has been repeated in countless New Mexico cases. *See, e.g., Hall v. Lea County Elec. Coop.,* 76 N.M. 229, 233, 414 P.2d 211, 213–14 (1966) (quoting *Floyd v. Towndrow,* 48 N.M. 444, 446, 152 P.2d 391, 392 (1944) (quote originating in 1 A.C. Freeman, *Law of Judgments* § 45 (5th ed. 1925)); *Cole v. McNeill,* 102 N.M. 146, 147, 692 P.2d 532, 533 (Ct.App.1984); *Clancy v. Gooding,* 98 N.M. 252, 254, 647 P.2d 885, 887 (Ct.App. 1982); *Johnson v. C & H Constr. Co.,* 78 N.M. 423, 425, 432 P.2d 267, 269 (Ct.App. 1967). It will be observed that this general statement is essentially the same as that set out in *Sacramento Valley, supra,* and undoubtedly the statement originated in *Forgay v. Conrad* or one of its progeny.[9]

Like most general statements, however, this one, perhaps because of its frequent repetition, is often pronounced as if it were an absolute, inflexible rule, like the law of gravity, instead of a general proposition admitting of various exceptions. That the rule has exceptions or qualifications, however, was explicitly recognized by this Court in its early statement in *Sacramento Valley:* The retention of jurisdiction for the purpose of distributing funds, etc., does not destroy the judgment's finality for purposes of permitting an appeal to be taken. Other exceptions or qualifications have been recognized in the numerous and widely varying circumstances in which the *Forgay–Conrad* rule has been applied in the federal courts. *See* 9 *Moore's* ¶ 110.11, at 91–105. And, despite the appearance of inflexibility in the foregoing statement of the general rule, our case law makes it clear that the term "finality" is to be given a practical, rather than a technical, construction. *Central–Southwest Dairy Coop. v. American Bank of Commerce,* 78 N.M. 464, 466–67, 432 P.2d 820, 822–23 (1967) (quoting from *Gillespie v. United States Steel Corp.,* 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964) ("[I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality."); *Clancy,* 98 N.M. at 254–55, 647 P.2d at 887–88; *Bralley v. City of Albuquerque,* 102 N.M. 715, 718, 699 P.2d 646, 649 (Ct.App.1985). As we have said in another context, to determine whether a judgment is final, the court must look to its substance and not its form. *Rio Arriba County Bd. of Educ. v. Martinez,* 74 N.M. 674, 678, 397 P.2d 471, 474 (1964).

Our statutes, rules, and cases illustrate numerous situations in which an order does, as contemplated by *Foster v. Addington,* 48 N.M. 212, 213, 148 P.2d 373, 374 (1944), "practically dispose of the merits of the action" even though further proceedings remain necessary "to carry the order into effect." In *Sacramento Valley,* a decree granting an injunction and appointing a receiver for a corporation was held final so as to be appealable, although further proceedings regarding the disposition and distribution of the assets of the corporation were necessary. 15 N.M. at 577–78, 113 P. at 838. In *Cantrell v. Curnutt,* 80 N.M. 519, 458 P.2d 594 (1969), the initial judgment declared that a partnership owed a certain sum to one of the partners, adjudicating all claims of indebtedness between the partners inter se and between the partners and the partnership. That judgment

9. See, for example, *Thomson v. Dean,* 74 U.S. (7 Wall.) 342, 345, 19 L.Ed. 94 (1868) (stating that "this court has always desired that appeals be taken only from decrees which are not only final but complete" and referring to the expediency of "refraining from making final decrees on any part of a cause, however important, until prepared to dispose of it completely.").

was held final, although further proceedings were necessary to determine the status of certain assets of the partnership, direct their sale, and apply the proceeds: "We are satisfied that the court in determining that the liquor license was an asset of the partnership functioned under its retained jurisdiction for the purpose of a final accounting and dissolution of the partnership." *Id.* at 521, 458 P.2d at 596. *See also State v. Quesenberry,* 72 N.M. 291, 293–94, 383 P.2d 255, 257 (1963) (judgment in condemnation action awarding compensation to landowners and vesting title to real estate in state was final judgment; mandamus to enforce it was ancillary to and in aid of the judgment and served the same purpose as a writ of execution).

Similarly, in mortgage foreclosure cases, this Court has often recognized that a decree adjudicating the mortgagor's indebtedness is final and appealable, notwithstanding the necessity for further proceedings to enforce the judgment and supervise the sale of the mortgaged property. *Speckner v. Riebold,* 86 N.M. 275, 523 P.2d 10 (1974), holds that there are two separate adjudications in a suit to foreclose a mortgage: the initial judgment declaring the rights of the parties in the mortgaged premises and the decree that the mortgaged property be sold. The initial judgment is final and appealable for thirty days after its entry. The second part of the judgment is interlocutory and becomes final only when the judicial sale is confirmed. 86 N.M. at 277, 523 P.2d at 12. *See also Plaza Nat'l Bank v. Valdez,* 106 N.M. 464, 745 P.2d 372 (1987) (initial decree of foreclosure did not deprive court of jurisdiction to entertain motion for extension of redemption period because motion was filed within thirty days after second decree confirming foreclosure sale); *Waisner v. Jones,* 103 N.M. 749, 713 P.2d 565 (Ct.App.1986) (order confirming foreclosure sale is final appealable order if rights of parties to sale proceeds are determined), *rev'd on other grounds after remand,* 107 N.M. 260, 755 P.2d 598 (1988). Relying on *Speckner,* we have very recently held that the court adjudicating the action on the debt has continuing jurisdiction over the foreclosure sale and that the exercise of a right of redemption is merely a continuation of the process of enforcing the mortgage and the rights and liabilities flowing from it. *Crown Life Ins. Co. v. Candlewood, Ltd.,* 112 N.M. 633, 635, 818 P.2d 411, 413 (1991).

Our holding in *Crown Life* was nothing new; sixty years ago we held that a motion to enter a deficiency judgment after a judicial sale of property ordered sold by the original decree of foreclosure

> was merely a step in proper subsequent proceedings to enforce the judgment already rendered. The personal indebtedness of the defendants had already been adjudged. The amount for which execution should issue was alone left to be determined, and that by mere computation. We cannot see how the motion for entry of deficiency judgment can be considered as a new judgment, or as a modification of the original "final decree," any more than a motion to confirm the master's report of sale should be so considered. An order of confirmation is a "final order affecting a substantial right made after the entry of a final judgment." So, also, an order in proceedings supplementary to execution. So we must classify an order determining, after foreclosure sale, the amount of deficiency to be entered as a personal judgment.

Armijo v. Pettit, 34 N.M. 559, 561, 286 P. 827, 828 (1930) (citations omitted) (citing *Cooper v. Brownfield,* 33 N.M. 464, 468, 269 P. 329, 330 (1928)). *See also Leonard Farms v. Carlsbad Riverside Terrace Apartments, Inc.,* 86 N.M. 241, 522 P.2d 576 (1974) (court had jurisdiction long after initial decree of foreclosure to determine by way of accounting amount owed junior mortgagee and to impress equitable lien therefor on other property of redemptioner-mortgagor).

[redacted] Yet another example, closely analogous to the present case, of a judgment that is treated as final even though further proceedings are necessary to implement it is a case in which costs remain to be assessed in favor of the prevailing party. The pendency of proceedings to fix the amount of costs does not render the judg-

ment nonfinal. *Schleft v. Board of Educ.,* 107 N.M. 56, 57, 752 P.2d 248, 249 (Ct.App. 1988) (relying on *Prudential Ins. Co. of America v. Anaya,* 78 N.M. 101, 428 P.2d 640 (1967)).

To distill from all of this a general principle that will provide an easy answer to the question of when a judgment is final and when it is not is probably a hopeless undertaking. We agree with the United States Supreme Court that it is impossible to devise a formula to resolve all marginal cases coming within the twilight zone of finality. One formula, not yet mentioned in this opinion, has been phrased by our court of appeals as follows: "The test of whether a judgment is final so as to permit the taking of an immediate appeal, lies in the effect the judgment has upon the rights of some or all of the parties." *Bralley,* 102 N.M. at 718, 699 P.2d at 649. But this, of course, fails to explain what kind of effect upon the rights of the parties is necessary for an order to be considered as final.

We probably can do little better than to propose the following guidelines, which may answer some but undoubtedly will not answer all of the difficult questions falling into the twilight zone: Where a judgment declares the rights and liabilities of the parties to the underlying controversy, a question remaining to be decided thereafter will not prevent the judgment from being final if resolution of that question will not alter the judgment or moot or revise decisions embodied therein. *See Budinich,* 486 U.S. at 199, 108 S.Ct. at 1720. Where a postjudgment request, such as one for attorney's fees, raises issues "collateral to" and "separate from" the decision on the merits, such a request will not destroy the finality of the decision, *see id.* at 199–200, 108 S.Ct. at 1720; proceedings to carry out or give effect to the judgment do not render the judgment nonfinal, because the trial court always retains jurisdiction to enforce its unsuperseded judgment, *see Prudential Ins. Co. of America v. Anaya,* 78 N.M. at 107, 428 P.2d at 646; *Armijo v. Pettit,* 34 N.M. at 561, 286 P. at 828.

What we have said is to some extent inconsistent with certain, for the most part alternative, holdings in two court of appeals cases. In *Johnson v. C & H Construction Co.,* 78 N.M. 423, 432 P.2d 267 (Ct.App.1967), the court dismissed for lack of jurisdiction an appeal in a worker's compensation case. The court held that the judgment in the case was not final because it did not dispose of issues of disability and attorney's fees. Similarly, in *Watson v. Blakely,* 106 N.M. 687, 748 P.2d 984 (Ct. App.1987), the court ruled that the judgment appealed from was not final, in part because it omitted any provision disposing of the petitioner's claim for attorney's fees. The petitioner had filed an action seeking domestication of a divorce decree entered in the Dominican Republic and various other forms of relief including attorney's fees. The trial court entered a judgment awarding several items of relief, but, in addition to failing to rule on the attorney's fee request, did not rule on whether the divorce decree would be domesticated and whether any relief by way of an accounting would be granted to the respondent, who sought such relief in his counterclaim.

It is apparent that in both *Johnson* and *Watson* there were alternative bases for the holding that the judgment appealed from was not final. Nevertheless, in *Watson* the court said specifically: "[W]here an award of attorney's fees is authorized by statute or rule, and a request is made for such award, a judgment which does not dispose of the issue of attorney's fees is not a final order." 106 N.M. at 691, 748 P.2d at 988. The court cited *Johnson* as support for this statement. Subsequently, in *Schleft v. Board of Education, supra,* in holding that the pendency of further proceedings to fix the amount of costs did not render a judgment nonfinal, the court distinguished *Johnson,* saying: "[T]he award of attorney fees in worker's compensation cases differs significantly from the award of costs in other cases. ... The award of attorney fees was integral to the compensation claims presented in the *Johnson* complaint." 107 N.M. at 57, 752 P.2d at 249.

The lessors in the present case make a similar argument, founded on the provisions in the lease agreement entitling the prevailing party in litigation over the lease to recover that party's attorney's fees and costs in such litigation. They argue: "By virtue of the lease agreement, attorneys' fees and costs ... are an additional element of damages to which [the lessors] are entitled." Regardless of whether this is a correct characterization of the attorney's fee provision in the lease, we think that the question of finality of a judgment adjudicating the rights and liabilities of the parties to a lease, or any other contract, should not turn on whether attorney's fees and costs are characterized as an additional element of damages, rather than as supplementary relief awarded to the prevailing party. Likewise, the finality of a judgment should not turn on whether the governing statute or court rule authorizes attorney's fees as part of the relief to be afforded to a successful plaintiff, rather than, for example, as an amount to be taxed as "costs" in favor of the prevailing party.[10] In this respect we agree with the Supreme Court in *Budinich* that the

> effect of an unresolved issue of attorney's fees for the litigation at hand should not turn upon the characterization of those fees by the statute or decisional law [or, we would add, the contract] that authorizes them.
>
> We have said elsewhere that "[t]he considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." ... This practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "nonmerits," but rather preservation of operational consistency and predictability in the overall application of [28 U.S.C.] § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.

486 U.S. at 201–02, 108 S.Ct. at 1721–22 (quoting *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 69, 68 S.Ct. 972, 977, 92 L.Ed. 1212 (1948)).

Accordingly, to the extent that *Johnson* and *Watson* are inconsistent with the views we have expressed above, we find it necessary to overrule those cases, insofar as they hold that an authorization for attorney's fees, whether or not it is conceptualized as part of the relief afforded by the statute or other governing rule or contract, and whether or not it is requested in the plaintiff's complaint or the defendant's answer, if not granted and fixed in the judgment renders the judgment nonfinal and unappealable.

In reaching our decision on the finality of the January 1990 judgment in this case, we have not overlooked the strong policy in New Mexico disfavoring piecemeal appeals. That policy has been endorsed in numerous opinions of this Court and of the court of appeals. *See, e.g., Banquest/First Nat'l Bank v. LMT, Inc.,* 105 N.M. 583, 585, 734 P.2d 1266, 1268 (1987); *C.C. Davis v. Meadors–Cherry Co.,* 63 N.M. 285, 289, 317 P.2d 901, 904 (1957) (per curiam); *Foster v. Addington, supra,* 48 N.M. at 213, 148 P.2d at 374; *Cole v. McNeill, supra,* 102 N.M. at 148, 692 P.2d at 534. This concern, however, has been addressed in several of the cases cited earlier in this opinion that follow *Budinich* and hold that an unresolved attorney's fee issue does not destroy the finality of an otherwise final judgment. In *Snodgrass v. State Farm Mutual Automobile Insurance Co.,* for example, the Supreme Court of Kansas commented:

> We are aware that the rule we have adopted may lead to an occasional "piecemeal" appeal of a judgment on the merits and an award of attorneys fees. The

10. *See, e.g., Home Plumbing & Contracting Co. v. Pruitt,* 70 N.M. 182, 186–87, 372 P.2d 378, 381 (1962) (under mechanic's lien statute, NMSA 1953, Section 61–2–13 (now NMSA 1978, Section 48–2–14 (Repl.Pamp.1987), allowance for attorney's fees to successful lien claimant should be treated as costs).

> problem of the "piecemeal" appeal may be avoided if trial judges delay entering judgment on the merits until the fee question is resolved and dispose of both the merits and the attorney fees in a single judgment. The better practice will be to resolve all fee questions in a timely fashion. This will allow an appeal to proceed more expeditiously.

246 Kan. at 377–78, 789 P.2d at 215. In *Paranteau v. DeVita,* the Supreme Court of Connecticut said essentially the same thing and added:

> If for some reason the question of attorney's fees must be decided *after* the entry of judgment on the merits, we suggest that the trial court insist upon the prompt filing and disposition of fee requests so that any pending appeal on the merits of the action may be amended to include any prospective appeal from a supplemental postjudgment award of attorney's fees.

208 Conn. at 524, 544 A.2d at 639 (emphasis in original). In other words, the trial courts can be of significant help to the appellate courts in promoting the policy against piecemeal appeals.

Like the Kansas and Connecticut courts, we acknowledge that the rule we have adopted may, at times, disserve this policy. That consequence, however, does not strike us as a sufficient reason to hold that the pendency of an attorney's fee request destroys the finality of a judgment on the merits. For, while our decision may not always promote the policy against piecemeal appeals, which is rooted in a desire to maximize judicial economy, *see Banquest,* 105 N.M. at 585, 734 P.2d at 1268 (refusing to hear appeal under SCRA 1986, 1–054(C)(1), because court might have to consider the same issue again on a second appeal), it does promote the equally important policy of facilitating meaningful appellate review of cases in which the aggrieved party exercises the constitutional right to an appeal. *See* N.M. Const. art. VI, § 2 (aggrieved party has absolute right to one appeal); *Govich v. North American Syss.,* 112 N.M. 226, 814 P.2d 94, 98 (1991) (New Mexico has strong policy that courts should facilitate, rather than hinder, the right to appeal). As Professor Moore says, commenting on *Gillespie v. United States Steel Corp., supra,* "In most instances ... *Gillespie* has been taken, along with *Forgay* and *Cohen [v. Beneficial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)], as authority for the principle that 'final' is a practical, rather than technical term, and its meaning is to be developed from case to case with the aim of achieving judicial efficiency without loss of meaningful review." 9 *Moore's* ¶ 110.12, at 109 (citations omitted).

This latter policy—promoting meaningful review—will most often be subserved, rather than subverted, by the rule we adopt today. For that matter, the policy of achieving judicial efficiency may also be promoted by enabling the parties to get on with their appeal, without wasting the time necessary to prepare for and conduct an attorney's fee hearing before even beginning the steps necessary to perfect the appeal. Those steps—filing the notice of appeal and the docketing statement, preparing the record proper, designating and preparing the transcript of proceedings, etc.—can all be initiated and perhaps completed while the parties prepare for and the court conducts the attorney's fee hearing. If either party is dissatisfied with the result of that hearing, that party can then appeal from the court's decision; and, as happened in this case, the two appeals can then be consolidated. We see no loss in judicial efficiency from this procedure, and we see the potential for considerable gains in expeditiously processing the appeal on the merits, whether or not it is consolidated with another appeal from the ruling on attorney's fees.

For all of these reasons, we hold that the January 1990 judgment in this case was final and appealable when entered, and we overrule the lessors' contention that it was not.

III.

Before proceeding to the merits of the lessee's appeal, we consider the lessors' further contention that the trial court erred

by refusing to fix the amount of attorney's fees on the ground that it had lost jurisdiction. On this issue we sustain the lessors' position and hold that the court retained jurisdiction to set the amount of attorney's fees, even though more than thirty days had passed from the entry of the basic judgment and even though the lessee had in the interim appealed from that judgment.

The court's order denying the lessors' applications for attorney's fees did not specify a reason for the conclusion that the court lacked jurisdiction to award them, although the order noted that the lessee had filed a notice of appeal on February 6, 1990. The lessee responds to the lessors' appeal from this order by relying both on the rule that the taking of an appeal divests the district court of jurisdiction and on the rule that a trial court retains jurisdiction over its judgment for thirty days after entry of the judgment and thereafter has no jurisdiction over the subject matter of the action.

A.

The first rule has been stated many times in New Mexico, substantially as follows: "[T]he trial court loses jurisdiction of the case upon the filing of the notice of appeal, except for the purposes of perfecting such appeal, or of passing upon a motion directed to the judgment pending at the time." *Wagner Land & Inv. Co. v. Halderman,* 83 N.M. 628, 630, 495 P.2d 1075, 1077 (1972) (citing *Mirabal v. Robert E. McKee, General Contractor, Inc.,* 74 N.M. 455, 457, 394 P.2d 851, 852 (1964), and *National Am. Life Ins. Co. v. Baxter,* 73 N.M. 94, 100, 385 P.2d 956, 960 (1963)). *See also Corbin v. State Farm Ins. Co.,* 109 N.M. 589, 592, 788 P.2d 345, 348 (1990) ("The taking of appeal divests the district court of jurisdiction of the cause of action and transfers it the appellate court[,]" citing *State ex rel. Bell v. Hansen Lumber Co.,* 86 N.M. 312, 313, 523 P.2d 810, 811 (1974)); *State v. Clemons,* 83 N.M. 674, 675, 496 P.2d 167, 168 (Ct.App.1972) ("[T]he appeal 'completely divests the district court of jurisdiction' except as provided in *State v. White* [71 N.M. 342, 347, 378 P.2d 379, 382 (1962)]. Divestiture occurs by the taking of an appeal because the appeal removes the litigation from the district court.") (citing numerous cases, including *Halderman, Mirabal,* and *Baxter*). Like the rule that a judgment is not final unless the case has been disposed of to the fullest extent possible, the rule that an appeal "completely divests" the trial court of jurisdiction over "the case" or "the litigation" has, through frequent repetition, taken on the character of an inflexible law of nature rather than a pragmatic guideline enabling trial courts to determine when to proceed further with some part of a case and when to refrain because issues already resolved are under consideration by an appellate court. The rule is frequently attributed to *State v. White,* which, however, involved the question whether a trial court could *modify its judgment* in the face of a pending appeal from the judgment.

It is clear, though, that a pending appeal does *not* divest the trial court of jurisdiction to take further action when the action *will not affect the judgment on appeal* and when, instead, the further action enables the trial court to carry out or enforce the judgment. A prime example is *Prudential Insurance Company of America v. Anaya, supra,* in which this Court held that the trial court had jurisdiction, after a notice of appeal was filed, to determine the amount of costs to be awarded the prevailing party. We distinguished *Baxter* and *White* and said, relying on *Samples v. Robinson,* 58 N.M. 701, 275 P.2d 185 (1954), that the proceeding to fix the amount of costs was a proceeding to carry out the trial court's judgment allowing costs—a judgment which had not been superseded and which the court had a duty to enforce under NMSA 1953, Section 21–9–5 (now NMSA 1978, Section 39–1–5 (Repl. Pamp.1991)). As we have noted above, a proceeding to fix the amount of attorney's fees is analogous to a proceeding to fix the amount of costs. It does not seek to alter or revise the judgment in any way or otherwise to affect the issues on appeal from the judgment; it seeks only to carry out the judgment by quantifying the supplementa-

ry relief to which the prevailing party—under the applicable statute, court rule, or contract—is entitled.

Another example appears in *Armijo v. Pettit, supra,* in which we held that a motion to enter a deficiency judgment could be entertained, notwithstanding the pendency of an appeal from a judgment adjudicating defendants' indebtedness, foreclosing a lien, and directing judicial sale of the property subject to the lien. We said:

> Appellant admits that, until superseded, this judgment could be enforced, *even after the taking of the appeal,* up to the point of entering deficiency judgment. She denies, however, that, after the appeal, and pending receipt of mandate from this court, the lower court has jurisdiction to enter a "new judgment" for the deficiency.
>
> The original "final decree" remained in full force and effect, *though appealed from,* and appellant was at liberty, at her peril, to proceed to enforce it.
>
> As we see it, appellant's motion did not ask for a new judgment, or for any modification of the judgment appealed from. It was merely a step in proper subsequent proceedings to enforce the judgment already rendered. ... We cannot see how the motion for entry of deficiency judgment can be considered as a new judgment, or as a modification of the original "final decree," any more than a motion to confirm the master's report of sale should be so considered.

34 N.M. at 561, 286 P. at 828 (emphasis added; citations omitted).

A third example is a trial court's retention of jurisdiction to award supplemental relief under NMSA 1978, Section 44–6–9, to enforce a declaratory judgment. *See United Nuclear Corp. v. General Atomic Co.,* 98 N.M. 633, 644, 651 P.2d 1277, 1288 (1982) ("The supplemental proceedings here come within the rule permitting collateral proceedings necessary to give effect to a judgment pending appeal. Pending appeal, a trial court retains jurisdiction to enforce an unsuperseded judgment.").

A fourth example lies in the power of a district court to fix the amount of a supersedeas bond, approve an additional thirty-day extension beyond the initial sixty-day limitation within which appellant must file the bond, and rule on appellant's motion for a stay of execution of the judgment, all under NMSA 1978, Section 39–3–22 (Repl. Pamp.1991), and SCRA 1986, 1–062 (Supp. 1991). *See Devlin v. New Mexico State Police Dep't,* 108 N.M. 72, 74, 766 P.2d 916, 918 (1988).

Federal courts have held that the pendency of an appeal does not divest the trial court of jurisdiction to rule on a request for attorney's fees. *See, e.g., Masalosalo v. Stonewall Ins. Co.,* 718 F.2d 955, 956–57 (9th Cir.1983); *Terket v. Lund,* 623 F.2d 29, 33–34 (7th Cir.1980). In *Terket,* the court disagreed with a contrary ruling in *Wright v. Jackson,* 522 F.2d 955, 957–58 (4th Cir.1975), saying:

> In analyzing the result reached by the court in *Wright,* we note first that the general rule divesting the district court of "jurisdiction" upon the filing of a notice of appeal does not refer to the court's jurisdiction under any statute or mandatory rule. "It is a judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time. It should not be employed to defeat its purposes not [sic—or] to induce needless paper shuffling."
>
> ....
>
> ... It is true that in ruling on the issue of attorneys' fees a district court must take into account both the relative merit of the plaintiff's case and the result obtained. But this is not the sort of reconsideration of the merits which could lead to altering the substantive judgment or in any way interfere with the pending appeal. The district court merely takes the merits into account, along with many other factors, in making a discretionary decision entirely distinct from the underlying judgment. Thus the policy against two courts treating the same issue concurrently does not require withdrawing the district court's power to decide attor-

neys' fees motions while an appeal is pending.

623 F.2d at 33–34 (citations omitted) (quoting 9 *Moore's* § 203.11, at 3–45 n. 1 (2d ed. 1980)).

In *Garcia v. Burlington Northern Railroad Co.*, 818 F.2d 713 (10th Cir.1987), the Court of Appeals for the Tenth Circuit held that a district court lacked jurisdiction to award prejudgment interest after an appeal had been taken. The court noted the federal rule, which is essentially the same as the New Mexico rule noted above, that filing a timely notice of appeal transfers the matter from the district to the appellate court and divests the district court of jurisdiction. *Id.* at 721. The court continued:

> In collateral matters not involved in the appeal, however, the district court retains jurisdiction.... [C]ourts have found certain matters to be collateral to a final judgment. For example, even after a timely notice of appeal is filed, a district court may retain jurisdiction to determine the propriety and amount of attorney's fees.

Id. (citations omitted).

It is possible to read one of our holdings in *Baxter* as inconsistent with the foregoing rationale. In that case two orders authorizing payment of attorney's fees in a proceeding for receivership of an insurance company were held void both because they were entered after a notice of appeal had been filed and because they were entered more than thirty days after the instigators of the receivership had filed a petition for a rehearing on their request for reimbursement of expenses. It appears from the opinion that at least some of the attorney's fees awarded by the two orders were incurred *before* the receivership action and thus related to the subject matter of the order under appeal. However, it is probable that at least parts of the two orders granted the instigators reimbursement of attorney's fees incurred during, and as a result of, the receivership. Thus, *Baxter* can be read as saying that a trial court has no jurisdiction after entry of an underlying judgment to award attorney's fees incurred in procuring the judgment. To the extent *Baxter* can be so read, we now disapprove this holding and adopt instead the statements in, inter alia, *Garcia* that, in collateral matters not involved in the appeal, such as determining the propriety and amount of attorney's fees, the trial court retains jurisdiction.

B.

Similarly, we do not follow *Baxter* to the extent it can be read to say that the passage of thirty days from entry of the underlying judgment deprives, under NMSA 1978, Section 39–1–1 (Repl.Pamp.1991), the trial court of jurisdiction to rule on requests for attorney's fees to the party who has prevailed in the judgment. Section 39–1–1, the pertinent provisions of which are quoted in the footnote,[11] provides that the trial court retains control over a final judgment for thirty days. "[O]nce the thirty-day period has passed, we have consistently held that the court loses jurisdiction over the subject matter." *Elwess v. Elwess*, 73 N.M. 400, 403, 389 P.2d 7, 8 (1964) (court lacked jurisdiction, after dismissing case pursuant to stipulation, to reopen it when more than thirty days had passed after order of dismissal). This rule has been applied most frequently in cases in which a postjudgment motion has been denied by operation of law because of the passage of thirty days from the filing of the motion; the appellate court has held that the trial court lacked jurisdiction thereafter to take some action on the merits of the case. *See, e.g., Halderman*, 83 N.M. at 630, 495 P.2d at 1078 (motion to permit filing of requested findings nunc pro tunc as of day before entry of judgment was denied by operation

11. "Final judgments and decrees, entered by district courts in all cases tried pursuant to the provisions of this section shall remain under the control of such courts for a period of thirty days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any motion which may have been filed within such period, directed against such judgment; provided, that if the court shall fail to rule upon such motion within thirty days after the filing thereof, such failure to rule shall be deemed a denial thereof...." NMSA 1978, § 39–1–1 (Repl.Pamp.1991).

of law thirty days after filing; trial court was without jurisdiction thereafter to permit the filing of requested findings and conclusions); *Baxter,* 73 N.M. at 100, 385 P.2d at 960 (trial court had lost jurisdiction to deal with motion for rehearing because it had been denied by operation of law); *Chavez-Rey v. Miller,* 99 N.M. 377, 381, 658 P.2d 452, 456 (Ct.App.1982) (trial court's order granting remittitur, entered more than thirty days after filing of defendant's post-trial motion for new trial or remittitur, was denied by operation of law and court thereafter had no jurisdiction to order remittitur), *cert. denied,* 99 N.M. 358, 658 P.2d 433 (1983).

Once again, we have a statement of a general rule that goes a bit too far: "[O]nce the thirty-day period has passed, ... the court loses jurisdiction over the subject matter." *Elwess.* But it is clear from our cases that, although the court may lose jurisdiction over the subject matter of the dispute resolved by the underlying judgment, the passage of more than thirty days from entry of the judgment does not oust the court of jurisdiction to rule on matters "collateral to" or "separate from" the judgment. For example, in *Cantrell v. Curnutt, supra,* this Court held that Section 39–1–1 did not deprive the court of jurisdiction to determine the status of a liquor license, although considerably more than thirty days had passed since entry of the initial judgment adjudicating issues among the partners and the partnership: "We are satisfied that the court in determining that the liquor license was an asset of the partnership functioned under its retained jurisdiction for the purpose of a final accounting and dissolution of the partnership." 80 N.M. at 521, 458 P.2d at 596. Similarly, in *Plaza National Bank v. Valdez, supra,* a judgment of foreclosure of a mortgage did not cause the trial court to lose jurisdiction to entertain the mortgagor's motion, filed more than thirty days after entry of the judgment, for an extension of the redemption period. Under *Speckner v. Riebold, supra,* entry of the initial judgment did not, despite Section 39–1–1, prevent the court from entering a subsequent order dealing with the rights of the parties in connection with the judicial sale of the property. *Valdez,* 106 N.M. at 465, 745 P.2d at 373.

And so we reach the same conclusion with respect to the trial court's loss of jurisdiction under Section 39–1–1 as we have reached concerning the same issue when a notice of appeal is filed after entry of a final judgment. The trial court retains the same jurisdiction to deal with matters collateral to or separate from the issues resolved in the judgment as it has following the filing of the notice of appeal. The necessity for further proceedings to carry the judgment into effect or otherwise to dispose of a matter that does not entail alteration or revision of decisions embodied in the judgment does not prevent finality of the judgment; and the court does not lose jurisdiction, after thirty days have passed or an appeal has been taken, to dispose of such matters. Determining the amount of an attorney's fee award is one such matter.

IV.

We now consider the merits of the lessee's appeal, though the issues involved in that appeal may be disposed of in fairly short order. As noted earlier, the lessee's challenge to the January 1990 judgment is based on an attack on the trial court's findings of fact, which in turn is based on an argument that the findings are not supported by substantial evidence. The lessee first asserts that there was no substantial evidence to support the court's finding that the lessee had a reasonable time after signing the lease to commence construction and failed to exercise due diligence by not taking any substantive steps toward commencing construction between January 1, 1983, and September 16, 1986.

After reviewing the record, we determine that substantial evidence supported these findings. On September 16, 1986, when the lessors sent the lessee a notice of default, more than seven years had elapsed since execution of the lease. The lessee had obtained all of the preliminaries required to secure a loan commitment (zoning, appraisal, preliminary plans,

survey) by the end of 1981, yet at the time it received the notice of default it still had not obtained financing. Kelly testified that he was unable to obtain financing because of high interest rates, but the lessors adduced evidence showing that after July 1982 (and except for July 1984) the prime rate was lower than at the time the lease was signed. Moreover, the lease agreement authorized Kelly to refinance any high-interest loan if rates later went down. The lease did not—as it could have—make Kelly's obligation to construct a motel contingent upon securing financing at a given interest rate, so the court could readily have inferred that Kelly assumed the risk of obtaining a rate for construction financing that would ensure acceptable profitability from the leased premises. *See Tyrpak v. Lee,* 108 N.M. 153, 154, 768 P.2d 352, 353 (1989) (on appeal, we review the evidence in the light most favorable to support the trial court's findings and indulge all reasonable inferences in support of the court's decision).

The lessee also challenges the trial court's findings that the lessors' notice of default was sufficient and that the lessee failed to correct the default within thirty days after receipt of the notice. Here lessee argues that, assuming it breached the lease, lessors acquiesced in the breach for perhaps as long as three years and should have given lessee notice of their intention to enforce the terms of the lease before giving notice of default.

Lessee's argument involves the related concepts of waiver, modification, and estoppel, although it does not expressly identify these concepts in its brief. All three of these principles rely upon the same basic contention that lessors' conduct negated the express default provision in the lease. *See J.R. Hale Contracting Co. v. United New Mexico Bank,* 110 N.M. 712, 716, 799 P.2d 581, 585 (1990); *see also* 3A A.L. Corbin, *Corbin on Contracts* § 752 (1960) (comparing waiver, modification, and estoppel). We conclude, however, that the facts of this case do not require application of any of the three principles.

There was no waiver because there was no evidence that the lessors actually intended to waive their right to declare a default under the lease. *See United New Mexico Bank,* 110 N.M. at 716, 799 P.2d at 585 (waiver is the voluntary relinquishment or abandonment of a known right). Although the lessors may have been entitled to declare a default much earlier than September 1986, their failure to do so apparently was due to the lessee's repeated assurances that construction would commence shortly.

Similarly, there was no evidence that the parties agreed to amend the lease to eliminate the requirement that the lessee would commence construction of a motel with due diligence. *See id.* (modification occurs when party requests and receives consideration for a waiver). There was no request for, or receipt of, consideration for a modification of the lease.

Finally, there was no estoppel, because the lessee did not show that it detrimentally relied on the lessors' delay in enforcing the terms of the lease. *See id.* at 717, 799 P.2d at 586 (waiver by estoppel occurs when party is misled to his prejudice into honest and reasonable belief that waiver is intended). On the contrary, the court could well have inferred from the evidence that the lessee concentrated its resources in other business ventures and virtually ignored the subject property.

Consequently, we uphold the trial court's findings that the notice of default was sufficient and that the lessee failed to correct the default within the stipulated time period.

Lessee also contests two other findings of the trial court, but it raises no new issues and its arguments do not require additional analysis.

The judgment appealed from in Cause No. 19,021 is affirmed. The order appealed from in Cause No. 19,443 is reversed, and the cause is remanded for further proceedings consistent with this opinion, including the setting of a reasonable attorney's fee

for the services of counsel for the lessors on this appeal.

IT IS SO ORDERED.

FRANCHINI and FROST, JJ., concur.

824 P.2d 1048

Harold C. MORROW, Plaintiff–Appellee,

v.

Thomas S. COOPER and Cooper & Company, P.A., a professional corporation, Defendants–Appellants.

No. 12475.

Court of Appeals of New Mexico.

Sept. 20, 1991.

E.H. Williams, Las Cruces, for plaintiff-appellee.

Lisa L. Warren, Kevin E. Kane, Marek, Yarbro & Carter, P.A., Las Cruces, for defendants-appellants.

OPINION

APODACA, Judge.

Defendants appeal from an adverse judgment entered by the trial court after a nonjury trial. Plaintiff Harold Morrow (shareholder) had filed suit to enforce various rights as a stockholder. In part, he sought a valuation of the fair value of the shares he owned in defendant Cooper & Company, P.A. (the corporation), a closely held professional accounting firm. The corporation counterclaimed for money it claimed shareholder owed it. The trial court awarded judgment to shareholder in the sum of $36,082.09, with interest, against the corporation and defendant Thomas S. Cooper (Cooper), the corporation's major stockholder, jointly and severally.

The corporation and Cooper (referred to collectively as defendants) have raised five issues in their brief-in-chief: whether the trial court (1) had subject matter jurisdiction to hear the case; (2) erred in holding Cooper individually liable for a corporate debt; (3) abused its discretion in binding defendants to an unreasonable interpretation of the parties' pre-trial statement and misapplied NMSA 1978, Section 53–15–4 (Repl.Pamp.1983); (4) erroneously established a "mandatory redemption"; and (5) erred in finding that shareholder had not received any compensation for his stockholder interest or, alternatively, abused its discretion in refusing to grant defendants an equitable offset. We affirm the trial court on Issue 1 and reverse on Issues 2 and 3. Because of our disposition, we need not address Issues 4 and 5.

FACTS

Shareholder was employed by the corporation as a certified public accountant at the corporation's office in Deming, located in Luna County. In November of 1981, shareholder became a 5% stockholder in the corporation, financing the purchase of one thousand shares of stock for $35,600.00. Shareholder and the corporation made payments toward the purchase of the stock until shareholder ended his employment with the corporation in April of 1984. The corporation paid $9,431.91 on shareholder's debt to the creditor bank for the purchase of the stock, which amount was not repaid by shareholder. Before quitting, shareholder offered to purchase the corporation's Deming practice, but the offer was rejected. He then left the corporation, taking a number of the corporation's clients with him. After leaving his employment, shareholder continued making the payments in connection with the stock purchase. He never received any dividends for his shares before or after he quit, nor was he granted any of the privileges usually conferred upon stockholders when he left the corporation.

In December of 1987, the corporation agreed to sell most of its assets to another corporation. Learning of the corporation's actions, shareholder filed a dissent to the proposed sale. He later filed his complaint in the trial court, asserting four causes of action: (1) the right to inspect the corporate books; (2) a shareholder's derivative action; (3) dissolution of the corporation; and (4) stock valuation under NMSA 1978, Sections 53–15–3 to –4 (Repl.Pamp.1983) as a dissenting shareholder. The parties submitted a combined pre-trial statement to the trial court and agreed that only the cause of action on the stock valuation would proceed to trial. This claim involved a determination of shareholder's right to be compensated for the fair value of his stock under Section 53–15–4. More specific facts pertinent to each issue are included in our discussion.

DISCUSSION

1. *Subject Matter Jurisdiction.*

Shareholder filed his complaint in Luna County, although the corporation had its registered office in Dona Ana County. Defendants argue that the trial court did not have subject matter jurisdiction over the complaint under Section 53–15–4(E), which states in part:

> If, within the period of thirty days [a time period specified in a previous subsection], a dissenting shareholder and the corporation do not [agree on the fair value of the shares], then the corporation * * * may, file a petition in any court of competent jurisdiction *in the county in*

> *this state where the registered office of the corporation is located* praying that the fair value of the shares be found and determined * * *. *The jurisdiction of the court shall be plenary and exclusive.* [Emphasis added.]

Defendants rely on the emphasized language to argue lack of jurisdiction. Specifically, they contend that subsection E is a jurisdictional statute and therefore nonwaivable. Shareholder, on the other hand, argues that subsection E is only a venue statute and that defendants waived this issue by not pleading improper venue as a defense in the trial court. On this point, we agree with shareholder.

Although the statute, in describing the jurisdiction of the court located in the county of the corporation's registered office as "plenary and exclusive," appears at first glance to be jurisdictional, we do not believe a careful reading indicates that was the legislative intent. *See Quintana v. New Mexico Dep't of Corrections,* 100 N.M. 224, 668 P.2d 1101 (1983) (all rules of statutory construction are aimed at discovering legislative intent). The question of whether subsection E is a venue or jurisdictional statute has never been addressed by this court or our supreme court. However, the same issue has been raised in several other jurisdictions involving statutory language similar in nature.

For example, in *TBK Partners, Ltd. v. Western Union Corp.,* 517 F.Supp. 380, 388 (S.D.N.Y.1981), the statute in question conferred "exclusive" jurisdiction over appraisal proceedings in the judicial district in which a corporation's offices were located. The court there rejected an argument that the statute was jurisdictional.

> That is no more, however, than a venue provision designed to put an appraisal proceeding in one and only one judicial district per each company—and does not purport to be a grant of "exclusive" state-court jurisdiction in the sense contended for by the objectors. *See Application of Harwitz,* 192 Misc. 91, 92, 80 N.Y.S.2d 570, 572; [sic] (Sup.Ct.Bronx Co.1948) (predecessor of § 623(h) construed as venue provision) * * *.

Id.

Additionally, in *In re McLoon Oil Co.,* 565 A.2d 997, 1001 (Me.1989), the subject statute stated that "the appraisal suit 'shall be brought in the county where the registered office of the [corporation] was last located.' " The corporation attempted to argue that the case should be dismissed on jurisdictional grounds. The court held otherwise, stating:

> We reject, however, * * * the [corporation's] argument that the wrong venue is jurisdictionally fatal to the Dissenters' claim to their appraisal remedy as to McLoon's stock. There is no discernable legislative purpose to be served by treating the statutory appraisal proceeding as anything other than a transitory action leading to a conditional money judgment in favor of dissenting shareholders. "The matter of wrong venue in transitory actions * * * is a matter of procedure." *Burtchell v. Willey,* 147 Me. 339, 342, 87 A.2d 658, 660 (1952).
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> * * * * * *
>
> * * * An objection to venue in [the corporation's] initial pleading or motion would have been the appropriate means to object to the wrong venue.

Id.

We agree with the analysis of these two cases. We cannot perceive of any reason why our legislature would prescribe or limit the jurisdiction for actions brought under the subject statute here to one judicial district only. It appears that the purpose of the statute was more a matter of convenience than a matter of conferring exclusive jurisdiction on a particular court.

In *Kalosha v. Novick,* 84 N.M. 502, 505 P.2d 845 (1973), our supreme court discussed the difference between venue and subject matter jurisdiction. " 'Venue, in the technical meaning of the term, means the place where a case is to be tried, whereas jurisdiction does not refer to the place of trial, but to the power of the court to hear and determine the case.' " *Id.* at 504, 505 P.2d at 847 (quoting 20 Am.Jur.2d, *Courts* § 89) (1965). In *Kalosha,* the provision

relied on as jurisdictional also had seemingly mandatory language. The court, however, rejected such an interpretation. In interpreting the provision as one prescribing venue rather than jurisdiction, the court gave two reasons for its decision: (1) there was nothing in the New Mexico Constitution purporting to limit the district courts' jurisdiction in the manner suggested on appeal; and (2) adopting such an interpretation would "encourage dilatory pleading and impede the judicial process." *Id.* at 505, 505 P.2d at 848. *See also Peisker v. Chavez,* 46 N.M. 159, 123 P.2d 726 (1942) (holding that mandatory-sounding language in transitory action statute related only to venue, not to jurisdiction). This same reasoning is applicable to the statute at issue in this appeal. We thus hold that subsection E prescribes venue, not jurisdiction, and that defendants waived this issue by not preserving it in the trial court.

2. *Cooper's Individual Liability.*

As noted previously, judgment was granted not only against the corporation but also against Cooper, individually. The only reference to Cooper's individual liability is found in one of the trial court's conclusions of law. There is nothing in the findings or conclusions explaining the imposition of individual liability on Cooper. A judgment cannot be sustained on appeal unless the conclusion upon which it is based finds support in the trial court's findings. *Bustos v. Gilroy,* 106 N.M. 808, 751 P.2d 188 (Ct.App.1988).

We find nothing in Article 15 of the Business Corporation Act or the Professional Corporation Act (NMSA 1978, Sections 53–6–1 to –13 (Repl.Pamp.1983)) that permits rendering an individual judgment against a shareholder of a professional corporation based solely upon a failure of the corporation to properly value the stock of the corporation. For that reason, such liability must be predicated on a theory outside the language of the statute. As observed in Volume 9, Natural Resources Journal, "The New Mexico Professional Corporation," 591, at 614 (1969), although the Professional Corporation Act does not preclude a corporate officer or employee from being sued individually for his wrongful acts, and he can also make the corporation liable for his wrongful acts, the other professional shareholders, who are also the other professional employees, "cannot be held liable." The Professional Corporation Act "limits a shareholder's liability for the acts of the 'employee' or 'agent' to the amount he has contributed to the corporation." To hold an individual liable for corporate debts, the complaining party must establish that the corporation should not be recognized as a matter of law. In *Scott v. AZL Resources, Inc.,* 107 N.M. 118, 121, 753 P.2d 897, 900 (1988), our supreme court stated:

> A basic proposition of corporate law is that a corporation will ordinarily be treated as a legal entity separate from its shareholders. Shareholders can thus commit limited capital to the corporation with the assurance that they will have no personal liability for the corporation's debt * * *. Only under special circumstances will the courts disregard the corporate entity to pierce the corporate veil holding individual shareholders * * * liable. This is done where the corporation was set up for fraudulent purposes or where to recognize the corporation would result in injustice.

Shareholder did not plead a cause of action based on a "piercing the corporate veil" theory. Neither did he establish the necessary prerequisites that would entitle him to such extraordinary relief. *See id.* Three requirements must be satisfied to obtain this relief: a showing of instrumentality or domination, improper purpose, and proximate causation. *Id.* Additionally, shareholder did not request a finding that the corporation be pierced and individual liability be imposed on Cooper. *See Fenner v. Fenner,* 106 N.M. 36, 738 P.2d 908 (Ct.App.1987) (a party who does not tender specific findings of fact waives review of the findings on appeal). We conclude there is not substantial evidence nor any findings of fact in the record to support the trial court's conclusion with respect to Cooper's individual liability. Consequently, we reverse on this issue and instruct the trial

court to enter an order dismissing Cooper as a defendant.

3. *Valuation Date of the Stock and the Correct Application of Section 53-15-4.*

Defendants contend that the trial court selected the wrong date in determining the fair value of shareholder's stock. We agree with this contention. Both parties agreed in the pre-trial statement that the value of the stock as of April 16, 1984, the day that shareholder terminated his employment with the corporation, was $45,514.00. The trial court held that this was also the fair value of the shares at the time the corporation was sold, approximately three years later. Relying on Section 53-15-4(A), defendants argue that the valuation date of April 16, 1984, was incorrect. Subsection A states that the amount to be paid to dissenting shareholders is "the fair value [of the dissenting shareholders' shares represented by certificates] as of the day prior to the date on which the vote was taken approving the proposed corporate action, excluding any appreciation or depreciation in anticipation of the corporate action." Defendants thus argue that the trial judge should have assessed the value of the stock as of the day before the corporation was sold, in December of 1987.

In support of their argument, defendants contend that, when shareholder left the firm, he took a substantial number of the corporation's clients with him. This occurrence, defendants argue, together with the loss of shareholder's services, caused the stock to decline in value. Additionally, defendants argue that, although they stipulated to the value of the stock at the time of termination, they had no intention of stipulating that *that* value would be equal to the value of the stock *at the time of the sale.*

On the other hand, shareholder argues that defendants stipulated to the fair value of the stock in the pre-trial statement and that they cannot now assert that the trial court's adoption of their own appraisal was error. Shareholder relies on the trial court's holding that the pre-trial statement, once approved by the trial court, could not be altered. Shareholder also construes the pre-trial statement as providing that defendants did not contest the fair value of the stock to be $45,514.00 *as of the day before the sale.*

The pre-trial statement states, as an uncontroverted fact, that "[a]t the time of termination of his ownership interest in [the corporation], [shareholder] was the owner of a five percent (5%) interest in said corporation having a value of * * * ($45,514.00)." Additionally, that part of the pre-trial statement labeled "* * * [shareholder's] claims" states that "the value of * * * [shareholder's] stock remains unsettled[.]" The trial court not only viewed the pre-trial statement as binding on the parties but interpreted defendants' stipulation of the termination value as a stipulation to the pre-sale value. We believe this action by the trial court severely restricted defendants' ability to present evidence indicating that the value of the stocks had depreciated since April of 1984. Defendants have continually objected to this interpretation of the pre-trial statement. As we understand defendants' arguments to the trial court and on appeal, they do not argue that the issues listed in the pre-trial statement should have been modified. Rather, they only contest the trial court's interpretation of the statement's language.

Although we agree with both parties' arguments that a pre-trial order is used to control the course of subsequent proceedings and to eliminate unfair surprise, *State ex rel. State Highway Dep't v. Branchau,* 90 N.M. 496, 565 P.2d 1013 (1977), we do not believe that a trial court should be unbending in its interpretation of the issues. *See Mantz v. Follingstad,* 84 N.M. 473, 505 P.2d 68 (Ct.App.1972) (pre-trial order, while becoming the law of the case, does not prevent the trial court from changing its mind about the applicable law in order to prevent perpetuating error); *Blumenthal v. Concrete Constructors Co. of Albuquerque, Inc.,* 102 N.M. 125, 692 P.2d 50 (Ct.App.1984) (pre-trial order controls subsequent court actions if it is entered without objection and no motion to modify it has been made). In this case, the

trial court was alerted early in the proceedings that the interpretation it intended to give the statement was not that intended by defendants.

As stated in *Crabtree v. Measday,* 85 N.M. 20, 22, 508 P.2d 1317, 1319 (Ct.App. 1973):

> [The parties'] stipulation[s] must be given a fair and reasonable construction in order to effect the intent of the parties. To seek the intention of the parties, the language should *not* be so construed as to give it the effect of an admission of a fact obviously intended to be controverted. Neither should it be so construed as to constitute a waiver of a right not plainly intended to be relinquished. [Emphasis in original.]

Our reading of the pre-trial statement indicates to us that defendants were simply stipulating to the termination value date and nothing more. Doing so did not preclude defendants from showing a fluctuation in value at a later date. Therefore, the trial court should have permitted defendants to introduce evidence on the value of the stock the day before the corporate sale. Additionally, the value of the stock was not listed under the uncontested fact section, and shareholder himself acknowledged in his statement of claims that the value was not settled. By insisting on its own interpretation and limiting the evidence defendants could proffer on the valuation issue, the trial court impeded the efficiency that the pre-trial order was intended to bring with it. *See Johnson v. Citizens Casualty Co. of New York,* 63 N.M. 460, 321 P.2d 640 (1958) (purpose of pre-trial conference is to simplify the issues). We conclude that the trial court should have allowed defendants to present evidence with respect to the fair value of the stock under Section 53–15–4(A). We thus reverse the trial court on this issue and instruct the trial court on remand to conduct an evidentiary hearing on the value of the stock as of the day before the sale. In doing so, the trial court shall take into account the financial loss to the corporation resulting from shareholder's termination, as well as the loss of several of the corporation's clients upon shareholder's termination.

CONCLUSION

We hold that: (1) the trial court had subject matter jurisdiction to try this case; (2) neither the pleadings nor the substantial evidence support Cooper's individual liability for the corporate debts in the absence of a showing that the corporation's veil should be pierced; and (3) the trial court erred in its interpretation of the parties' pre-trial statement, thus improperly foreclosing defendants from proving the value of the shares on the day before the sale of the corporation. Because the judgment awarded to shareholder previously took into account the sum of $9,431.91 awarded to defendants on their counterclaim, and this amount was not at issue on appeal, the trial court shall apply this credit to the judgment to be entered on remand. We remand to the trial court for further proceedings consistent with this opinion. Each party shall bear their respective costs on appeal.

IT IS SO ORDERED.

DONNELLY and FLORES, JJ., concur.

824 P.2d 1053

In the Matter of the PROTEST OF Mr. William E. COBB and Mrs. Ann Cobb, Protest Nos. C–88–01 through C–88–11.

William E. COBB and Ann Cobb, Protestants–Appellants,

v.

OTERO COUNTY ASSESSOR, Assessor–Appellee.

No. 11361.

Court of Appeals of New Mexico.

Oct. 28, 1991.

Certiorari Denied Jan. 7, 1992.

Wayne A. Jordon, Durrett, Jordon & Durrett, P.C., Alamogordo, for protestants-appellants.

Daniel A. Bryant, Parsons & Bryant, P.A., Ruidoso, for assessor-appellee.

Gerald B. Richardson, Sp. Asst. Atty. Gen., Taxation and Revenue Dept., Santa Fe, amicus curiae.

OPINION

ALARID, Chief Judge.

Protestants (the Cobbs) appeal the decision of the Otero County Valuation Protests Board (board), upholding the valuation of their property by the county assessor. Three issues are raised on appeal: 1) whether the mass appraisal method is proper; 2) if not, did the assessor present competent evidence of market value; and 3) should the board have accepted the Cobbs' evidence of comparable sales. We affirm.

FACTS

The Cobbs are the owners of a number of undeveloped properties in the Timberon Subdivision in Otero County. In 1988, the Cobbs protested the valuation assigned to eleven of those properties. The value asserted by the Cobbs was what they had paid for each of the properties. A hearing was held on the protest and evidence was taken by the board. At the hearing, the Cobbs argued that the county assessor did not use the proper method in determining the value of their properties. The board found that the mass appraisal method used comparable sales to arrive at a value. It further found that the method is a generally accepted technique for establishing market values of properties and was a reasonable method for the Otero County Assessor to use. The board concluded that the Cobbs had not overcome the statutory presumption of correctness.

DISCUSSION

The standard of review of the issues raised by the Cobbs is whether the board's decision to uphold the valuation of the assessed properties is supported by substantial evidence or whether the decision is arbitrary, unlawful, unreasonable or capricious. *Swisher v. Darden,* 59 N.M. 511, 287 P.2d 73 (1955). In making this determination, we are limited to a review of the record before the board. *Id.*

NMSA 1978, Section 7-36-15(B) (Repl.Pamp.1990), states that "the value of property for property taxation purposes shall be its market value as determined by sales of comparable property...." Market value means a price which a purchaser, willing but not obliged to buy, would pay an owner, willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied. *Peterson Properties v. Valencia County Valuation Protests Bd.,* 89 N.M. 239, 549 P.2d 1074 (Ct.App.1976). In reviewing sales of other properties, "to compare" means to examine the characteristics or qualities of one or more properties for the purpose of discovering their resemblances or differences. The aim is to show relative values by bringing out characteristic qualities. *Id.* Such factors to consider in determining the market value of a tract of land are its size, shape, location, topography, accessibility to roads, and availability of public utilities. *Petition of Kinscherff,* 89 N.M. 669, 556 P.2d 355 (Ct.App. 1976).

The mass appraisal method is a "process of valuing a universe of properties as of a given date, in a uniform order, utilizing standard methodology, employing a common reference for date, and allowing for statistical testing." International Association of Assessing Officers, *Property Assessment Valuation,* 277 (1977). The process is a method by which large areas of land are given a valuation, based on market data, as to what similar land will sell for without engaging in individual parcel-by-parcel appraisals. The process allows tax assessors to accomplish the tremendous job of valuing thousands of parcels of land in their jurisdictions in a systematic and cost-effective manner. The system may incorporate any of the three generally accepted approaches to valuation of property.

The Otero County Assessor implemented the process as follows:

1. The universe of similar properties is defined by determining that a particular group of properties within an area or neighborhood are similar as to size, shape, location, topography, accessibility, and availability of utilities.
2. Information concerning sales of properties within the area or neighborhood is gathered and the data is analyzed. A fair market value for the entire unit is determined based on the mode, which is the most frequently occurring purchase price for properties in the universe. The fair market value is assigned to all properties in the universe.
3. Information regarding sales in the universe is collected on an ongoing basis. That data is used to verify and update values in the universe.
4. If a property owner files a protest, the property is physically examined by the appraiser and the data regarding comparable sales in the universe is examined in order to determine whether the valuation is correct.

Viewing the manner in which the mass appraisal method is implemented and maintained in Otero County, it is clear that the method uses comparable sales. The assessor uses comparable sales to make the initial determination of value and to accomplish the periodic updates required by statute. Comparables are also used when an owner protests, in order to assure that the value is correct. It is clear that the value of the property, for the purpose of taxation, is based on market value determined by comparable sales.

We cannot accept the Cobbs' argument that the mass appraisal used by the Otero County Assessor is a methodology not allowed for by Section 7–36–15. The methodology is simply a variation of the comparable sales approach to valuation. There is nothing in the statute mandating an independent fee appraisal on each parcel of land in New Mexico. Nor is there anything in the statute prohibiting the mass appraisal method. We will not read language into the statute that is not there, particularly if it makes sense as written. *See Burroughs v. Board of County Comm'rs of Bernalillo County,* 88 N.M. 303, 540 P.2d 233 (1975).

The Cobbs rely on our decision in *Protest of Plaza Del Sol, Ltd. v. Bernalillo County Assessor,* 104 N.M. 154, 717 P.2d 1123 (Ct.App.1986), to argue that the method is not based on comparable sales. They argue that the steps set forth in *Plaza Del Sol* are not part of the mass appraisal method. We disagree. Determination of comparable sales includes selection of the sales, determination of units of comparison, analysis to determine differences, and estimation of market value of the subject property. *Id.* The mass valuation method as described by the Otero County Assessor for assessment of unimproved property includes a determination of units of comparison and difference. This defines the universe of comparable sales. The selection of sales comes from the universe, and analysis of the sales gives an estimation of the market value of the subject property. The determination of comparable sales requires selection of sales and comparison. Clearly that is done in mass appraisal of unimproved property. Furthermore, the steps set out by this court in *Protest of Plaza Del Sol, Ltd. v. Bernalillo County Assessor* were simply to emphasize that

determining the market value of property is not satisfied by applying calculations derived from a text. A market value determination requires selection and analysis of comparable sales and, if necessary, calculating appropriate adjustments. There is substantial evidence in the record to support the board's finding that the steps taken by the Otero County Assessor did in fact involve the examination of sales of unimproved comparable properties, and therefore it is not deemed arbitrary, unlawful, unreasonable or capricious.

We hold that where the mass appraisal method is based on standard appraisal procedure, such as comparable sales, and the resulting valuation bears a reasonable relationship to the market value, it is an appropriate method of valuation under the statute. In this case, we are not asked to consider, nor do we consider, whether the mass appraisal method may be properly used in the valuation of developed properties.

The determination of value by the assessor is presumed correct. NMSA 1978, § 7–38–6 (Repl.Pamp.1990). That presumption of correctness can be overcome by the taxpayer's showing that the assessor did not follow the statutory provision of the act or by presenting evidence tending to dispute the factual correctness of the valuation. *La Jara Land Developers, Inc. v. Bernalillo County Assessor*, 97 N.M. 318, 639 P.2d 605 (Ct.App.1982). Here the taxpayers did not show that the assessor did not follow the statutory provision. Nor did their evidence overcome the presumption of correctness. Therefore, we need not address whether the assessor presented competent evidence of comparable sales in order to support his appraisal value of the property.

The evidence of market value presented by the Cobbs was the price for which they bought the properties. We have already stated that the proof of purchase price alone is not sufficient to fix market value in this particular case. *Cobb v. Otero County Assessor*, 100 N.M. 207, 668 P.2d 323 (Ct.App.1983); *Peterson Properties v. Valencia County Valuation Protests Bd.* In *Cobb*, however, this court noted that it was feasible that evidence of a sale of the property to be taxed could be used to determine its market value. In instances where the acquisition price is considered as a factor in determining the market value of property, the sale should be an arm's length transaction, of recent date, and a valid market comparable. *Cobb v. Otero County Assessor*, 100 N.M. at 209, 668 P.2d at 325. These are not the circumstances of the case at bar. The board found that the Cobbs had embarked on a mailing campaign intended to convince landowners to sell their property to the Cobbs at below market value prices. This activity does not constitute a transaction at arm's length. *See Walters v. Knox County Bd. of Revision*, 47 Ohio St.3d 23, 546 N.E.2d 932 (Ohio 1989) (arm's length transaction is one without compulsion or duress, where the parties act in their own self interest, *generally in an open market* (emphasis added)).

CONCLUSION

For the reasons stated herein we hold that mass appraisal, so long as it is based on a standard appraisal procedure, is an appropriate method of valuation for property tax purposes. We, therefore, affirm the decision of the board.

Appellee moved this court for costs and attorney fees on appeal. We decline to award them as the record does not reflect that this was a frivolous appeal or that rules of appellate procedure were deliberately ignored. *See State ex rel. N.M. State Highway Dep't v. Silva*, 98 N.M. 549, 650 P.2d 833 (Ct.App.1982).

IT IS SO ORDERED.

DONNELLY and CHAVEZ, JJ., concur.

824 P.2d 1058

Maria Rita GUTIERREZ, Plaintiff-Appellee,

v.

ALBERTSONS, INC., Defendant-Appellant.

No. 10954.

Court of Appeals of New Mexico.

Nov. 21, 1991.

Certiorari Denied Jan. 7, 1992.

David Greer, Albuquerque, for plaintiff-appellee.

Matthew P. Holt, Sager, Curran, Sturges & Tepper, P.C., Las Cruces, for defendant-appellant.

OPINION

MINZNER, Judge.

Defendant Albertsons, Inc. appeals the judgment on a verdict in favor of plaintiff Maria Rita Gutierrez (Gutierrez) in this slip-and-fall action. Albertsons makes the following arguments on appeal: (1) there was insufficient evidence to support the jury's finding that Albertsons was negligent; (2) admission of Gutierrez' testimony about the absence of maternity care insurance coverage for her was reversible error; and (3) Gutierrez' failure to sue Albertsons' allegedly negligent employee barred her claims against it as a matter of law. We affirm.

FACTS.

On May 25, 1984, Gutierrez, who was five and a half months pregnant, was shopping in aisle four of Albertsons, moving toward the front of the store. While reaching for an item on a shelf, she slipped and fell, landing on her back. She did not remember anything after she reached for the item until she was on the floor. She did not know what caused her to fall.

A nurse who was in the same aisle, also moving toward the front of the store and ahead of Gutierrez, heard her hit the floor. She turned around and saw Gutierrez on her back. She saw a puddle of clear liquid approximately six inches wide by two and a half to three feet long next to Gutierrez. Gutierrez was near the center of the aisle and the puddle was closer to the side. The nurse saw no streaks or footprints in the water.

Mr. Moulton, the assistant store manager, was the second person to arrive on the scene. He saw the water, which he described as one or two puddles, each about six inches in diameter and adjacent to where Gutierrez was lying. He was asked about the source of the liquid and said he did not know where it came from. He checked a lobster tank that was six to eight feet away at the end of aisle four, but he found no trail of water between the tank and the puddle and no leak in the tank. When asked during direct examination about the "appearance of the puddle at the time of the accident[,]" he said "I don't remember seeing foot marks. I remember a couple cart tracks." Subsequently, on redirect, he described what he saw as "some wheel marks."

Mr. Kell, the store manager, described the liquid as less than four ounces, covering an area of one foot by three feet. He said that it was in several spots, rather than one solid body. He tasted the liquid to see if it contained salt, which was added to the water in the lobster tank. He determined that it was water without salt. He also checked the tank for leaks and found none, and was unable to determine the source of the water. He took a sample of the liquid.

Mr. Lujan, a courtesy clerk, testified on direct examination that when Gutierrez fell, he was summoned over the intercom and that, when summoned, he was getting a spot or wet mop. He also said that he saw Gutierrez on the floor. When asked during direct examination to describe the water, he said that it was "streaked," and

he said "carts had already went over it and everything." On cross-examination he testified that the streaks he saw were there after Gutierrez had been carried out of the store.

Both the nurse and Gutierrez testified that while Gutierrez was lying where she fell, waiting for an ambulance to arrive, someone with a mop and bucket began mopping up the water that was next to her. She testified that she overheard someone say: " 'Look at all that water.' " Moulton identified himself, Kell, and Lujan as the store personnel in the aisle after the fall and said that he believed he told Lujan to bring a mop. Gutierrez said that she was asked to move so that he could mop around her.

Moulton and Kell testified about the store's policy regarding inspections and cleaning. They said the store was cleaned every night by a professional janitorial service and ordinarily, but not always, swept again the following morning. When a new shift of clerks arrived at 4:00 each afternoon, one of their first tasks was to sweep the store before the rush at shortly after 5:00. Also, each store employee was instructed to inspect the floor for possible debris or foreign substances whenever walking through the store for any reason.

Lujan testified at trial on direct examination that he swept the entire floor before the accident and that he swept the aisle in question ten to fifteen minutes before the accident. He said there was no liquid on the floor at that time. Kell testified that he saw Lujan begin to sweep the floor of the store and saw him finish it before the fall. He did not see him sweep aisle four. Moulton said that he saw Lujan sweeping part of the aisle, although he did not determine if it was the part where Gutierrez fell.

When pressed on direct examination, Lujan testified that he was "not sure" if he swept aisle four, but had he started sweeping at the last aisle, he would have continued through aisle four. During cross-examination, Albertsons arranged for an audiotape to be played; the tape had been used to record a telephone interview between Lujan and a representative from Albertsons' home office risk management division. The conversation occurred approximately two months after the accident. During that conversation, an exchange occurred in which Lujan may have misunderstood what he was being asked. Nevertheless, Lujan's initial responses indicated that he had swept only aisle four; after being asked if there was something on aisle four that required clean-up, he then modified his testimony and said he had swept all aisles.

On the same tape, Lujan indicated that he was in the back at the time of the accident getting a mop because the floors were "a little bit dirty." At trial, on direct examination, he testified he was getting a mop "to clean up produce, because produce gets—the floor gets real dirty, real black." When pressed, however, he testified that he didn't remember why he was getting the mop.

Albertsons moved for a directed verdict at the close of the evidence presented on behalf of Gutierrez. The record on appeal includes a partial transcript; that transcript contains the testimony offered on behalf of Gutierrez, as well as the record made in connection with the motion for directed verdict at the close of Gutierrez' case. The record does not indicate whether Albertsons presented any evidence.

After the jury returned its verdict, Albertsons moved for judgment, notwithstanding the verdict. The motion was denied.

I. SUFFICIENCY OF THE EVIDENCE.

The parties seem to agree that the controlling law on the matter of Albertsons' negligence stems from *De Baca v. Kahn,* 49 N.M. 225, 161 P.2d 630 (1945). The supreme court held in that case that a slip-and-fall plaintiff must prove not only that there was a dangerous condition in a defendant's premises, but also that the defendant knew or had reason to know of the condition. *Id.; see also Barakos v. Sponduris,* 64 N.M. 125, 325 P.2d 712 (1958); *O'Neil v. Furr's, Inc.,* 82 N.M. 793, 487 P.2d 495 (Ct.App.1971).

In *O'Neil,* this court articulated the duty owed by a store owner to a business invitee who is injured from a slip-and-fall action on the store owner's premises. The court stated:

> In order to find one negligent towards his business invitees it is necessary that the evidence or reasonable inferences therefrom establish a dangerous condition which either is known or should have been known to the proprietor; that the dangerous condition is such that the owner realizes that his invitees would not discover the danger for themselves; and with such knowledge the proprietor fails to exercise reasonable care to protect his invitees.

Id., 82 N.M. at 795, 487 P.2d at 497. *See generally* Sonja A. Soehnel, Annotation, *Liability of Operator of Grocery Store to Invitee Slipping on Spilled Liquid or Semiliquid Substance,* 24 A.L.R.4th 696 (1983). *Compare* SCRA 1986, 13–1318 (Repl.1991) (adopted January 1, 1987, setting forth proprietor's duty in slip-and-fall case where dangerous condition exists from factors not created by proprietor).

The parties also seem to agree that even if the jury was entitled to reject the evidence of due care in this case, Gutierrez still had to come forward with some positive evidence of negligence. Negligence may not be presumed from the fact that an injury occurred. *See generally Williamson v. Piggly Wiggly Shop Rite Foods, Inc.,* 80 N.M. 591, 592, 458 P.2d 843, 844 (Ct.App.1969).

As we understand Gutierrez' theory at trial, she asked the jury to find in effect either that (1) the water had been present on aisle four, Lujan had seen it, but he had failed to mark its presence; or (2) the water had been present on aisle four and Lujan had missed it.[1] Albertsons contends that the evidence was insufficient to support either theory because the evidence shows that Lujan swept the floor shortly before the accident and the water was not then present. Alternatively, Albertsons contends that, even if the jury was entitled to disregard Lujan's testimony, then there was no evidence other than the fact of an accident resulting in an injury, and such evidence is not sufficient to support a finding of negligence. We first discuss the sufficiency of the record on appeal to support a conclusion that the appellate claim was preserved.

A. Preservation.

The docketing statement indicates that Albertsons preserved its right to question the legal sufficiency of the evidence by filing "motions" for directed verdict. Gutierrez did not challenge that assertion while this case was assigned to the summary calendar, and we accept it as true. *See State v. Sisneros,* 98 N.M. 201, 647 P.2d 403 (1982).

Ordinarily, appellant has the burden of producing an appellate record that is adequate to show that the issues raised on appeal were preserved and to facilitate ap-

1. The jury was given an instruction that read as follows:

> In this civil action, plaintiff Maria Rita Gutierrez seeks compensation from the defendant, Albertson's, Inc., for damages which the plaintiff claims were proximately caused by negligence.
>
> To establish the claim of negligence on the part of defendant, the plaintiff has the burden of proving at least one of the following contentions:
>
> 1. Defendant failed to make a reasonable inspection of aisle 4 of their store located at Zuni and San Mateo in Albuquerque, as was necessary to maintain that aisle in a safe condition.
>
> 2. The defendant failed to correct or warn Maria Gutierrez of the presence of a clear liquid on the floor of aisle 4 of their store which was a dangerous condition, and which they knew of, or would have known of had they made a reasonable inspection of their floor.
>
> Plaintiff also contends, and has the burden of proving, that such negligence was a proximate cause of the injuries and damages.
>
> The defendant denies the contentions of the plaintiff and claims that the plaintiff herself was negligent.

There was no objection to the instruction given to the jury. Therefore, those instructions became the law of the case. *Bendorf v. Volkswagenwerk Aktiengeselischaft,* 90 N.M. 414, 564 P.2d 619 (Ct.App.1977). As we understand Gutierrez' theory at trial, she concentrated on proving the second contention. The first contention appears to have been an integral part of the second.

pellate review. *See Nichols v. Nichols,* 98 N.M. 322, 648 P.2d 780 (1982). In this case, that burden would have been most clearly satisfied by ensuring that the transcript included a record of the motion for directed verdict made at the close of the evidence offered on behalf of Albertsons. *Compare Bondanza v. Matteucci,* 59 N.M. 354, 284 P.2d 1024 (1955) (where defendant's motion for directed verdict at conclusion of plaintiff's case was not renewed at close of entire case, defendant waived right to judgment notwithstanding verdict) *with Andrus v. Gas Co. of N.M.,* 110 N.M. 593, 798 P.2d 194 (Ct.App.1990) (if the defendant's motion for a directed verdict at the close of the plaintiff's case is denied and the defendant proceeds to put on its case, its claim of error is waived).

B. Denial of Motion for Directed Verdict.

We conclude that the trial court did not err in denying Albertsons' motion for directed verdict at the close of Gutierrez' case. There was evidence to support each of Gutierrez' theories. Under these circumstances, it would have been error to grant the motion. *See Jones v. New Mexico School of Mines,* 75 N.M. 326, 404 P.2d 289 (1965).

First, we disagree with Albertsons that the evidence showed as a matter of law that the water was not present on aisle four shortly before the accident. Lujan's testimony, when taken together with the tape-recorded conversation, raised a jury question regarding whether he had swept aisle four at all and, if he had swept it, whether he might have missed the water. Moreover, because both Moulton and Lujan testified that there were cart marks in the puddle of water, there was sufficient evidence to support an inference that the puddle had been in existence for some time. *See Bank of N.M. v. Rice,* 78 N.M. 170, 429 P.2d 368 (1967) (if reasonable minds may differ as to conclusion to be reached under the evidence or permissible inferences, resolution of the issue is for the jury to determine); *see also* SCRA 1986, 13–308 (fact may be proved by circumstantial evidence where evidence gives rise to reasonable inference of truth of fact sought to be proved).

The more difficult question is whether, if the jury was entitled to disbelieve Lujan's testimony that he had swept aisle four and that there was no water there at that time, there was, nevertheless, sufficient evidence to support both of Gutierrez' trial theories. *See generally State v. Manus,* 93 N.M. 95, 100, 597 P.2d 280, 285 (1979) (discussing limitations on jury's broad authority in treating the proof), *overruled on other grounds, Sells v. State,* 98 N.M. 786, 653 P.2d 162 (1982); *see also State v. Corneau,* 109 N.M. 81, 89, 781 P.2d 1159, 1167 (Ct. App.1989) (indicating that with appropriate jury instructions, fragmentation of the evidence can be avoided). Albertsons has argued on appeal that the evidence presented equally possible logical inferences, and thus the jury was required to speculate that Albertsons knew or should have known of the puddle's existence. For this reason, Albertsons urges this court to hold that Gutierrez failed to carry her burden of proof. *See Lovato v. Plateau, Inc.,* 79 N.M. 428, 444 P.2d 613 (Ct.App.1968) (if facts are equally consistent with two conclusions, they tend to prove neither). Albertsons argues that Gutierrez "introduced absolutely no evidence from which a reasonable mind could conclude that Albertson's knew, or should have known, that there was liquid on the floor where Ms. Gutierrez slipped."

We disagree. We think Gutierrez presented sufficient evidence to raise a jury question as to actual as well as constructive notice.

Our task in resolving this issue, as described by the court in *Keene v. Arlan's Dep't Store of Baltimore, Inc.,* 35 Md.App. 250, 370 A.2d 124, 127 (1977), when reviewing a similar contention, is to affirm if there is any reasonable ground that supports the decision of the fact finder at trial. The question is not whether the evidence would have supported a different verdict, but whether there is evidence to support the result that was reached. *Haaland v. Baltzley,* 110 N.M. 585, 798 P.2d 186

(1990). In reviewing the proof, we disregard inferences that do not support the judgment. *Nosker v. Trinity Land Co.*, 107 N.M. 333, 757 P.2d 803 (Ct.App.1988).

In *Keene*, for example, a woman slipped and fell on a " 'clear, sleek solution' " in a department store as she walked toward her husband, who had been waiting in a checkout line for fifteen minutes. The only evidence suggesting that the owner in that case had actual notice of the dangerous condition in enough time to remedy it was (1) a cashier's excited utterance immediately after the fall: " 'I told them if this wasn't cleaned up, someone's going to fall,' " and (2) her husband's testimony that he did not see the cashier talk to anybody other than the customers going through her line during his fifteen-minute wait. 370 A.2d at 126, 129. The court observed that if the jury believed the husband's testimony, it could have inferred that the cashier gave her warning more than fifteen minutes before the fall. The court conceded that the inferences to be drawn from the evidence were "arguable at best, but the determination of the weight of the evidence is the responsibility of the jury." 370 A.2d at 130.

The Supreme Court of Alabama confronted the issue of constructive notice in *Foodtown Stores, Inc. v. Patterson*, 282 Ala. 477, 213 So.2d 211 (1968). In *Foodtown Stores, Inc.*, plaintiff slipped and fell on some snap beans in a grocery store produce department. There was no evidence regarding the condition of the beans, and the plaintiff did not see anything on the floor before falling. Defendant's employee had been in the back room of the store for about ten minutes when the accident occurred, but testified that before going to the back of the store he had cleaned and swept the produce department, there were six or seven customers in the department when he swept, and when he left he saw nothing on the floor. Another employee testified that he also saw the group of customers. The court held that this evidence was sufficient to submit the case to the jury and affirmed the judgment for the plaintiff, reasoning that the jury could have found the defendant negligent by inferring that (1) when the employees saw the group of customers, they knew that "vegetable matter could have very easily been knocked ... to the floor" by one of the group, and (2) the employee who swept was removing "debris of vegetable matter from the floor just ten minutes before the accident occurred." *Id.* 213 So.2d at 216.

The court in *Foodtown Stores, Inc.* stressed that all questions of fact in slip-and-fall cases are "for the jury to consider in each case, after proper instructions from the court." *Id.* 213 So.2d at 215–16. *Cf. Cuevas v. W.E. Walker, Inc.*, 565 So.2d 176 (Ala.1990) (conflicting testimony constituted evidence sufficient to raise genuine issues of material fact which precluded entry of summary judgment in favor of defendant in slip-and-fall case).

Here, as in *Keene* and *Foodtown Stores, Inc.*, the jury was presented with alternative possibilities, each supported by evidence. We think the question of whether the evidence was evenly balanced was for the jury, which was instructed subsequently that "[e]venly balanced evidence is not sufficient." *See* SCRA 1986, 13–304 (Repl. 1991). We first discuss the evidence regarding actual notice.

1. Actual Notice.

The fact that Lujan was in the back of the store to obtain a mop supports an inference that he was retrieving the mop to clean up the puddle in question. Thus, the jury might have determined that Lujan had actual notice of the puddle in sufficient time to have noticed its location or cleaned it up. That is, he noticed the puddle, continued sweeping the store until he was finished, and then proceeded to take care of the puddle.

Kell testified that small amounts of liquid would have been removed with paper towels from another part of the store, while a larger amount of liquid would have been removed with a wet mop. We recognize that Kell testified the amount of water present on aisle four could have been removed with paper towels and that Lujan said he was getting the wet mop to spot-

clean dirty portions of the floor. However, Lujan's testimony was inconsistent, and eventually he testified that he did not know why he was getting the mop. In addition, the puddle was large enough that it caused a bystander to comment on its size. Under these circumstances, we think the jury was entitled to accept the evidence that he was getting a mop and ignore the evidence that he was going to use the mop to clean either other aisles in the grocery section or the produce department. *Cf. State v. Manus; State v. Corneau* (evidence must not be so fragmented as to distort it).

Moreover, the fact that someone was mopping up the spot shortly after Gutierrez slipped and while she lay in the puddle corroborates an inference of actual knowledge. Moulton's testimony supports an inference that it was Lujan who began mopping while Gutierrez lay in the aisle. Because this action seems such an unusual gesture under the circumstances, we think the jury was entitled to infer that Lujan was attempting to complete a task he had set out to do at an earlier time.

2. Constructive Notice.

The accident occurred during the peak shopping hours on a very busy day of the year: at approximately 5:00 p.m. on the Friday of Memorial Day weekend. The payroll records offered into evidence by Gutierrez indicated that Albertsons was understaffed at the time. Nine of seventeen "courtesy clerks" had quit or had been fired that week. Moulton testified that he made sure there were enough clerks at the checkout stands to achieve the employees' goals of prompt service. The courtesy clerks' responsibility for cleaning was secondary. Moreover, Moulton testified that he was watching Lujan closely on the day of the accident to time his sweeping job and to ensure that he returned to the front of the store as soon as possible to help the customers. Finally, in his deposition, Lujan conceded that he might have missed the puddle.

There was evidence that there were cart wheel marks through the puddle. This evidence, as indicated above, supports an inference that the puddle had been there for some time.

In *Morton v. Lee,* 75 Wash.2d 393, 450 P.2d 957 (1969), the Washington Supreme Court, in reviewing the appeal of the owners of a food market in a slip-and-fall case, considered the issue of whether appellants had actual or constructive notice of the presence of a hazardous condition that resulted in the plaintiff's fall. The court noted:

> Ordinarily, it is a question of fact for the jury, whether under all of the circumstances, a defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care. *Presnell v. Safeway Stores, Inc.,* 60 Wash.2d 671, 374 P.2d 939 (1962). The permissible period of time for the discovery and removal or warning of the dangerous condition is measured by the varying circumstances of each case.

450 P.2d at 959–60. Our review of the record indicates the existence of evidence from which the jury could reasonably determine that Albertsons knew, or should have known, of the existence of the dangerous condition and failed to exercise reasonable care to protect Gutierrez and other business invitees from such hazard.

The issue on appeal regarding constructive notice in this case is whether the jury was entitled to determine that it was more likely that Lujan failed to see the puddle than that the puddle was created in the ten-minute interval between the completion of sweeping and Gutierrez' fall. The jury was entitled to assess the opportunity for human error supported by the evidence that the store was unusually busy and by Lujan's concession that he might have missed the puddle. Based on logical and proper inferences drawn from concededly sparse evidence, the jury was entitled to conclude that it was more likely that the puddle was missed than that it was created in a ten-minute interval. Thus, a finding of constructive notice was permissible.

II. ADMISSIBILITY OF EVIDENCE.

The substance of the evidence material to this issue was that Gutierrez lost her job

as a result of her injuries, and thus had no insurance coverage for maternity care. Albertsons states that Gutierrez proved this point by stating someone told her that she had maternity coverage, and she was speculating about its absence after she no longer worked for her employer. Albertsons states that it objected to this evidence on unspecified hearsay and best evidence grounds.

The record reveals the following:

Q. [by plaintiff's attorney] What would, if you had not had the fall, what were your plans? How were you going to work at that job if you were five and-a-half months pregnant?

A. [by plaintiff] I was having no trouble doing my rooms. I intended to work till until the last minute, until the last day I could work plus I had my maternity leave.

Q. How did you have maternity leave? How is that plan?

A. They let you go for a couple of months, two, three months and whenever you are ready to come back, you could come back to your job.

Q. Did they have some kind of an insurance with respect to your maternity?

A. I had hospitalization insurance.

Q. What would it cover generally?

A. It would cover—

At this point, counsel for the defense interceded with, "Objection, Your Honor, Best Evidence Rule." There was a bench conference in which Gutierrez' attorney stated that he intended to elicit proof of the fact of lapsed insurance coverage. The attorneys explained why there was no policy of insurance in evidence, and then the attorney for Albertsons stated, "Your Honor, if I could add, the best evidence is also hearsay." The trial court allowed the evidence to come in. Gutierrez' attorney asked whether her maternity expenses would be covered by her employer's insurance and she answered affirmatively, all without further objection from the defense.

Albertsons adequately preserved two objections here. The first is an objection on the best evidence rule. This rule is found at SCRA 1986, 11-1002, and is only applicable when a party seeks to prove the contents of a writing. Because Gutierrez only sought to prove the fact of lost coverage rather than the contents of the insurance policies, there was no need for the original policies. *See Kennedy v. Lynch*, 85 N.M. 479, 513 P.2d 1261 (1973). The second preserved objection, which was based on hearsay, was not directed to Gutierrez' testimony. The attorney for Albertsons stated, "the best evidence is also hearsay." The only way to reasonably construe this statement is as an objection to the insurance policies, *i.e.*, the best evidence, as being hearsay. Because the trial court properly refrained from requiring production of the insurance policies, a hearsay objection was not appropriate. Albertsons failed to preserve an issue regarding any other error in admitting Gutierrez' testimony. *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 745 P.2d 717 (Ct.App.1987).

Gutierrez' testimony on direct examination was not proof of an out-of-court statement. Rather, she stated her personal knowledge of her status as an insured person. Thus, the testimony was not hearsay. *See* SCRA 1986, 11-801(C). Gutierrez stated that someone told her her employer terminated her coverage upon separation from work only during cross-examination by Albertsons. At this point, it became clear that the basis of Gutierrez' earlier testimony was hearsay. However, Albertsons did not renew its objection or move to strike Gutierrez' testimony about lost insurance coverage. By not objecting or moving to strike, Albertsons waived the hearsay issue it raises on appeal.

The jury was free to choose how to weigh this evidence, including the choice of rejecting it in favor of Gutierrez' earlier testimony on direct examination. *Cf. Tapia v. Panhandle Steel Erectors Co.*, 78 N.M. 86, 89, 428 P.2d 625, 628 (1967) (where appellant contended on appeal that witness's testimony on direct examination was nullified by his testimony on cross-examination, resolution of discrepancy was for fact finder). Albertsons' appellate com-

plaint that the testimony was speculative is misplaced.

III. FAILURE TO JOIN EMPLOYEE.

Gutierrez never sued Lujan, the employee who was responsible for cleaning the floor of Albertsons at the time she slipped and fell. Albertsons argues that Gutierrez' failure to sue Lujan within the time allowed by law for such a suit precluded any suit against Albertsons based on vicarious liability for Lujan's acts or omissions. To support this argument, Albertsons reasons that because its liability is derivative of Lujan's, and because a right of action against Lujan no longer exists, Albertsons is not derivatively liable for a right of action against it. *See generally Kinetics, Inc. v. El Paso Prods. Co.*, 99 N.M. 22, 653 P.2d 522 (Ct.App.1982) (discussing effect of dismissal of partnership from lawsuit on liability of partner and company of which partner was wholly-owned subsidiary).

We do not decide whether *Kinetics, Inc.* applies to this case or whether it is a correct statement of the law because Albertsons failed to preserve this issue. At the hearing on the motion to amend the complaint, Albertsons obtained leave from the trial court to plead release as a defense. However, it never made the "release" argument to the trial court. In arguing its motion for a directed verdict, Albertsons made no reference to any argument that it was released from liability or that under *Kinetics, Inc.* it could not be sued on a theory of respondeat superior.

We will not rule on a question that was not raised below. *Cisneros v. Molycorp, Inc.*, 107 N.M. 788, 794, 765 P.2d 761, 767 (Ct.App.1988); SCRA 1986, 12–216. By failing to raise the issue, as the trial court expressly allowed it to do, Albertsons failed to adequately preserve it. Despite the fact that Gutierrez' answer brief alerted this court to the fact that the issue was not preserved, Albertsons' reply brief did not cite us to any part of the record indicating where the issue was preserved. *See Batchelor v. Charley*, 74 N.M. 717, 720, 398 P.2d 49, 50 (1965) ("The burden is upon appellant to show that the question presented for review was ruled upon by the trial court...."); *see also* SCRA 1986, 12–213(A)(3) (Cum.Supp.1991); –216(A).

CONCLUSION.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

DONNELLY, J., concurs.

BIVINS, J., dissents.

BIVINS, Judge (dissenting).

Where a jury has found negligence, the reviewing court must consider the evidence in a light most favorable to support the verdict, and should not reverse unless convinced that there was neither evidence nor inferences therefrom which will support the verdict. *Lewis v. Barber's Super Mkts., Inc.*, 72 N.M. 402, 403–04, 384 P.2d 470, 471 (1963); *see also Barakos v. Sponduris*, 64 N.M. 125, 127, 325 P.2d 712, 713 (1958). My review convinces me that reversal is mandated.

A. FACTUAL BACKGROUND

With that standard in mind, I will set forth the relevant facts. On Friday, May 25, 1984, Plaintiff fell while shopping with a friend in Defendant's store. The friend did not testify. Plaintiff was five and one-half months pregnant at the time. While proceeding toward the front of the store with her friend behind her pushing a cart, Plaintiff attempted to reach for some soup. Plaintiff could not recall anything from the time she reached for the soup until she fell. "I remember I went to reach for some soups and the next thing I knew I was on the floor. That is all I can remember." Plaintiff did not feel anything that indicated the presence of water until *after* she fell. It was when someone started to mop up the water that she felt moisture on her back. Plaintiff said she had no idea what caused her to fall.

Witnesses who responded gave clearer testimony as to the nature, size, location, and source of the spillage. Ms. Turner, a nurse, who at the time was proceeding toward the front of the store on aisle four,

did not see Plaintiff fall but "heard a thud as if someone was falling." She saw Plaintiff, to the rear of the aisle, on the floor on her back. Turner saw a clear liquid puddle next to Plaintiff, approximately six inches in width by two and one-half to three feet in length, which she assumed to be water. "She was right by the puddle lying on the floor on her back." Plaintiff was "pretty much in the middle" of the aisle and the water was closer to the side of the aisle. Turner did not know the source of the water. She saw no streaks through the water and saw no footprints in the puddle.

Mr. Moulton, the store director, was the second to arrive. He observed the liquid on the floor. When asked about the source of liquid, he said he had no idea how the liquid or the water got on the floor. Moulton did investigate a lobster tank six to eight feet away at the end of the aisle, but stated that there was no trail of water leading from the tank to the spot where Plaintiff had fallen and there was no leak in the tank. Moulton described seeing one or two puddles, each "maybe six inches in diameter or so." He also recalled that the water was adjacent to where Plaintiff was lying on her back. Moulton saw no foot marks but did remember "a couple of cart tracks."

Mr. Kell, the store manager, observed the liquid. He described it as less than four ounces covering an area of one foot by three feet. He said the liquid was not in a solid body but made up of several spots. He tasted the liquid and determined it was water. He also checked the lobster tank and found no leakage. The purpose of tasting the liquid was to determine if it contained salt which is used in the tank. It did not. Kell took a sample of the spillage. He too could not find a source for the spilled water.

B. DISCUSSION

1. *Failure of Proof of Reason for Plaintiff's Fall*

The first obstacle in finding substantial evidence to support Defendant's negligence is that Plaintiff offered no evidence as to how she fell or what caused her to fall. *See Caldwell v. Johnsen,* 63 N.M. 179, 184, 315 P.2d 524, 527–28 (1957) (directed verdict upheld where plaintiff unable to explain what caused her to fall). Plaintiff did not describe slipping or sliding on the surface of the floor or on the water itself. She did not say she lost her balance or footing. Plaintiff was asked the following question and gave the following answer:

> Q. Would it be fair to say you don't recall anything from the time you actually reached for the soup until you fell?
>
> A. That's right, I don't recall. I don't remember nothing.

The only evidence remotely tying the puddle of water to Plaintiff's fall, other than the presence of the water near her after she fell, was the testimony of Turner who, when asked if she saw anything that might have caused the fall, said "there was water on the floor." This amounts to no more than speculation. Turner did not see Plaintiff fall and did not claim to know how she fell. Moreover, a reasonable inference could not be drawn from that testimony since Turner said that the puddle showed no marks of having tracks or footprints through it. Further, at the time Turner arrived to aid Plaintiff, Plaintiff was to the side of the puddle, not in it. *See Barakos,* 64 N.M. at 129, 325 P.2d at 714–15 (testimony may be disregarded where legitimate inferences may be drawn that cast reasonable doubt upon the truth or accuracy of the oral testimony); *Bowman v. Incorporated County of Los Alamos,* 102 N.M. 660, 662, 699 P.2d 133, 135 (Ct.App.1985) (an inference "is more than a supposition or conjecture" (citing *Lovato v. Plateau, Inc.,* 79 N.M. 428, 430, 444 P.2d 613, 615 (Ct.App.1968)). Plaintiff's counsel's representation that Turner saw "Plaintiff ... lying on her back in water after the fall" is not supported by the record.

Although not involving a slip and fall accident, *Lovato* is instructive. In that case, plaintiffs, who had just filled the tank on their pickup, heard an explosion underneath and saw a flash. *Id.* at 430, 444 P.2d at 615. It was unknown what was burning, how the flammable substance got on

the paved apron, how long the substance had been there, or what caused the ignition. There was no evidence as to any notice to or knowledge on the part of anyone that any gasoline or other flammable substance had been spilled or otherwise caused to be present. The supreme court said that all reasonable inferences from the evidence must be indulged in support of the plaintiffs' case, but that "an inference is more than a supposition or conjecture. It is a logical deduction from facts which are proven and guess work is not a substitute therefor." *Id.* The supreme court affirmed a directed verdict for defendant in that case for failure of proof. I would do so here for the same reason. *See also Bowman,* 102 N.M. at 662–63, 699 P.2d at 135–36; *cf. Rayco Drilling Co. v. Dia–Log Co.,* 81 N.M. 101, 107, 464 P.2d 17, 23 (1970) (equal probabilities will not support recovery). To do otherwise would require stacking inference upon inference. This is impermissible. *Hansler v. Bass,* 106 N.M. 382, 386, 743 P.2d 1031, 1035 (Ct.App.), *cert. denied,* 106 N.M. 375, 743 P.2d 634 (1987); *Duran v. General Motors Corp.,* 101 N.M. 742, 753, 688 P.2d 779, 790 (Ct. App.1983), *cert. quashed,* 101 N.M. 555, 685 P.2d 963 (1984).

2. *Failure of Proof of Defendant's Negligence*

In addition to the failure of proof linking Plaintiff's fall to the water, there was a failure of proof as to negligence by Defendant. In an analogous case, this court, relying on *Lovato,* concluded that no inference of negligence could be drawn by the unexpected presence of foreign matter on the floor. *See Williamson v. Piggly Wiggly Shop Rite Foods, Inc.,* 80 N.M. 591, 593, 458 P.2d 843, 845 (Ct.App.1969). In *Williamson,* the floor had been swept and mopped an hour before the fall, and the produce manager had inspected the area several times during that interim and saw nothing. *Id.*

In the case before us, it is undisputed that one of the courtesy clerks dry-mopped the entire store, including aisle four, starting at 4:00 p.m., and had completed the cleaning before the accident, which occurred at approximately 5:00 p.m. Moulton had seen the clerk, Lujan, make his turn in aisle four. It was estimated that Lujan had cleaned aisle four ten to twenty minutes before the accident. Lujan testified that he saw no water when he mopped that aisle. Lujan described how the dry mop grips the floor when it comes into contact with water. That did not occur.

The law governing slip and fall cases is well-established. To find a shopkeeper negligent toward business invitees, the evidence must show a dangerous condition that either is known or should have been known; that the condition is such that the shopkeeper realizes that his invitees would not discover the danger themselves; and with such knowledge the shopkeeper fails to exercise reasonable care to protect his invitees. *O'Neil v. Furr's, Inc.,* 82 N.M. 793, 795, 487 P.2d 495, 497 (Ct.App.1971). A business is not an insurer of the safety of its customers, *De Baca v. Kahn,* 49 N.M. 225, 230, 161 P.2d 630, 633 (1945), and the mere presence of a slippery spot does not establish negligence since this condition may arise temporarily in any business. *Kitts v. Shop Rite Foods, Inc.,* 64 N.M. 24, 27–28, 323 P.2d 282, 284 (1958).

Here, we have evidence of a wet spot on the floor without any proof of its source. The evidence shows that the floor had been mopped ten to twenty minutes before Plaintiff fell. No one reported any spillage and none was observed either by the clerk when he cleaned the area or by any other store employee. The only logical inference is that the water was spilled between the time the clerk cleaned aisle four and the time Plaintiff fell. This length of time is insufficient to hold Defendant negligent given the condition of the puddle when Plaintiff fell.

We said in *Williamson* that the mere presence of a slick or slippery spot does not of itself establish negligence because this condition may arise temporarily. Negligence may not be presumed from the mere fact that an injury has been sustained. *Williamson,* 80 N.M. at 592, 458 P.2d at 844; *see also Waterman v. Ciesielski,* 87 N.M. 25, 27, 528 P.2d 884, 886 (1974) (unex-

plained accident is not enough to infer negligence); *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 495, 745 P.2d 717, 720 (Ct.App. 1987). To impose liability here would require that we make Defendant an insurer of the safety of its customers. Defendant is not held to that standard. *De Baca*, 49 N.M. at 230, 161 P.2d at 633.

In reviewing for the existence of substantial evidence to support the verdict, it should be noted that Plaintiff called as her witnesses, Moulton, Marcus Lujan, and one other store employee, Adrian Gallegos. This point is made because evidence regarding the sweeping of the store, including aisle four, came in through Plaintiff's proof. With that in mind, I will now comment on the evidence the majority relies on to support the verdict.

a. Lujan's Actions and Subsequent Testimony

As to actual knowledge of the existence of the water in time to remove it, the majority first looks to Lujan's presence in the mop closet after he completed sweeping the floors. While the majority emphasizes variances in Lujan's testimony as to why he was getting the wet mop, those differences do not permit the jury to infer a different purpose. The jury could disbelieve Lujan's testimony and statement that he intended to clean dirty areas or the produce department, however, the jury would not be justified in finding the opposite was true, i.e., that Lujan was actually getting the mop to go back and clean the spilled water in aisle four that he knew he had missed. *See De Baca*, 49 N.M. at 231, 161 P.2d at 633 (even if jury disregards testimony, it is not justified in finding the opposite is true).

The majority's attempt to get around this rule also fails. The jury could not reasonably infer that because Lujan was in the mop closet after finishing his sweeping, he must have had actual knowledge of the water when he swept aisle four ten to twenty minutes earlier. That is not a permissible inference.

In *Stambaugh v. Hayes*, 44 N.M. 443, 103 P.2d 640 (1940), the supreme court faced a similar argument. Plaintiff in that case attempted to prove an employer liable under the doctrine of respondeat superior for the negligence of one of its employees. The accident occurred when the employee was en route to a friend's house. The employee, an insurance agent, was required to put in long days, collecting in his debit area until all accounts had been collected, then spend the remainder of the week selling new insurance. *Id.* at 449, 103 P.2d at 644. The employee was approaching his debit area at 6:30 p.m., when he collided with and killed plaintiff's decedent, a ten year old boy. The employee testified that he worked in his debit area until 6:00 p.m., then went to his fiancee's house. He decided to quit for the day and left her house after being there fifteen minutes and headed for Old Town to visit a family friend, where he had a standing invitation. *Id.* at 450, 103 P.2d at 644. Plaintiff argued that since the employee was approaching his debit area, the jury could infer he was still working or intended to sell new insurance to his friend. The supreme court, according the jury's verdict the same deference as we do here, reversed the judgment against the employer. The court held that even disregarding the employee's testimony, there was not the slightest evidence upon which to base even conjecture regarding employee's destination or mission at the time of the accident. The court held there were no facts from which to draw a logical deduction, only conjecture and probabilities. *Id.* at 451, 103 P.2d at 645; *see also Gonzales v. Shoprite Foods, Inc.*, 69 N.M. 95, 98–99, 364 P.2d 352, 354 (1961) ("An inference is not a supposition or conjecture, but a logical deduction from facts proved, and guesswork is no substitute therefor.").

The *Stambaugh* court defined a reasonable inference "as a process of reasoning whereby, from facts admitted or established by the evidence, or from common knowledge or experience, a reasonable conclusion may be drawn that a further fact is established." *Stambaugh*, 44 N.M. at 451, 103 P.2d at 645. The court also stated that "[w]here evidence is equally consistent

with two hypotheses, it tends to prove neither." *Id.*

It was equally consistent that Lujan was obtaining the mop to clean the dirty areas. Moulton testified that was the procedure. To infer Lujan was going back to aisle four would require the jury to infer that was his destination and from that inference further infer he was going there to clean the puddle of water, the existence of which he had knowledge. This stacking of inferences on inferences is impermissible. *Id.*

The inference the majority says may be drawn from Lujan's presence in the mop closet is even more improbable when viewed in light of other evidence Plaintiff offered. She proved through Moulton and Lujan that Lujan did sweep the store; that he used a three-foot wide dry mop; that he would go up each aisle at least twice; that the width of the dry mop covered all but a foot or less of the aisle when run over twice; that the mop would drag when it came into contact with water and the water would streak; and that Moulton observed Lujan making his turn at the front of aisle four where Moulton was working at a check-out counter.

b. Plaintiff's Constructive Knowledge Argument

Nor can a permissible inference be drawn from the fact someone mopped up the water while Plaintiff was still lying on the floor, referred to by Plaintiff as the "guilty conscience" evidence. It may have been insensitive to ask Plaintiff to move so someone could mop around her, but removing the water proves nothing, even if the jury could infer it was Lujan who did it. Moulton testified he may have told Lujan to bring a mop. The same type of conjecture, piling inferences on inferences is required here as with the mop closet evidence. It is just as logical, perhaps more so, to infer that the water was removed to prevent others from falling. Moulton had called for paramedics and there was testimony that the store had between 2,000 to 3,000 customers a day.

To uphold a finding of constructive knowledge of the water, the majority relies on evidence that the store was busy and that about one-half of the courtesy clerks had quit or been laid off the prior week. In addition to the fact that Moulton testified he believed most of the positions had been filled, there is no evidence that Lujan was rushed or pressured to hurry up with his mopping chores. Had there been any evidence suggesting the presence of the water when Lujan swept aisle four, Plaintiff's efforts to show the layoff and busy condition might have some worth. As presented, it offered no more than conjecture. There simply was no evidence showing the store was short-handed or that its procedures caused the accident.

The last item of evidence relied on to establish constructive knowledge is Moulton's testimony that while he saw no footprints, he remembered a couple of cart marks. He arrived after Turner who saw neither. The majority also relies on testimony by Lujan to the same effect, but a fair reading of his testimony reflects that he was referring to the condition after Plaintiff had been removed by a stretcher with wheels on it, not before.[1] Be that as

1. The following exchange took place between Plaintiff's counsel and Lujan on direct examination:

Q. How much water was there?

A. It was like streaked. I mean, there was carts, had already went over. *After she was gone you mean?*

Q. *No, when she was*—well, was there water underneath her?

A. I don't remember.

(emphasis added). When Lujan related his answer to "after she was gone you mean?", counsel said "No," but then changed the subject. Lujan was not afforded the opportunity to describe the condition he observed before Plaintiff left. Moments later, Lujan was given that opportunity. On cross-examination to complete his answer, the following exchange occurred:

Q. The streaks that you saw that were through the water, were those there before or after Mrs. Gutierrez was taken by the paramedics?

A. It was after.

Q. Do you know if she was taken on a stretcher that had wheels on the bottom of it?

A. I think so.

Further, the majority does not account for the fact that Lujan arrived at the scene after others, and we do not know how much time expired from the time Moulton responded, saw Plaintiff

it may, Moulton did remember a couple of cart marks through the water.

Case law requires that the foreign matter have been on the floor for a sufficient length of time that the store should have seen it. *See generally* 65 C.J.S. *Negligence* § 63(124) (1966) (storeowner liable only if had constructive or actual notice of presence of substance and substance was on floor long enough that storeowner had reasonable opportunity to remove it). The period, of course, is for the jury to determine, but it must be for an unreasonable length of time. New Mexico case law holds the mere presence of a slippery spot does not prove negligence since this condition may arise temporarily in any business. *Kitts,* 64 N.M. at 27–28, 323 P.2d at 284. The *Restatement (Second) of Torts* § 328D cmt. g (1965) (citations omitted) provides a useful example:

> A, a customer in B's store, slips on a banana peel near the door, and falls and is injured. The banana peel is fresh, and there is no evidence as to how long it has been on the floor. Since it is at least equally probable that it was dropped by a third person so short a time before that B had no reasonable opportunity to discover and remove it, it cannot be inferred that its presence was due to the negligence of B.

Does a couple of cart marks permit an inference that the water had been there a sufficient length of time to require the store to observe it? Appellate courts have not directly addressed this question. If a grape or banana falls on the floor and is stepped on by one customer, is that sufficient to raise an inference that the store should become aware of it before a second customer steps on the item? To say it is would require the store to maintain patrols and constantly keep surveillance over the customers. I do not believe New Mexico law goes that far.

Because New Mexico case law is clear, the majority understandably has looked for out-of-state authority to support affirmance. I do not believe that authority helps. In *Foodtown Stores, Inc. v. Patterson,* 282 Ala. 477, 213 So.2d 211, 216 (1968), the Supreme Court of Alabama relied on the fact that six or seven customers were at the produce counter, coupled with the fact that produce does sometime fall on the floor, to conclude an inference could be drawn that the store should have known the beans might fall when it had been ten minutes since the clerk had swept the floor. Alabama apparently requires the stores to anticipate happenings, such as beans falling, and be available to sweep every few minutes. New Mexico does not. As stated in *Williamson,* 80 N.M. at 592, 458 P.2d at 844, "the law does not impose upon a storekeeper the duty to follow each customer about, dustpan in hand, to gather up debris...." (citations omitted). In fact, New Mexico case law makes clear the mere presence of foreign material on the floor does not give rise to an inference of neglect. *Kitts,* 64 N.M. at 27–28, 323 P.2d at 284. We apply a common sense approach that requires reasonable care, not constant surveillance. *See Barrans v. Hogan,* 62 N.M. 79, 83, 304 P.2d 880, 882 (1956) (evidence held insufficient to charge defendant with knowledge of dangerous condition on floor).

Nor does *Keene v. Arlan's Department Store,* 35 Md.App. 250, 370 A.2d 124, 126–29 (1977), require affirmance. In that case, the clerk's utterance coupled with her close proximity to the "clear, sleek solution," and the plaintiff's husband's presence in the check-out line for fifteen minutes was sufficient to give rise to an inference that the store had knowledge of the spot for at least fifteen minutes. We have no comparable situation in the case before us.

Here, the proof was uncontradicted that when Plaintiff fell the puddle was clear, not streaked, and with the exception of Moulton's recollection of a couple of cart marks, was undisturbed. Utilizing the definition on the drawing of inferences, as set

on the floor, left to call paramedics and to call for assistance on the intercom to which Lujan responded. Plaintiff would have had to show the condition did not change during that time. Plaintiff did not do so because she did not rely on this evidence to establish notice or knowledge.

forth in *Stambaugh*, the only logical inference is that a customer ahead of Plaintiff ran over the puddle. 44 N.M. at 451, 103 P.2d at 645. Turner, who preceded Plaintiff, was going the same direction. It could have been Turner, or someone else, if Turner was pushing her cart on the wrong side of the aisle. With 2,000 to 3,000 customers a day, on a busy Friday, at 5:00 p.m., it is not reasonable to conclude that the water could have remained in near perfect condition for the ten to twenty minutes since Lujan swept that aisle. We know from experience shoppers often travel up and down each aisle. The only logical inference is that the puddle came into existence just prior to Plaintiff reaching that area.

The court today has not only impliedly overruled forty-six years of well-established law starting with *De Baca v. Kahn*, 49 N.M. 225, 161 P.2d 630 (1945), it has adopted a rule that where the condition of a foreign matter is relied on to prove constructive notice, the store must know of its existence after the first customer comes into contact with it no matter how short a period that may be. This approach will no doubt be a welcome surprise for Plaintiff. Perhaps recognizing the weakness of this argument, Plaintiff did not even rely on it in her brief and presumably not below. She made no more than a passing glance in her brief of the cart mark testimony of Moulton.

Nor does Plaintiff rely on the theory advanced in the majority that Lujan may not have even swept aisle four. While I disagree with the majority's interpretation of Lujan's taped interview six weeks after the incident, even if it could be read as the majority suggests,[2] the idea put forth is at odds with Plaintiff's theory and the uncontradicted proof she offered. She established through Moulton and Kell that Lujan did sweep the entire store and through Moulton he swept aisle four. That testimony was not impeached. Moreover, Plaintiff never attempted to show Lujan failed to sweep, only that he missed the water when he did sweep. To say a jury question was raised as to whether Lujan "swept aisle four at all" not only changes Plaintiff's theory but ignores case law that unimpeached testimony must be accepted, particularly when offered by the prevailing party. *See Lahr v. Lahr*, 82 N.M. 223, 225, 478 P.2d 551, 553 (1970) (reversible error found where individual's unimpeached testimony was not accepted).

As stated at the outset, in reviewing a verdict the appellate court must consider the evidence in a light most favorable to support the verdict. We disregard unfavorable facts and inferences that could be drawn from those facts. Nevertheless, principles guide us in determining whether the verdict is supported by substantial evidence. We keep in mind that substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion. *Sandoval v. Department of Employment Sec.*, 96 N.M. 717, 718, 634 P.2d 1269, 1270 (1981). In examining the evidence for substantiality, we should give it a reasonable and fair interpretation. We must not fragment the evidence unduly to find support for the verdict. *See State v. Manus*, 93 N.M. 95, 100, 597 P.2d 280, 285 (1979). Also, the inferences to be drawn from facts must be reasonable and logical; guesswork is no substitute. Once we have examined the evidence in support of the verdict, we then must ask whether a rational trier of fact could find for the prevailing party by the greater weight of the evidence. As applied to this case, could a rational trier of fact find that Defendant either knew of the presence of the water or that the water had been on the floor for such a length of time prior to Plaintiff's fall that Defendant should have been aware of its presence and then failed to remove it or warn of its existence? I would hold it could not. Plaintiff has only

2. The transcription of the taped telephone interview between Mr. Huebert and Lujan on July 9, 1984, read in context, indicates that the interviewer at the outset thought Lujan had swept only aisle four. This lack of communication resulted no doubt from Lujan's early answer that he had swept aisle four ten minutes before the accident. In any event, I fail to see how the majority can make a leap from their interpretation to the conclusion that Lujan may not have swept aisle four at all.

shown that there was water on the floor and that maybe she fell on that water but proved none of the essential elements of negligence. The sufficiency of the evidence depends on the amount necessary to satisfy the burden of proof. *See State v. Davis,* 97 N.M. 130, 132, 637 P.2d 561, 563 (1981) (when no rational trier of fact could find guilt beyond a reasonable doubt, jury verdict can be overturned on appeal); *State ex rel. Dep't of Human Servs. v. Williams,* 108 N.M. 332, 335, 772 P.2d 366, 369 (Ct.App.), *cert. denied,* 108 N.M. 273, 771 P.2d 981 (1989). Here Plaintiff's burden was to prove negligence by the greater weight of the evidence; evenly balanced evidence is not sufficient. *See* SCRA 1986, 13–304 (instruction given to jury in this case). In my opinion, the evidence of negligence here was not evenly balanced; it did not exist. The majority holding otherwise, I respectfully dissent.

824 P.2d 1073

Robert FISCHOFF, Plaintiff–Appellee,

v.

Joseph Anthony TOMETICH, Jr., Defendant–Appellant.

No. 11832.

Court of Appeals of New Mexico.

Dec. 16, 1991.

Daniel J. O'Friel, Linda Martinez-Palmer, Law Offices of Daniel J. O'Friel, Ltd., Santa Fe, for plaintiff-appellee.

Richard S. Lees, Scheuer & Engel, P.C., Santa Fe, for defendant-appellant.

OPINION

BLACK, Judge.

FACTS

On September 29, 1980, Plaintiff obtained a judgment against Defendant in the amount of $8,263.25, including costs. Plaintiff filed interrogatories in aid of execution on January 30, 1981. The judgment was docketed on February 2, 1981. Although not reflected in the record before us, Plaintiff alleges he brought a second complaint seeking foreclosure of the judgment lien. On July 25, 1989, Plaintiff obtained the writ of execution which is the subject of the present proceeding.

The district court initially entered an order staying the writ of execution. At the hearing on the motion to quash the writ Defendant argued that NMSA 1978, Section 39-1-20, prohibited the execution because more than seven years had passed since rendition of the 1980 judgment. The district court found Section 39-1-20 "was repealed by implication" by the 1983 amendment to Section 37-1-2 and refused to quash the writ.

THE STATUTES

Section 39-1-20. **Execution after judgment.**

An execution may issue at any time, on behalf of anyone interested in a judgment, within seven years after the rendition or revival of the judgment.

Section 37-1-2. **Judgments.**

Actions founded upon any judgment of any court of the state may be brought within fourteen years from the date of the judgment, and not afterward. Actions founded upon any judgment of any court of record of any other state or territory of the United States, or of the federal courts, may be brought within the applicable period of limitation within that jurisdiction, not to exceed fourteen years from the date of the judgment, and not afterward.

NMSA 1978, § 37-1-2 (Repl.Pamp.1990), *amended by* 1983 N.M. Laws, ch. 259, § 1.

ISSUE

May a judgment creditor execute on a judgment more than seven years after its entry?

DECISION

Repeal by implication is disfavored and legislative enactments, even when arguably contradictory, should be construed, when possible, so as to give effect to both. *Clothier v. Lopez,* 103 N.M. 593, 711 P.2d 870 (1985). We conclude that Section 37-1-2 (amended 1983) allows a judgment creditor to bring an action to revive a judgment for a period of fourteen years after its entry. Pursuant to Section 39-1-20, execution may issue at any time within seven years after the rendition or revival of the judgment.

Because Plaintiff's attempted execution occurred more than seven years after the judgment was rendered, we hold that it is barred unless he brings an action to revive the judgment within fourteen years of the rendition of judgment. We therefore reverse the district court and remand with instructions to enter an order quashing Plaintiff's writ of execution, without prejudice.

THE ARGUMENTS

Defendant argues that Section 39-1-20 is controlling and limits the remedy of execution to the seven-year period following entry of a judgment. Plaintiff argues that, since an execution is an action founded upon a judgment, Section 37-1-2 should govern. Defendant responds that a specific statute should be given effect over a

conflicting general statute. *See, e.g., Matter of Rehabilitation of W. Investors Life Ins. Co.,* 100 N.M. 370, 671 P.2d 31 (1983). Therefore, he concludes the district court erred in failing to quash the writ of execution issued more than seven years after the rendition of the judgment.

Defendant further notes that since the judgment was filed in 1980 and the limitation contained in Section 37–1–2 was not extended until 1983, even if that statute applied, the seven-year statute of limitation in effect at the time of the entry of the judgment would bar Plaintiff's execution nine years later. Plaintiff contends that when the 1983 legislature amended Section 37–1–2 to extend the limitation period to fourteen years, it overlooked the fact that the limitation period on executions was still seven years. Defendant counters that historically the statutory limitation period for execution on judgments has been different than the limitation period for actions on judgments, so the 1983 legislature likely intended to maintain this tradition. While we cannot agree totally with either party, we do agree with Defendant that the solution to the present controversy lies in the historical relationship of these two statutes of limitation and the intent of the 1983 legislature.

EXECUTION IS NOT AN ACTION FOUNDED UPON A JUDGMENT WITHIN THE MEANING OF SECTION 37–1–2

Plaintiff's argument that execution is an action on the judgment and therefore subject to the limitation period of Section 37–1–2 was disposed of long ago in *Crowell v. Kopp,* 26 N.M. 146, 189 P. 652 (1919). Judgment in *Crowell* was entered in 1911 upon a promissory note and foreclosing a mortgage. In 1918 a special master was appointed. The special master proceeded to advertise the property for sale. Defendant moved to vacate the order appointing the special master on the ground that, pursuant to statute, the judgment was dormant after five years and no suit having been brought to revive the judgment, it was "absolutely dead." *Id.* at 147, 189 P. at 652. As in the present case, counsel for the judgment creditor in *Crowell* argued for application of the general statute of limitations for "[a]ctions founded upon any judgment," then governed by NMSA 1915, Section 3347.[1] *Id.* at 149, 189 P. at 653. The supreme court disposed of this contention with language that is likewise dispositive of Plaintiff's argument in the present case:

> Section 3347 has no bearing upon the question. This proceeding is not an action on the judgment any more than an execution to enforce a common-law judgment would be an action on the judgment. The section refers to and controls actions in regular form, brought upon judgments to revive them or to recover upon them or upon foreign judgments, and the like.

Id. at 149–50, 189 P. at 653.

The time in which execution on a judgment may issue is therefore clearly not governed by the limitation period set forth in Section 37–1–2 and we must reject Plaintiff's argument to the contrary.

A JUDGMENT CREDITOR MAY FILE AN ACTION TO REVIVE HIS JUDGMENT, THEN OBTAIN EXECUTION WITHIN SEVEN YEARS FOLLOWING REVIVAL

In *Crowell,* however, the supreme court went on to examine the operation of the more specific limitation statute for execution on judgments. At the time of the *Crowell* decision, and indeed until 1983, the limitation period for execution was controlled by two sequential statutes originally promulgated in the Kearney Code. The *Crowell* court set forth the statutory

1. *Crowell* involved an interpretation of NMSA 1915, Section 3347, the predecessor to Section 37–1–2. Before Section 37–1–2 was amended in 1983, its language was virtually identical to that of NMSA 1915, Section 3347, and the only change in 1983 was to expand the statute of limitations from seven to fourteen years. The word "action" was interpreted in *Crowell* in the narrow sense of "procedures in court." In the broader sense, an execution could be considered an action taken in connection with a judgment. However, we believe *Crowell's* interpretation of the phrase "action on a judgment" controls our interpretation of Section 37–1–2. *See Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973).

scheme then embodied in NMSA 1915, Sections 3085 and 3086:

> Sec. 3085. It shall not be necessary to bring proceedings in any court to revive a judgment having been already obtained before a court of competent jurisdiction in this state except in cases where such judgment had been rendered for a period of five years or more next preceding the issue of final process for the enforcement of the same.
>
> Sec. 3086. An execution may issue at any time on behalf of any one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same.

26 N.M. at 149, 189 P. at 653. The *Crowell* court explained the interaction of these two provisions as follows:

> Sections 3085 and 3086 come from chapter 61, Laws 1887. Previous to the passage of this chapter we had no statute enlarging the time beyond the common-law year and a day within which execution might issue on a judgment. The chapter merely enlarged the time within which execution might issue without first reviving the judgment.

26 N.M. at 150, 189 P. at 653.

Because Section 3086 is the predecessor to Section 39–1–20, *Crowell* dictates that Section 39–1–20 prohibits execution on a judgment more than seven years after its issuance or revival. We believe, however, that Plaintiff is free to pursue his execution remedy through a different procedure. Clearly, Section 39–1–20 prohibits a judgment creditor from merely obtaining a writ of execution more than seven years after rendition of the judgment, *unless that judgment has been revived. See Crowell v. Kopp,* 26 N.M. 146, 189 P. 652 (1919). Nothing in *Crowell,* or Section 39–1–20, prohibits a judgment creditor from seeking execution following revival. A judgment creditor such as Plaintiff may therefore rely upon an action for revival of his judgment. *Bailey v. Great W. Oil Co.,* 32 N.M. 478, 259 P. 614 (1927) (a judgment creditor has the option of executing or filing revival action).

The issue in this case, then, must focus on how long Plaintiff had to file a revival action under Section 37–1–2. Defendant argues that at the time the judgment was entered in 1980, Section 37–1–2 allowed an action to be brought on a judgment for a period of only seven years. Plaintiff therefore should be precluded from relying upon the fourteen-year period created by the 1983 amendment, reasons Defendant. He relies on *Stern & Krauss v. Bates,* 9 N.M. 286, 50 P. 325 (1897), *overruled on other grounds by Lindauer Mercantile Co. v. Boyd,* 11 N.M. 464, 70 P. 568 (1902), to support his contention that, absent an expression of legislative intent to the contrary, amendments to statutes of limitations governing actions on judgments do not apply to existing judgments. While we note dicta in much more recent cases of this court [2] and our supreme court [3] appear to assume that the statute of limitation in effect at the time of the filing of the action is controlling,[4] we do not find it necessary to resolve the question here because we believe the 1983 legislature intended to allow the extended period of Section 37–1–2 to permit execution after revival of existing judgments.

Prior to its repeal in 1983, Section 39–1–19, the companion to Section 39–1–20, allowed a judgment to be revived by filing "a transcript of the docket of the judgment in the office of the county clerk of the county in which the judgment was entered, before the expiration of the limitation upon actions founded upon judgments as provided by Section 37–1–2 NMSA 1978." NMSA 1978, § 39–1–19. The purpose of this statute was to replace common law revival suits

2. *Dolezal v. Blevins,* 105 N.M. 562, 563, 734 P.2d 802, 803 (Ct.App.1987).

3. *Britton v. Britton,* 100 N.M. 424, 429, 671 P.2d 1135, 1140 (1983).

4. Nor do we necessarily agree with Appellant that applying the amendment to permit suit based upon matters which occurred before its effective date is a "retroactive" application. *See Prager v. Prager,* 80 N.M. 773, 461 P.2d 906 (1969).

with the simpler, less expensive act of merely filing a transcript of judgment. *Peerless Ins. Co. v. Davis,* 96 N.M. 726, 634 P.2d 1278 (1981).

In 1983 the act amending Section 37-1-2 also changed this long-standing relationship between revival procedure and the limitation period for execution on a judgment. In that year, the legislature adopted Senate Bill 5, which provided:

> Section 1. Section 37-1-2 NMSA 1978 (being Laws 1891, Chapter 53, Section 2, as amended) is amended to read:
>
> "37-1-2. JUDGMENTS.—Actions founded upon any judgment of any court of the state may be brought within fourteen years from the date of the judgment, and not afterward. Actions founded upon any judgment of any court of record of any other state or territory of the United States, or of the federal courts, may be brought within the applicable period of limitation within that jurisdiction, not to exceed fourteen years from the date of the judgment, and not afterward."
>
> Section 2. REPEAL.—Section 39-1-19 NMSA 1978 (being Laws 1887, Chapter 61, Section 1, as amended) is repealed.
>
> Section 3. SAVING CLAUSE.—Nothing in this act shall be construed to revive a judgment for which the statute of limitation has expired under prior law.

1983 N.M. Laws, ch. 259, §§ 1-3.

The 1983 legislature, then, repealed the expedited statutory procedure for reviving judgments codified in Section 39-1-19 and left judgment creditors to rely exclusively upon the common-law action for revival of judgments. In adopting this provision, the legislature clearly linked the repeal of Section 39-1-19, providing streamlined revival procedure, with the extension of the limitation period for actions founded upon judgments. We believe in repealing the long-standing statutory provision creating a simplified procedure for revival of judgments, the legislature expressed its intent that common-law actions on the judgment be the exclusive means of revival. *Cf. State v. Buck,* 275 N.W.2d 194 (Iowa 1979) (repeal of criminal sentencing statute revived the common law); *State v. General Daniel Morgan Post No. 548 V.F.W.,* 144 W.Va. 137, 107 S.E.2d 353 (1959) (repeal of bribery statute revived the common law).

Moreover, in extending the limitations period in Section 37-1-2 in the same bill abolishing the statutory revival proceeding, we must conclude the legislature intended the longer limitation period to apply to existing judgments. *Cf. Martin v. Luther,* 689 F.2d 109 (7th Cir.1982) (repeal of statutory language to be considered in light of corresponding superseding language of the revised statute); *State v. Clark,* 80 N.M. 340, 455 P.2d 844 (1969) (statutes passed in same session on same subject to be construed as a whole). The language of the savings clause of Senate Bill 5 also suggests the legislature intended the extended limitation periods would apply to existing valid judgments. We believe that, in passing Senate Bill 5, then, the legislature intended to allow judgment creditors the extended fourteen-year period to pursue the more cumbersome common-law remedy. *Cf. State ex rel. Stratton v. Serna,* 109 N.M. 1, 780 P.2d 1148 (1989) (amended language must be read in context of previously existing language and, taken as a whole, it manifests legislative intent).

CONCLUSION

We reverse the district court and conclude that the execution on the 1980 judgment is prohibited by Section 39-1-20 unless and until Plaintiff revives the judgment within the fourteen years allowed pursuant to Section 37-1-2. We thus remand to the district court with instructions to enter an order quashing Plaintiff's writ of execution, without prejudice. Each party shall bear its own costs on appeal.

IT IS SO ORDERED.

APODACA and FLORES, JJ., concur.

824 P.2d 1078

STATE of New Mexico, ex rel. Hal STRATTON, Attorney General, Plaintiff–Appellee,

v.

ALTO LAND & CATTLE COMPANY, et al., Defendants–Appellants.

No. 11333.

Court of Appeals of New Mexico.

Dec. 18, 1991.

Tom Udall, Atty. Gen. and Frank D. Weissbarth, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

S. Thomas Overstreet, S. Thomas Overstreet, P.C., Alamogordo, for defendants-appellants.

OPINION

MINZNER, Judge.

Defendants Alto Land and Cattle Company (Alto) and James Wimberly (Wimberly)

appeal the trial court's orders allowing the attorney general to file a complaint in intervention and, on the basis of that complaint, requiring them to comply with the provisions of the New Mexico Subdivision Act (Act).[1] We conclude there was substantial evidence to support the court's determination that both defendants engaged in conduct in violation of the Act. We also conclude that the attorney general was authorized to seek injunctive relief to compel compliance. However, in addressing the issues raised by defendants, we have become convinced that the order entered requires revision. We think the order entered compels compliance that is not yet proper under the statutory scheme of enforcement.[2] Therefore, we affirm in part and reverse in part and we remand with instructions to enter a revised order in accordance with this opinion.

BACKGROUND.

The land that is the subject of this appeal, the Traylor Ranch, was purchased from Herbert Lee Traylor in 1971 by a group of local investors, including defendant Wimberly, organized into the Lincoln County Real Estate Trust (trust). In 1974, the trust sold the Traylor Ranch to Alto. Wimberly had no interest in Alto at this time, although he later became a shareholder and president.

In 1974, there was in existence a map showing the Traylor Ranch and other contiguous property marked into forty-acre parcels. The Traylor Ranch purchase included sixteen forty-acre parcels. In 1975, Wimberly transferred an additional forty-acre tract to Alto, which sold it on the same day to James L. Wimberly Enterprises, Inc., which transferred its interest on the same date to Wayne Townley. This parcel appears to have been contiguous to the parcels that were part of the Traylor Ranch. In 1978 and 1979, Alto sold eight forty-acre tracts to different purchasers.

According to testimony at trial, potential buyers chose parcels to purchase from the map, and some parcels had been offered for sale through newspaper advertisements. In 1978 and 1979, Alto also sold eight five-acre parcels from one forty-acre tract. The five-acre parcels were advertised for sale and were marketed by Great Western Realty, a real estate company owned by Wimberly. Wimberly testified that some of the land was sold to purchasers by way of real estate contracts. Alto sold the seven remaining forty-acre parcels to Land Barons of Ruidoso in 1982.

In 1985, the Lincoln County attorney filed a complaint for injunctive relief and mandamus against defendants on behalf of the board of county commissioners. The complaint alleged that defendants had violated both the Act and county subdivision regulations. In 1987, the trial court granted the attorney general's motion to intervene, and in 1988 the county's complaint was dismissed with prejudice.

The complaint in intervention alleged inter alia that in 1967, prior to Alto's acquisition of the property, a predecessor-in-interest had divided the property for the purpose of sale or lease into seventeen tracts

1. The Act is presently codified at NMSA 1978, Sections 47–5–9, 47–6–1 to –25, –26, –27, and –28. Enacted in 1973, it was amended in 1979 and again in 1981 following this court's decision in *State ex rel. Anaya v. Select Western Lands, Inc.*, 94 N.M. 555, 613 P.2d 425 (Ct.App.1979). *See generally* Note, *Definitional Loopholes Limit New Mexico Counties' Authority to Regulate Subdivisions,* 24 Nat. Resources J. 1083 (1984) [hereinafter "Note, *Definitional Loopholes*"]. The Act "governs subdivision activity outside municipal boundaries.... grants the counties the power to adopt county subdivision regulations, to approve county subdivision plats, and to enforce the provisions of the Act." *Id.*

2. As indicated in note 1, the legislature first granted counties the power to govern subdivision activities in 1973. *See* 1973 N.M. Laws, ch. 348. The Act was subsequently amended in 1979, *see* 1979 N.M. Laws, ch. 172, and again in 1981. *See* 1981 N.M. Laws, ch. 148. The thrust of the 1981 amendments was "an attempt to eliminate the statutory construction problems encountered in *Select Western.*" *See* Note, *Definitional Loopholes, supra* at 1091. The 1979 Act had redefined the term "subdivision" to require a division of land surface into five parcels within three years, *see* 1973 N.M. Laws, ch. 348, § 1; *see also* NMSA 1978, § 47–6–2(I) (Repl.Pamp. 1982). It also revised the provision containing the civil enforcement powers given certain public officials. *See* 1979 N.M.Laws, ch. 172, § 3; *cf.* NMSA 1978, § 47–6–26 (Repl.Pamp.1982) (indicating no change occurred in 1981).

of forty acres each, and that "[t]hese divisions were part of the creation by Ruidoso Land Sales, Inc. of a 1320–acre subdivision consisting of 33 tracts of 40 acres each." The complaint in intervention also alleged that when Alto acquired the property, Wimberly knew that the property had been illegally subdivided; from 1975 to 1982 Alto sold sixteen of the seventeen tracts; in 1978 and 1979 it sold the seventeenth tract in eight five-acre parcels; and in "resubdividing, offering for sale and selling" the seventeen tracts, Alto and Wimberly failed to comply with specific requirements of the Act, as well as the county subdivision regulations.

After a bench trial, the trial court concluded that defendants were in violation of both the Act and county subdivision regulations. The court entered an order in early 1989 requiring defendants to comply with the Act and the current county subdivision regulations with respect to all property previously sold or now held by them and to take certain specific steps in order to comply.

The order contains four paragraphs. The first paragraph directs defendants to comply "with each requirement" of the Act and current county subdivision regulations with respect to all property previously sold or now held by them and lists five specific requirements, including filing a plat approved by the board, filing a disclosure statement, "submitting, obtaining approval of, and constructing the subdivision in conformity with a terrain management plan, a surface drainage plan, a subsurface drainage plan, a water availability plan and a liquid waste management plan," and constructing roads on a schedule approved by the board. The second paragraph directs that the process be initiated within sixty days and provides that failure to comply will entitle the state to proceed under SCRA 1986, 1–070, to obtain a money judgment "and/or issuance of a writ of attachment against the property of [defendants] to cover the costs of performance by a person appointed by the court." The third paragraph provides that all current owners of property within the subdivision be given an opportunity to sign the proposed plat, but that their failure to do so shall not prevent the board from acting. The fourth paragraph provides as follows: "Until such compliance has taken place, ALTO and WIMBERLY be enjoined from offering for sale, selling, or otherwise transferring any further interest in property held by them within the aforementioned Sections."

On appeal, defendants contend that the trial court erred in granting the motion to intervene on four grounds: (1) lack of a hearing; (2) insufficient basis for intervention under SCRA 1986, 1–024; (3) expiration of the limitations period provided in NMSA 1978, Section 37–1–4 (Repl.Pamp. 1990); and (4) after the dismissal of the county's first amended complaint with prejudice, that portion of the complaint in intervention addressing the alleged violation of county subdivision regulations should have been dismissed as previously decided. Defendants have also argued (5) that the current owners of the property are indispensable parties; (6) that the relevant county regulations are the regulations that were in force at the time of the sales; (7) that the court's order seeks to require the county commission to exercise its discretion, which is an inappropriate use of mandamus; (8) that the injunctive relief sought is moot, because defendants no longer own any of the land in question; (9) that no subdivision was created, and therefore the Act and the county regulations did not apply; (10) that the trial court failed to exercise independent judgment in adopting all of the findings and conclusions requested by the state; and (11) that the trial court erred in holding Wimberly accountable for Alto's acts.

We address the issues in two groups. The first group includes issues (9), (10), and (11). These issues are answered by determining that there is sufficient evidence to support the court's findings and conclusions that there had been a violation of the Act. The second group includes the remaining issues. These issues all concern the attorney general's authority to seek the relief granted. With one exception, we understand the parties to have agreed that the 1973 version of the Act applies, and

therefore we have cited to the 1973 session laws throughout most of the opinion.

SUFFICIENCY OF THE EVIDENCE.

The parties agree that Judge (later Justice) Walters' opinion in *State ex rel. Anaya v. Select Western Lands, Inc.*, 94 N.M. 555, 613 P.2d 425 (Ct.App.1979) contains the relevant test. Consequently, although the decision to adopt that test was not concurred in by two judges and thus was not a decision of this court, *see Casias v. Zia Co.*, 94 N.M. 723, 725, 616 P.2d 436, 438 (Ct.App.1980) (quoting NMSA 1978, § 34–5–11 (" 'Decisions of the court shall be in writing with the grounds stated, and the result shall be concurred in by at least two judges.' ")), we apply that test to the facts of this case. The threshold issue is whether a subdivision was created.

Based on the way the attorney general framed his complaint in intervention, we believe he may have intended to prove initially that a predecessor in interest created a type-four subdivision, *see* 1973 N.M. Laws, ch. 348, § 2(N) (a "subdivision containing twenty-five or more parcels, each of which is ten acres or more in size"), and that Alto and Wimberly could be compelled to comply with the Act and the county subdivision regulations because they sold land within that subdivision. *See id.* § 2(H) (" 'subdivider' means any person creating a subdivision, *or* any person engaged in the sale or lease of subdivided land" (emphasis added)); § 2(I). The first count of the complaint, however, also alleged that in making sales, Alto and Wimberly failed to comply with requirements applicable to type-three subdivisions. *See id.* § 2(M) (a "subdivision containing not less than five but not more than twenty-four parcels, any one of which is less than ten acres in size"). At trial, the attorney general appeared to rely solely on the evidence of sales by Alto between 1975 and 1982 and advised the court that a type-three subdivision was at issue. After the hearing, the trial court made no findings or conclusions as to the type of subdivision that had been created, when it was created, or by whom. The record indicates that none were requested. As a result, the precise basis of the trial court's conclusion that defendants had violated the Act is uncertain. *Cf. State ex rel. Anaya v. Select W. Lands, Inc.*, 94 N.M. at 557, 613 P.2d at 427 (trial court found a type-four subdivision had been created).

At oral argument, however, the state indicated that it was relying on its proof as sufficient to show a violation as a result of a type-three subdivision created by Alto and Wimberly. We therefore assume that the state was attempting to prove that the sixteen forty-acre parcels sold between 1975 and 1982 should be included with the eight five-acre parcels sold in 1978 and 1979 as part of a single subdivision.

The state contended at oral argument that the dispositive issue in determining whether a subdivision was created in this case is whether more than five lots were sold in accordance with a predetermined plan. *See* ch. 348, § 2(I) (" 'subdivision' means an area of land within New Mexico, the surface of which has been divided by a subdivider into five or more parcels for the purpose of sale or lease"). We agree.

Under *Select Western*, "[t]here must be proof that at some time prior to alienation, there *has been* a division of one parcel into five or more, and that the dividing *was done* so that the smaller parcels could be sold or leased." *Id.* at 558, 613 P.2d at 428 (emphasis in original). "The owner must manifest by some overt conduct a clear indication that division has already taken place before the parcels are offered for sale." *Id.* at 559, 613 P.2d at 429. In *Select Western*, Judge Walters concluded that there was no evidence that the owners of the 3400–acre tract known as Gene West Ranch had ever chosen to divide that tract and sell it in more than five parcels. Rather, the evidence showed only that from time to time a portion of the tract was sold. Under these circumstances, the land remaining in *Select Western*'s ownership after each sale fell within the statutory exception from the definition of a subdivision for "land retained by the subdivider after subdivision but which has not been divided for a subdivision[.]" 1973 N.M. Laws, ch. 348, § 2(I)(1).

Here, on the other hand, there was evidence of a predetermined plan to sell the land acquired in 1974 in more than five parcels. In fact, the trial court found that "[a]t the time of the conveyance [to Alto in 1974], WIMBERLY and ALTO procured a plat of the area showing the location of [sixteen forty-acre] tracts." This finding has not been challenged, and we accept it as true. *City of Roswell v. Reynolds*, 86 N.M. 249, 252, 522 P.2d 796, 799 (1974). In light of that finding, the evidence of subsequent sales in 1978 and 1979 was sufficient to support an inference of an intent to divide the tract acquired in 1974 into five or more parcels for the purpose of sale or lease. There was evidence that the lots were advertised by a company in which Wimberly had the controlling interest, and there was evidence that the lots had been identified with stakes as well as drawn on the map.

Defendants have summarized conflicting evidence on the issue of their intent to create a subdivision. For example, they note that one of the purchasers in 1978 specifically inquired whether the lot he purchased was within a subdivision and was told it was not; they also note that two of the witnesses for the state were licensed real estate brokers who had participated in selling the lots and who testified that no subdivision had been created.

We believe the evidence presented an issue of fact for the trial court, which resolved that issue against defendants. Because there was substantial evidence to support that decision, we will not disturb it. *See generally Tapia v. Panhandle Steel Erectors Co.*, 78 N.M. 86, 89, 428 P.2d 625, 628 (1967) (fact that there may have been contrary evidence that would have supported different verdict does not permit reviewing court to weigh evidence).

Wimberly also has argued that the trial court erred in finding him individually liable on these facts. We disagree. The trial court found that Wimberly sold an additional forty-acre tract to Alto in 1975 and that each of the forty-acre tracts sold was "divided and designated in advance of sale." The trial court also found that Wimberly was the sole shareholder of Great Western Realty and that he "directed and controlled [it] for the purpose of brokering the sale of parcels of land in the area encompassed by the State's complaint." There was substantial evidence to support these findings. Thus, whether the trial court intended to hold that Wimberly and Alto had created a subdivision or sold property within one, *see* 1973 N.M. Laws, ch. 348, § 2(H), the court's findings are sufficient to support a conclusion that both defendants engaged in conduct in violation of the Act.

Finally, we are not persuaded that the findings and conclusions entered reflect a lack of independent judgment. The relevant findings are supported by the evidence the record contains. *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 122, 597 P.2d 290, 307 (1979). We note, further, that the copy of the findings tendered by the state contains handwritten additions and changes evidently made by the trial court and that each finding and conclusion is separately marked "Given." Thus, there is no evidence that the fact finder failed to exercise independent judgment and no reason to remand. *Cf. Nunez v. Smith's Management Corp.*, 108 N.M. 186, 188, 769 P.2d 99, 101 (Ct.App.1988) (hearing officer's verbatim adoption of findings and conclusions proposed by prevailing employer did not require remand where hearing officer made four findings not proposed by employer and there was substantial support in the record for the findings worker specifically challenged). Under these circumstances, no reversible error has been shown. We next address the propriety of the order entered on the findings and conclusions made.

PROPRIETY OF THE ORDER ENTERED.

1973 New Mexico Laws, chapter 348, Section 26 (the original version of Section 26) contains the civil enforcement powers initially given to state and local officials. The original version of Section 26 reads as follows:

> Section 26. INJUNCTIVE RELIEF—MANDAMUS.—The board of county

commissioners, the district attorney or the attorney general may apply to the district court to have a subdivider enjoined from selling or leasing land within the affected subdivision until he complies with the terms of this act. In addition, the district attorney or the attorney general may bring mandamus to compel compliance with the provisions of this act. However, nothing in this section shall be construed as limiting any common law right of any person in any court relating to subdivisions.

The first sentence of the original version of Section 26 allowed the board of county commissioners, the district attorney, or the attorney general to apply to the district court to have a subdivider enjoined from selling or leasing land within the affected subdivision until the subdivider has complied with the Act. In addition, the second sentence of the original version of Section 26 allowed the district attorney or the attorney general to seek mandamus to compel compliance with the Act.

In 1979, the legislature revised the second sentence of the original version of Section 26. The revision authorized the board to bring mandamus to compel compliance. The revision also authorized the attorney general, the board, and the district attorney to seek injunctive relief to compel compliance. *Cf. State v. Heck,* 112 N.M. 513, 817 P.2d 247 (Ct.App.1991) (decided under current version of Act; the state sought injunctive relief against further sales until defendants obtained subdivision approval).[3]

In determining the propriety of the order entered, the threshold issue on appeal is the meaning of the term "mandamus" in the second sentence of the original version of Section 26. At oral argument, the state asked this court to consider affirming the trial court's order on an alternative ground in the event that we were not prepared to construe the term "mandamus" as it had argued we should do. The state argued, in the alternative, that when the legislature amended the original version of Section 26 in 1979, it authorized the kind of relief the trial court ordered and that because the change involved a change in remedy rather than a change in substantive rights, duties, and obligations, the later version of Section 26 can be applied in this case, or retrospectively. *See Hale v. Basin Motor Co.,* 110 N.M. 314, 319, 795 P.2d 1006, 1011 (1990) ("Remedial statutes are applied retroactively"). We first address the scope of the term "mandamus" under the original version of Section 26.

A. The Scope of Mandamus Under the Original Version of Section 26.

In construing the term "mandamus," we try to give effect to the intent of the legislature. *Orcutt v. S & L Paint Contractors, Ltd.,* 109 N.M. 796, 798, 791 P.2d 71, 73 (Ct.App.1990). In that effort, we look primarily to the language used in the statute. *Id.* We give the words used in the statute their ordinary meaning unless the legislature indicates a different intent and construe the statute in light of the purpose for which it was enacted. *State v. Rodriguez,* 101 N.M. 192, 194, 679 P.2d 1290, 1292 (Ct.App.1984).

Mandamus is a remedy that developed historically as a means to compel a specific kind of behavior, i.e., "compliance with a ministerial duty of an office." D. Dobbs, *Handbook on the Law of Remedies* § 2.10, at 112 (1973). In New Mexico, mandamus has typically been used as it historically evolved. In this jurisdiction, our supreme court has said that mandamus is the proper remedy where a public official refuses or delays to act and that a court will compel action in response to an action seeking a

3. Section 47–6–26 reads as follows:

47–6–26. Injunctive relief; mandamus.

The board of county commissioners, the district attorney or the attorney general may apply to the district court to have a subdivider enjoined from selling or leasing land within the affected subdivision until he complies with the terms of Sections 47–5–9 and 47–6–1 through 47–6–28 NMSA 1978. In addition, the board of county commissioners, the district attorney or the attorney general may seek injunctive relief or bring mandamus to compel compliance with the provisions of this act. However, nothing in this section shall be construed as limiting any common-law right of any person in any court relating to subdivisions.

writ of mandamus if the law requires the official to act in a certain way. *See Lovato v. City of Albuquerque,* 106 N.M. 287, 289, 742 P.2d 499, 501 (1987); *see generally* Dumars & Browde, *Mandamus in New Mexico,* 4 N.M.L.Rev. 155 (1974) (providing an overview of the New Mexico statute). This view of mandamus is consistent with its use in other jurisdictions. *See, e.g., Mobile Community Action v. Hanke,* 411 So.2d 783 (Ala.1982); *Beccia v. City of Waterbury,* 185 Conn. 445, 441 A.2d 131 (1981); *County of Allegheny v. Commonwealth,* 507 Pa. 360, 490 A.2d 402 (1985); *Martin v. Hatfield,* 251 Ga. 638, 308 S.E.2d 833 (1983); *Hill v. Butler,* 107 Ill.App.3d 721, 63 Ill.Dec. 385, 437 N.E.2d 1307 (1982).

Typically, then, a party brings an action of mandamus to compel performance of a public duty by a public official, *Martin v. Hatfield,* or a public or quasi-public duty owed by an individual. *Carroll v. American Agricultural Chem. Co.,* 175 Ga. 855, 167 S.E. 597 (1932). *Cf. Mobile Community Action v. Hanke* (nonprofit corporation operated as an anti-poverty organization and funded by federal government could be required by writ of mandamus to seat representatives of public sector designated by county commissioners to serve on board of directors as required under bylaws). The notion of a quasi-public duty may be a broad one. For example, *Parks v. Board of County Commissioners,* 11 Or.App. 177, 501 P.2d 85 (1972), held that mandamus would lie against a builder who had constructed buildings in violation of a zoning ordinance and who had intervened in a mandamus proceeding brought initially against a board of county commissioners. However, a writ of mandamus is available only to one who has a clear legal right to the performance sought; it is available only in limited circumstances to achieve limited purposes. *Beccia v. City of Waterbury; see also County of Allegheny v. Commonwealth; Hill v. Butler; cf. Parks v. Board of County Comm'rs* (court held that a statute authorizing the use of mandamus to remove an unlawfully constructed building meant at least that the person responsible for constructing the buildings had a duty to remove them).

We recognize that there are New Mexico statutes authorizing the use of mandamus in circumstances that would appear to be applicable only to private individuals. *See* NMSA 1978, §§ 59A-2-11(A) & 59A-3-7(B) (Repl.Pamp.1988) (insurance code); NMSA 1978, § 60-13-53 (Repl.Pamp.1989) (reconstruction licenses); NMSA 1978, § 60-14-18 (Repl.Pamp.1989) (manufactured housing). Moreover, in *Gabaldon v. Sanchez,* 92 N.M. 224, 226, 585 P.2d 1105, 1107 (Ct. App.1978), this court stated in dictum that a subdivider "should be compelled to comply with the [New Mexico Subdivision] Act. This result can be obtained if plaintiffs will convince either the district attorney of Valencia County or the attorney general to proceed for injunctive relief or mandamus." This language suggests the court assumed that mandamus would lie against a private subdivider.

We note, however, that Section 26 uses restricted language. The four statutes cited above as apparently permitting mandamus against the regulated party all use rather expansive language such as "mandamus or any other appropriate process," *see* §§ 59A-2-11(A) & 59A-3-7(B), or "mandamus or any proper legal proceeding," *see* §§ 60-13-53 & 60-14-18. Further, in the original version of Section 26, the legislature was quite specific about the injunctive relief that was authorized against "a subdivider." After specifying who was subject to such relief ("a subdivider"), Section 26 specifies what he or she may be enjoined from doing ("selling or leasing land within the affected subdivision"), and for how long he or she can be so enjoined ("until he complies with the terms of this act").

We conclude that the legislature's intent in authorizing mandamus under the original version of Section 26 is unclear. We assume but need not decide that, when the legislature enacted the original version of Section 26, it used mandamus in its usual meaning as a remedy available against public and some quasi-public officials and limited the use of injunctive relief to that provided in the first sentence. *Cf.*

Parks v. Board of County Comm'rs (statute authorized use of mandamus to prevent, abate, or remove the unlawful construction). We agree with the state's alternative argument that Section 47–6–26 should be applied retrospectively.

B. The Applicability of Section 47–6–26.

In *Hale,* the supreme court stated that "[s]ubstantive duties, rights, and obligations arise under and are determined by the law in effect at the time of the conduct in question," *Id.,* 110 N.M. at 319, 795 P.2d at 1011, but noted that "[s]ubstantive rights are to be distinguished from procedural or remedial rights that prescribe methods of obtaining redress or enforcement of substantive rights." *Id.*

The revision in 1979 is indistinguishable from the remedial provision applied retrospectively in *Hale.* In *Hale,* those who had been given a private cause of action under the Unfair Trade Practices Act had been given the additional right to collect treble damages. The party liable for treble damages had been liable under prior law for actual damages, and there was no change in the nature of the underlying liability. Here, also, the statutory revision authorized the use of a mandatory injunction against a party that was previously subject to liability for conduct contrary to the Act. Although the revision in enforcement powers occurred in conjunction with a redefinition of the term "subdivision," *see generally* 1973 N.M. Laws, ch. 348, § 2(I); NMSA 1978, § 47–6–2(I) (Repl.Pamp.1982) (the term "subdivision" was first defined to require division of land surface into five or more parcels and later defined to require a division into five or more parcels that occurred within a period of three years), for purposes of this appeal there was no significant change in the nature of a developer's liability.

We conclude that Section 47–6–26 should be applied retrospectively. As indicated below, however, we also conclude that the order entered contained provisions that were not appropriate under Section 47–6–26, so that the order must be revised on remand.

C. Revisions in the Order Required on Remand.

The state argues in effect that the trial court ordered defendants to do those acts that would be required of them had they filed a plat and such an order is a proper mandatory injunction under the amended version of Section 26. *See* § 47–6–26. We have had some difficulty in determining whether that is an appropriate characterization of the order.

Under the Act, "[t]he requirements imposed upon the developer vary according to the type of subdivision. Higher standards are imposed where there is a potential of greater density and adverse impact on the environment." J. Bingaman, *Subdividing Land in New Mexico: A Guide for Subdividers, Land Use Administrators, Public Officials and Land Purchasers* at 68 (Nov. 1980) [hereinafter *Subdividing Land* (1980)]. Here, the subdivision that was created includes no more than twenty-four parcels, and the order compels performance the Act itself imposed only on a subdivider of a larger subdivision.

For example, the order requires disclosure, a requirement imposed by the Act on a subdivider of a type-one, type-two, or type-four subdivision. *See* 1973 N.M. Laws, ch. 348, § 17. All three types are defined as subdivisions containing twenty-five or more parcels. *See id.* §§ 2(K), (L), & (N).

Further, the order requires construction in conformity with certain plans such as a terrain management plan, a water availability plan, and a liquid waste management plan. Under the Act, however, these requirements are imposed only on the subdivider of a type-one or type-two subdivision. *See id.* § 11(A). A type-one subdivision is defined as a "subdivision containing five hundred or more parcels, any one of which is less than ten acres"; a type-two subdivision is a subdivision of "not less than twenty-five but not more than four hundred ninety-nine parcels, any one of which is less

than ten acres in size." *See id.* §§ 2(K), (L).

As the attorney general suggested at oral argument, perhaps the state requested such specificity in the order only to ensure that all relevant issues were addressed when defendants prepared the requisite plat for board consideration and never intended to insist that each issue be addressed in a particular way. Alternatively, the order may reflect dual purposes in intervening: (1) to represent the county, and (2) to exercise the attorney general's independent enforcement power. As the case progressed, however, the county's complaint was dismissed with prejudice. Further, the state has conceded that the board "may waive any or all of the requirements imposed under current subdivision regulations."

On balance, then, the attorney general appears to have sought and obtained an order on its own behalf that required defendants to do all that might be required of them by the board prior to approving any plat they submitted. On the record before us, we are not satisfied that we can characterize the order as a proper exercise of power under Section 47–6–26.

By way of comparison, in analyzing the enforcement powers currently available under the Act, the Office of the Attorney General has commented:

> The 1978 amendment inserted "Board of County Commissioners" and "seek injunctive relief" in the second sentence. If the Board has approved a schedule of compliance tendered by the subdivider for the construction of a water system, waste system or roads, and a subdivider has not complied with these requirements, the Board, the District Attorney or the Attorney General has authority to compel the subdivider to complete these facilities. Thus, the Board, the District Attorney or the Attorney General can not only enjoin further sales but can impose the affirmative duty upon the subdivider to construct the facilities promised by the subdivider in gaining approval of his plat. These enforcement powers appear to be limited to the Board, the District Attorney or the Attorney General and may not extend to private parties. The Board may also utilize the remedies in this section to compel a subdivider to provide it with the needed information to make its determination on whether to approve or disapprove a proposed subdivision.

Subdividing Land (1980), *supra*, at 110–11.

Under this interpretation of Section 47–6–26, the attorney general and the district attorney are authorized to seek injunctive relief to compel performance required by the board. In addition, the attorney general, the district attorney, and the board may compel performance promised by the subdivider in gaining approval of the plat.

We do not read the passage from the manual as an attempt by the attorney general to exhaustively set forth all powers provided by the Act. In listing some of the authority, the manual does not mean to suggest that other authority was not provided. Indeed, by stating that the Act provides certain powers, the manual implies that other powers are also provided. In particular, we do not see how one could read the Act as permitting the board "to compel a subdivider to provide it with the needed information to make its determination on whether to approve or disapprove a proposed subdivision," but not permitting the board or the attorney general to compel a subdivider to prepare a plat and submit it to the county for approval.

Nevertheless, we think the only requirements that the order should have imposed on these defendants at this point in time are those necessary to put the board in a position to consider and act upon a proposed plat. As Amy Landau has pointed out in her New Mexico Law Review note, under the Act:

> The primary responsibility for subdivision approval remains with the county. Unless the county commissioners have approved a plat, the sale or lease of land is illegal, improvements to the land may be prohibited, and building permits may be withheld. By requiring compliance with the Act and regulations prior to plat

approval, the county can condition development upon a subdivider's specific performance of construction requirements based on local needs and environmental factors. [Footnotes omitted.]

Note, *Definitional Loopholes Limit New Mexico Counties' Authority to Regulate Subdivisions,* 24 Nat. Resources J. 1083, 1086 (1984). Thus, the conduct the state might compel at this stage includes the preparation of a certified plat, its acknowledgement in accordance with the Act, and submission to the board for approval with information required by the board. *See* 1973 N.M. Laws, ch. 348, §§ 3, 4, 8(A) & 12(B). We note that the county clerk may not accept the plat for filing until it has been approved by the board. *See* 1973 N.M. Laws, ch. 348, § 6.

We also agree with defendants that the current county subdivision regulations are not the applicable regulations. The regulations that should be applied in this case regarding any particular parcel are the regulations in effect at the time that parcel was sold. That is because we view the injunctive relief authorized in Section 47–6–26 as intended to give a purchaser the benefit it would have been entitled to had the subdivider complied with the Act and the regulations in effect at the time of the sale. We do not understand the legislature to have intended to give the purchaser a windfall and to impose a penalty on the subdivider by granting the purchaser benefits and imposing requirements on the subdivider enacted after the sale.

For the foregoing reasons, we conclude the trial court's order granted relief that was not authorized. However, because we have determined that the trial court's determination that a violation of the Act occurred is supported by substantial evidence, we reverse the order entered but remand for entry of a revised order consistent with this opinion. We now address defendants' remaining issues.

D. Remaining Issues.

With respect to the lack of a hearing on the motion to intervene, the record indicates that the trial court heard argument on the matter at trial. Defendants contend that they did not receive prior notice, but because they had raised the issue initially, we are not persuaded that the lack of notice substantially prejudiced them. Under these circumstances, we conclude any error was harmless. *See* SCRA 1986, 1–061.

Regarding the basis for intervention, Rule 1–024(B)(2) authorizes the trial court to permit intervention "when an applicant's claim * * * and the main action have a question of law or fact in common." Here, the state's complaint raised the same questions of fact and law under the Act that were raised in the county's complaint, and therefore the decision to permit intervention was within the court's discretion.

With respect to defendants' statute of limitations argument, we agree with the state that its complaint in intervention was not barred by the four-year statute of limitations provided in Section 37–1–4. *See generally Board of Educ., School Dist. 16 v. Standhardt,* 80 N.M. 543, 549, 458 P.2d 795, 801 (1969), which says:

> It appears * * * to be the general rule that statutes of limitations do not run against the state unless the statute expressly includes the state or does so by clear implications, but will run against county and other political subdivisions, including school districts, unless such may be deemed to be an arm of the state because of the particular governmental functions or purposes involved.

Defendants have argued that "[t]he county of Lincoln's actions are barred by Section 37–1–4 * * * by virtue of" NMSA 1978, Section 37–1–19 (Repl.Pamp.1990), which says that limitations periods bar actions by bodies "corporate or politic" except when otherwise expressly declared, and that in this case the complaint in intervention is also barred, because the county "is the real party in interest in an action to enforce an 'alleged' violation of its county subdivision regulations." *See* SCRA 1986, 1–017(A) ("Every action shall be prosecuted in the name of the real party in interest").

We disagree with defendants' premise that there was only one "real party in interest" and need not address the argu-

ment that Section 37-1-4 barred the county's complaint. *Cf. Board of Educ., School Dist. 16 v. Standhardt* (in suit by board of education on obligation owed by supplier, board was real party in interest and as such was barred by four-year statute of limitations). We have concluded that Section 47-6-26 authorized the attorney general to seek injunctive relief to compel compliance with the Act. As a result, the state was a real party in interest. "A party authorized by statute to maintain an action is a real party in interest." 3A J. Moore, J. Lucas & G. Grotheer, Jr., *Moore's Federal Practice* ¶ 17.14, at 17-125 (1991). *See also* SCRA 1986, 1-017(A).

We also agree with the state that the court's dismissal with prejudice of the county's complaint did not affect the state's complaint in intervention. We are not certain that defendants raised this issue at trial other than in the context of their statute of limitations argument. On appeal they have argued in effect that in dismissing the county's complaint with prejudice, the court necessarily resolved the issues raised by the complaint in intervention. If this argument was not raised at trial, no error was preserved for appellate review. *See* SCRA 1986, 12-216(A). In any event, the county's complaint was dismissed because the attorney general intervened. Although the written order dismissing the county's complaint was filed in December 1988, the court granted the state's oral motion to dismiss the county's complaint as trial began. The record indicates that the court was asked to dismiss the county's complaint because the complaint in intervention raised the same issues. Under these circumstances, there is no basis for a conclusion that dismissal of the county's complaint resolved the issues on the merits.

Even if the state and the county could be identified in some sense as a single party, the district court manifested a clear intention on the record that the dismissal against the county did not bar the state's claim, *see Restatement (Second) of Judgments* § 20 cmt. i (1982), and implicitly reserved the state's right to maintain its action by proceeding to try the action. *Cf. id.* § 26(1)(b) (when court in first action "has expressly reserved the plaintiff's right to maintain the second action," the general rule concerning splitting does not apply to extinguish the plaintiff's claim). In the context of this case, the dismissal by the county did not preempt the state's cause of action. *See id.* § 41 cmt. d; *cf. Adams v. United Steelworkers of America, AFL-CIO*, 97 N.M. 369, 372-74, 640 P.2d 475, 478-80 (1982) (stipulated dismissal with prejudice of workers' claim against employer for wrongful discharge has no collateral estoppel effect with respect to workers' claim against union for breach of duty to fairly represent him if worker did not have an opportunity to fully and fairly litigate the wrongful discharge claim against employer).

Defendants have also argued that the current owners of the property are indispensable parties. Defendants based this contention on the Act's requirement that every plat contain a statement "that the land being subdivided is subdivided in accordance with the desire of the owner of the land," that the plat be acknowledged "by the owner or his authorized agent," and that every plat submitted to the county be accompanied by an affidavit of "the owner or his authorized agent." *See* 1973 N.M. Laws, ch. 348, § 4. Defendants argue that the present owners must be joined because by statute they must participate in preparation of the plat. Here, however, the district court's order has the purpose of requiring to be done what should have been done prior to past sales. What should have been done is that Alto or Wimberly should have prepared a plat, together with the appropriate statement and acknowledgement, and submitted it to the board. *Id.* As we construe the appropriate scope of the order, we do not think the trial court erred in rejecting the argument that the present owners are indispensable parties. We conclude that this argument has no merit. *See C.E. Alexander & Sons, Inc. v. DEC Int'l, Inc.*, 112 N.M. 89, 91, 811 P.2d 899, 901 (1991) (court has discretion in applying a balancing test to determine whether the suit can continue without the party).

The evidence showed that the last parcels were sold in 1982. Defendants have argued that, under these circumstances, the attorney general's request for injunctive relief, under the fourth paragraph of the order, is moot. In *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979) (citation omitted), the Supreme Court held that an action for injunctive relief is mooted only if (1) " 'there is no reasonable expectation * * *' that the alleged violation will recur * * *, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953)). Here there was evidence that some of the property had been sold on real estate contract, and therefore the likelihood of the property reverting to defendants is unclear. In addition, it is undisputed that defendants have made no attempt to comply with the Act. We conclude that, on the record before us, we cannot say the issue of injunctive relief under the first sentence of the original version of Section 26 is moot.

CONCLUSION.

The trial court's findings are supported by substantial evidence and justify its conclusions that defendants have violated the Act. The complaint in intervention appears to have been drafted in reliance on a power of enforcement that the original version of Section 26 does not contain. However, Section 47–6–26 is applicable retrospectively, and under that section the attorney general was authorized to seek injunctive relief to compel defendants' compliance with those provisions of the Act that will enable the board to act in approving or rejecting the plat defendants must prepare and submit. Certain portions of the first paragraph of the order are not appropriate subjects of injunctive relief at this time, because no plat has as yet been submitted, and the board has not yet acted. Therefore, the trial court's order is reversed, and the case is remanded with instructions to enter an amended order consistent with this opinion. No costs are awarded.

IT IS SO ORDERED.

BIVINS and HARTZ, JJ., concur.

825 P.2d 221

STATE of New Mexico, Plaintiff-Appellee,

v.

Larry CANDELARIA, Defendant-Appellant.

No. 12623.

Court of Appeals of New Mexico.

Sept. 12, 1991.

Tom Udall, Atty. Gen., Max Shepherd, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Amme M. Hogan, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

APODACA, Judge.

Defendant appeals the district court's order placing him on probation for a period of eighteen months, as a result of his conviction for a petty misdemeanor. He contends the relevant statutory scheme does not permit the length of probation to vary depending on whether a defendant is sentenced in district court or a lesser tribunal. We agree and reverse the district court's sentencing order.

BACKGROUND

Defendant was indicted by a grand jury for several crimes, which included felonies and misdemeanors. Initially, he pled not guilty to all counts of the indictment. Later, however, he pled guilty to the charge of possession of less than one ounce of marijuana, a petty misdemeanor, and the

state agreed to dismiss all remaining charges. He was sentenced to fifteen days in the county jail, the maximum period of incarceration provided by the applicable statute. The district court suspended the sentence and placed defendant on supervised probation for eighteen months.

At the sentencing hearing, defendant objected to the length of the probation period. He argued that the district court would have no authority to enforce the terms of the probation once defendant had been on probation for fifteen days, the length of the underlying suspended sentence. *See State v. Encinias,* 104 N.M. 740, 726 P.2d 1174 (Ct.App.1986). In response, the district court stated that it would use its contempt powers to enforce the terms of the probation, should defendant fail to comply with those terms once the underlying sentence of fifteen days expired. In addition to appealing the district court's imposition of probation, defendant asks us to address the court's threatened use of contempt powers. Because we are reversing the district court's sentence, we need not address the contempt issue.

DISCUSSION

Defendant contends the pertinent statutes permit only a period of supervised probation not to exceed fifteen days, the maximum amount of time he could have been incarcerated for the misdemeanor. See NMSA 1978, § 30-31-23(B)(1) (Repl.Pamp.1989). To address defendant's contention, we must examine the applicable statutes and determine the legislative intent. These statutes are NMSA 1978, Sections 31-19-1(C) (sentencing authority for misdemeanors), 31-20-5(A) (probation requirements where sentence is suspended or deferred), and 31-20-6(C) (authorized length of probation where sentence is suspended or deferred) (Repl.Pamp.1990).

Section 31-19-1(C) provides generally that, when a court has suspended or deferred a sentence based on a misdemeanor conviction, the court shall place defendant "on supervised or unsupervised probation for all or some portion of the period of deferment or suspension." Section 31-20-5(A) states that "when the magistrate, metropolitan or district court has deferred or suspended sentence, it shall [place] the defendant on probation for all or some portion of the period of deferment or suspension if the defendant is in need of supervision," provided that the total period of probation does not exceed five years for district courts, and the total period of probation for metropolitan or magistrate courts does not exceed the maximum allowable incarceration time for the offense. Finally, Section 31-20-6(C) authorizes a district court to place a defendant on supervised probation for a term not to exceed five years.

There are at least two possible interpretations of the interplay between these statutes. Section 31-19-1(C) could simply be a *minimum* requirement that a misdemeanant *must be placed* on some type of probation if part or all of the sentence is suspended, since the section states a court *shall* impose probation for part or all of a suspended sentence. Sections 31-20-5(A) and 31-20-6(C) would then provide the maximum lengths for such probation—five years if the sentencing court is the district court and fifteen days (the maximum period of incarceration) if the sentencing court is a magistrate or metropolitan court. On the other hand, the language in Section 31-19-1(C) (requiring that a court impose probation for part or all of the suspended or deferred term) could be interpreted as a *maximum* probationary period for any misdemeanor. That is, under this view, no court could impose a longer probation period than the length of the suspended or deferred sentence. This interpretation focuses not on the court in which sentencing occurs, but on the offense that has been committed.

Based on our review of the legislative history surrounding the subject statutes, we conclude that the latter interpretation is correct. Consequently, we hold that the maximum period of probation for a misdemeanor depends not on the court in which the sentence is imposed, but instead on the crime that has been committed.

Our holding is supported not only by the history of the applicable statutes, but by the rule of lenity. *See State v. Keith,* 102 N.M. 462, 697 P.2d 145 (Ct.App.1985) (doubts about construction of criminal statutes are resolved in favor of rule of lenity). Additionally, we determine that allowance of such a variation in penalty based on the pure happenstance of where a case is tried would be an unreasonable result, which we must avoid in interpreting our statutes. *See Gonzales v. Lovington Pub. Schools,* 109 N.M. 365, 785 P.2d 276 (Ct.App.1989).

We now summarize the legislative history supporting our disposition. In 1984, our legislature added Section 31–19–1(C), with its language concerning suspension or deferral of a misdemeanant's sentence. The added language required that a court place the defendant on supervised or unsupervised probation for all or part of the period of deferment or suspension. *See* § 31–19–1(C) (Cum.Supp.1984). Section 31–20–5 was also amended to mention specifically magistrate and metropolitan courts, as well as district courts, and to state that the maximum probation period for magistrate and metropolitan courts could not be longer than the maximum incarceration term allowed by law, while the maximum for district courts was five years. *See* § 31–20–5(A) (Cum.Supp.1984). When this change was made, the distinction made by the legislature between the courts was inconsequential and even meaningless, because at that time, Section 31–20–6(D) provided that the only crimes resulting in a probation period longer than the maximum allowable sentence were third and fourth degree felonies. *See* § 31–20–6(D) (Cum.Supp.1984). It followed that, for misdemeanors, the maximum possible probation period was limited to the maximum legal sentence for that crime, no matter in which court the case was heard.

In 1985, the legislature amended Section 31–20–6 and eliminated the "maximum allowable sentence" restriction on length of probation for all crimes, not just third and fourth degree felonies. At that time, however, the legislature did not change the language in Section 31–20–5(A), which appeared to allow district courts to impose longer periods of probation than permitted for magistrate or metropolitan courts, even for the same gravity of crimes. The legislature also left intact Section 31–19–1(C), which could be interpreted to limit probationary periods for misdemeanors to the maximum incarceration period allowed by law. Because of this apparent conflict and the fact that, when the legislature first distinguished between magistrate or metropolitan courts and district courts, the distinction was meaningless, we conclude that the failure to eliminate that distinction in 1985 was merely an oversight by the legislature.

■ As we previously noted, our interpretation of the pertinent statutes is bolstered by our conclusion that, in prescribing a maximum penalty, it is unreasonable to focus on the court in which a defendant is tried, rather than the crime the defendant committed. The state argues that such a distinction is not unreasonable, contending that misdemeanors are most often tried in metropolitan or magistrate courts, and that, when a misdemeanor charge is filed in district court, it is normally a result of unusual circumstances—usually because other, more serious charges are filed together with the misdemeanor charge. We recognize that, within the maximum allowable range, a trial court has discretion to vary the penalty for a crime by suspending part or all of the sentence, depending on a wide variety of factors. NMSA 1978, § 31–20–3 (Repl.Pamp.1990). However, we do not believe it is reasonable to expand the maximum range of penalties for identical crimes, on the basis of a blanket assumption that a defendant who is tried for the crime in district court must have committed other crimes as well. We therefore reject this argument.

■ The state also argues that the rule of lenity should not apply to this appeal, because the language of the statutes is clear. We disagree. As we already noted, Section 31–19–1(C) may be interpreted to limit the maximum period of probation allowed, or it may be interpreted as a minimum requirement on the sentencing court.

Given this ambiguity, and because we believe application of the rule of lenity renders a more reasonable resolution of the issue, we resolve the ambiguity in defendant's favor. *See State v. Keith.*

CONCLUSION

In summary, we hold that the maximum period of probation that may be assessed in misdemeanor or petty misdemeanor cases is the maximum allowable period of incarceration for that crime, irrespective of whether a defendant is sentenced in district court or in a lower tribunal. We thus reverse the sentence imposed and remand for resentencing consistent with this opinion. Because of our disposition, it is unnecessary to address the contempt issue raised by defendant.

IT IS SO ORDERED.

DONNELLY and BIVINS, JJ., concur.

825 P.2d 224

John MATTHEWS, Plaintiff–Appellant,

v.

STATE of New Mexico, City of Albuquerque, Martines Leasing, Inc., and Ed Martines, Individually, Defendants–Appellees.

No. 11378.

Court of Appeals of New Mexico.

Oct. 8, 1991.

David M. Berlin, Duhigg, Cronin & Spring, Albuquerque, for plaintiff-appellant.

Mark J. Riley, Padilla, Riley & Shane, P.A., Albuquerque, for defendants-appellees.

OPINION

DONNELLY, Judge.

This is an appeal from an order granting summary judgment dismissing plaintiff's tort claim seeking damages against defendants resulting from a motorcycle accident on property leased by Martines Leasing, Inc. (the corporation). We address two issues: (1) whether the district court properly granted summary judgment against the corporation and Ed Martines, individually, relying on the provisions of the Off–Highway Motor Vehicle Act, NMSA 1978, Section 66–3–1013 (Repl.Pamp.1989) (statute); and (2) whether material issues of fact exist as to whether defendants Martines Leasing, Inc. and Ed Martines, individually, negligently obstructed a public easement. We affirm.

Plaintiff was injured on May 11, 1986, while riding his off-road motorcycle when he drove into a steel cable blocking the entrance to a dirt road leading into property operated by the corporation as a raceway and drag strip. On the afternoon of the accident, plaintiff had been riding his motorcycle in Montessa Park, an off-road recreational vehicle park, owned and maintained by the city of Albuquerque. After riding in the park, he drove onto a dirt road exiting from the south side of the park, and then rode westerly approximately one-quarter of a mile across state-owned lands, and onto a dirt access road which led to the land leased by the corporation from the state.

Following his accident, plaintiff filed suit against the state of New Mexico, the city of Albuquerque, the corporation, and Ed Martines, individually, alleging that he sustained, among other things, personal injuries, medical expenses, permanent disability, and loss of wage-earning ability due to the negligence or willful acts of the defendants in placing the obstruction across the roadway without "flagging," warning or other device to warn of the cable.

Defendants denied liability and asserted, among other things, that plaintiff was a trespasser and that they were immunized from liability under the provisions of the off-highway motor vehicle statute. It is

undisputed that at the time of plaintiff's accident he had not paid a fee to any of the defendants for entry into the land where the accident occurred.

Each of the defendants moved for summary judgment relying, among other things, upon the immunity extended to landowners under the off-highway motor vehicle statute. The corporation and Ed Martines, individually, filed affidavits in support of their motion for summary judgment and relied upon depositions taken by the parties. Martines and the corporation asserted, among other things, that at the time of the accident plaintiff was trespassing upon the lands in question and that he was precluded from recovery under the provisions of the statute. After a hearing, the district court granted summary judgment in favor of each of the defendants. Plaintiff's appeal herein involves only that portion of the district court's order dismissing his complaint against the corporation and Ed Martines, individually. No appeal has been taken from that portion of the order granting summary judgment in favor of the state or the city.

I. SCOPE OF STATUTORY IMMUNITY

Plaintiff argues that the district court erred in dismissing the corporation and Ed Martines, individually, from the suit, contending that an exception contained in the statute rendered the general immunity extended to landowners inapplicable to the instant case. § 66–3–1013. Defendants assert that the statute exempts them from liability for injuries or damages sustained by operators of off-highway motor vehicles occurring on their lands, and argue that *Vandolsen v. Constructors, Inc.*, 101 N.M. 109, 678 P.2d 1184 (Ct.App.1984), supports the district court's order of dismissal.

In *Vandolsen* a minor riding a dirt bike across property owned by a construction company drove into an excavation site that had been cut across a private road located on the defendant's property and was injured. This court upheld the district court's award of summary judgment, observing that the motorcyclist was a trespasser and that the statute barred any recovery thereunder, and that,

> not only trespassers are covered by the Act [§ 66–3–1013]. Any person, even those on the land with the owner's permission, cannot recover from the landowner unless entry onto the land is *subject to a fee.* § 66–3–1013(A). [Emphasis in original.]
>
> It would appear that the Legislature determined, in enacting Section 66–3–1013(A), that the use of vehicles off the highway is an inherently dangerous activity for which a landowner should not be liable unless the landowner opens his lands for that purpose and charges a fee.

Id. at 114, 678 P.2d at 1189.

Plaintiff in the instant case contends that the district court erred in construing the Act so as to arrive at an interpretation and result contrary to the plain language of the statute. Section 66–3–1013 reads:

> [Riding on private lands; landowner's liability.]
>
> A. No landowner shall be held liable for damages arising out of off-highway motor vehicle-related accidents or injuries occurring on his lands in which he is not directly involved unless the entry on the lands is subject to payment of a fee.
>
> B. It is unlawful to operate an off-highway motor vehicle on private lands except with the express permission of the owner of the lands.

In enacting the statute, the legislature addressed the problem of a landowner's liability for injuries sustained during the use of such lands by the operators of off-road recreational vehicles. Unless entry onto the land is subject to a fee, a landowner's liability for injuries resulting from off-highway recreational vehicle-related accidents occurring on his lands is limited. *See Vandolsen v. Constructors, Inc.* The statute, however, does not provide complete immunity; where the landowner receives a fee for the use of his lands, or where a landowner is "directly involved" in causing an injury to another, the statute provides an exception to the immunity granted therein. § 66–3–1013(A).

The district court, in awarding summary judgment to the corporation, apparently concluded that the immunity accorded "landowners" under the statute also applied to lessees. We agree. In construing the term "owner," as used in recreational use statutes, the courts have generally interpreted that term to include lessees. *See Vandolsen v. Constructors Inc.* (upholding district court's dismissal of negligence and strict liability claims under Section 66–3–1013 against both landowner and lessee); *see also Peterson v. Western World Ins. Co.*, 536 So.2d 639 (La.Ct.App.1988); *State ex rel. Tucker v. District Court of Thirteenth Jud. Dist.*, 155 Mont. 202, 468 P.2d 773 (1970); *see generally* 62 Am.Jur.2d, *Premises Liability* § 120 (1990); Annotation, *Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User*, 47 A.L.R. 4th 262, § 3, at 275 (1986).

Our off-highway motor vehicle statute follows, in part, the approach taken by the 1965 Model Recreational Use Act promulgated by the Council of State Governments and which limits private landowner liability from off-highway recreational motor vehicle accidents. Similarly, Section 66–3–1013 was enacted for the purpose of encouraging private landowners to permit their lands to be freely utilized for off-highway motor vehicle recreational use. *Vandolsen v. Constructors, Inc.*

Prior to the enactment of Section 66–3–1013 in 1975, the legislature, in 1967, had enacted a similar statute, NMSA 1978, § 17–4–7(A) (Repl.Pamp.1988), limiting the liability of landowners, lessees, or other persons in control of lands "who, without charge or other consideration, other than a consideration paid to [the] landowner by the state ... or any other governmental agency, grants permission ... to use his lands for the purpose of hunting, fishing, trapping, camping, hiking, sightseeing *or any other recreational use.*" (Emphasis added.) The latter statute provides that a landowner who grants permission to entrants for recreational use does not thereby:

(1) extend any assurance that the premises are safe for each purpose; or

(2) assume any duty of care to keep such lands safe for entry or use; or

(3) assume responsibility or liability for any injury or damage to, or caused by, such person or group;

(4) assume any greater responsibility, duty of care or liability to such person or group, than if such permission had not been granted and such person or group were trespassers.

A comparison of the two recreational land use statutes (Sections 17–4–7 and 66–3–1013) in effect at the time of plaintiff's accident indicates that the legislature, in enacting its more recent statute relating to off-highway motor vehicles, intended to further expand the scope of immunity extended to landowners for accidents or damages resulting from the use of off-highway recreational vehicles occurring on the lands of another. *See Vandolsen v. Constructors, Inc.*, 101 N.M. at 114, 678 P.2d at 1189 (use of off-road vehicles for recreational purposes "is an inherently dangerous activity for which a landowner should not be liable unless ... landowner opens his lands for that purpose and charges a fee."). Since the general recreational land use statute contained in Section 17–4–7 broadly immunizes landowners who permit entry upon their lands for "any ... recreational use," the legislature, in adopting Section 66–3–1013, obviously intended to extend the immunity of landowners as to claims resulting from injuries to operators or passengers of off-highway recreational vehicles beyond that provided by Section 17–4–7. *See Quintana v. New Mexico Dep't of Corrections*, 100 N.M. 224, 668 P.2d 1101 (1983) (in interpreting a statute, reviewing court presumes the legislature was informed as to existing law). Examination of the legislative history of Section 66–3–1013 indicates that, after its enactment, the statute was amended by the legislature in 1985, following this court's decision in *Vandolsen*, so as to broaden the type of recreational vehicles covered by such Act. 1985 N.M. Laws, ch. 189, § 13. The 1985 amendment substituted the term "Off–Highway Motor Vehicle" for "Off–Highway Motorcycles" used in the original Act,

but made no other substantive changes concerning the scope of immunity extended under such Act as interpreted in *Vandolsen.* In amending the statute, the legislature is presumed to have been informed as to the prior judicial interpretation or construction applied to such act. *Bettini v. City of Las Cruces,* 82 N.M. 633, 485 P.2d 967 (1971); *State v. Martin,* 90 N.M. 524, 565 P.2d 1041 (Ct.App.1977). Thus, we conclude that the interpretation of Section 66–3–1013 rendered by the *Vandolsen* court is in conformity with legislative intent.

In adopting Section 66–3–1013, our legislature did not grant complete statutory immunity to landowners for all tort claims arising by reason of injuries sustained by operators or passengers of off-highway recreational vehicles. The statute follows, in part, the approach taken by the Model Recreational Act, providing specific exceptions to landowner immunity. As indicated in W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on The Law of Torts,* Section 60, at 415–16 (5th ed. 1984):

> A significant development ... over the last couple of decades has been the enactment of "recreational use" statutes in most states, passed for the purpose of encouraging landowners to hold open to the public their lands and waters for recreational use. Although the statutes vary in their particulars from state to state, they all limit the duties of landowners toward recreational users injured on the land, typically shielding the owner from liability for such injuries unless the entrant was charged a fee for admission to the premises or was injured on account of the owner's willful or wanton misconduct. [Footnotes omitted.]

Similarly, under our statute, Section 66–3–1013, landowners are not relieved of all duty of care toward passengers or operators of off-highway recreational vehicles who enter upon the landowner's property for recreational purposes; instead, the statute creates two different standards of care: (1) a limited duty of care to off-highway recreational vehicle users who enter upon such lands without payment of a fee; and (2) a higher duty of care to recreational users who have paid a fee for the use of such property. *See* § 66–3–1013. Under the first standard, the statute generally immunizes a landowner from liability for accidents occurring to off-highway recreational vehicle operators occurring on such lands, except where the landowner is "directly involved" in causing injury to another. A heightened standard of care exists, however, where a fee has been paid for recreational use of such land. Under these circumstances, a landowner owes a duty of care beyond that owed at common law to a trespasser or licensee, and which is similar to that extended to business invitees. *See Vandolsen v. Constructors, Inc.; see generally Giese v. Mountain States Tel. & Tel. Co.,* 71 N.M. 70, 376 P.2d 24 (1962) (landowner owes to invitee a duty of ordinary care to maintain premises in reasonably safe condition for protection of persons invited to use premises). Similarly, as noted by Butler, *Outdoor Sports and Torts: An Analysis of Utah's Recreational Use Act,* 1988 Utah L.Rev. 47, at 94–95:

> Recreational use statutes provide a defense to claims of ordinary negligence, but with the exception of Idaho and Ohio, all state statutes allow an injured recreational user to recover for injuries that are willfully, maliciously, or deliberately caused.... The standard [of care required under recreational use statutes] is frequently described as analogous to a landowner's duty toward an unknown trespasser at common law. Willful, deliberate, or malicious conduct is usually not defined in the recreational use statute, however, and therefore must be defined by reference to other state law—typically case law applying those standards in other contexts. [Footnotes omitted.]

Although some state legislatures, in enacting recreational land use statutes, have specifically adopted exceptions to the immunity granted to landowners, where the landowners' conduct has resulted in injury to recreational users and such acts are found to constitute "reckless conduct," "gross negligence" or conduct which is "wanton" in nature, in adopting Section

66–3–1013 our legislature omitted any provision exempting landowners from liability to persons injured upon such lands resulting from acts or omissions of landowners amounting to negligence or heightened degrees of negligence. *See generally* Annotation, 47 A.L.R. 4th 262, *supra,* § 24(a), at 359. *Cf.* NMSA 1978, § 16–3–9 (Repl.Pamp.1987) (limiting liability of landowners to persons injured on such land while using a trail across such property, "unless the injuries are caused by the willful or wanton misconduct of the [landowner]."). Except as to cases involving claims for punitive damages, under SCRA 1986, 13–1827, New Mexico courts do not recognize degrees of negligence; rather, a party alleging that the other party has acted negligently is required to establish by a preponderance of the evidence that a defendant has failed to exercise ordinary care under the circumstances, thereby proximately causing the plaintiff's injury. *Govich v. North Am. Sys.,* 112 N.M. 226, 814 P.2d 94 (1991); *see also Scott v. Rizzo,* 96 N.M. 682, 634 P.2d 1234 (1981); *Gray v. Esslinger,* 46 N.M. 421, 130 P.2d 24 (1942); *Pittard v. Four Seasons Motor Inn, Inc.,* 101 N.M. 723, 688 P.2d 333 (Ct.App.1984); *Ruiz v. Southern Pac. Transp. Co.,* 97 N.M. 194, 638 P.2d 406 (Ct.App.1981).

Plaintiff argues, however, that the words "directly involved" contained in the statute constitute an exception to the statutory immunity granted by the statute, and that the matters submitted in response to defendants' motion for summary judgment indicate that material factual issues exist as to whether the acts or omissions of the corporation and Ed Martines, individually, were "directly involved" in the placing of an unmarked cable across the entrance to their property, without providing proper warnings or notice to plaintiff or other operators of off-highway motor vehicles.

No New Mexico decision has interpreted the words "directly involved" as used in Section 66–3–1013; however, looking to the general purpose of the statute and the Act as a whole, we conclude that in using the term "directly involved" the legislature intended to except from the grant of statutory immunity acts of a landowner which are willful or malicious in nature and proximately cause injury to off-highway recreational vehicle users. As noted in *Orawsky v. Jersey Central Power & Light Co.,* 472 F.Supp. 881 (E.D.Pa.1977), proof of willful or heightened culpability on the part of a landowner toward persons injured after entering such property without payment of a fee is required in order to establish liability under a recreational use statute, since such statute would have little purpose if an exception to immunity based upon the conduct of the landowner was interpreted so as to encompass ordinary negligence. In ascertaining legislative intent, the court looks not only to the language used in the statute, but also to the objects sought to be achieved by such legislation. *See Martinez v. Research Park, Inc.,* 75 N.M. 672, 410 P.2d 200 (1965); *Patterson v. Globe Am. Cas. Co.,* 101 N.M. 541, 685 P.2d 396 (Ct.App.1984).

As observed in 18 *Causes of Action* 613, "Cause of Action for Personal Injury or Death in Which Recreational Use Statute is Raised as Defense," Section 27, at 684 (1989):

> State recreational use statutes use different terminology in describing the conduct by a landowner that will result in a loss of statutory immunity. Such conduct is variously described as "willful or malicious" (the terms used by the MODEL RECREATIONAL USERS ACT), "willful and malicious," "willful and wanton," "gross negligence," or "reckless."

Although our statute does not expressly define the term "directly involved," in light of the statute's general purpose, we think the legislature, in enacting Section 66–3–1013, intended the words "directly involved" to refer to "willful" or "malicious" conduct proximately causing injury to individuals who have entered upon such property. In interpreting a statute, the court will not adopt a construction which will defeat the statute's purpose. *Gonzales v. Lovington Pub. Schools,* 109 N.M. 365, 785 P.2d 276 (Ct.App.1989).

In conformity with the statute's general purpose, "willful" or "malicious" misconduct has a well-defined meaning in New Mexico and such conduct is distinguishable from acts or omissions amounting to negli-

gent conduct. "Willful" or "malicious" includes acts or omissions of a landowner which show an actual or deliberate intention to injure or harm another. *See* SCRA 1986, 13–1619; *see also Tessier v. White,* 76 N.M. 748, 418 P.2d 200 (1966); *Potomac Ins. Co. v. Torres,* 75 N.M. 129, 401 P.2d 308 (1965); *Rea v. Motors Ins. Corp.,* 48 N.M. 9, 144 P.2d 676 (1944). As observed in *Thayer v. Denver & R.G.R.R.,* 21 N.M. 330, 154 P. 691 (1916), actionable negligence has no degrees, and when "willfulness" is an element of the conduct in question, the action ceases to be one of negligence. *See also Wood v. Sloan,* 20 N.M. 127, 148 P. 507 (1915).

Applying the above authorities to the case before us, we conclude that the matters presented in opposition to the motion for summary judgment failed to show the existence of facts indicating that the acts of defendant Ed Martines, individually, or agents or employees of the corporation, in placing the cable across the dirt road leading to the racetrack and drag strip area, were "willful" or "malicious" in nature. Once a party moving for summary judgment has made a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to show the existence of specific facts, admissible in evidence, showing whether a genuine issue for trial exists. *Koenig v. Perez,* 104 N.M. 664, 726 P.2d 341 (1986).

Under New Mexico law, a "willful" or "malicious" tortious act constitutes more than mere negligence; it is a purposeful act or conscious omission to do an act with the intent to do wrong or cause injury. *Tessier v. White.* Although we agree that the placing of a cable across a roadway resulting in harm to another may establish or give rise under certain circumstances to an inference that such act was willful or malicious in nature, no such showing has been made here. Plaintiff has failed to present evidence indicating that the blocking of the entrance to the lands leased from the state was "willful" or "malicious" in the instant case. Both Ed Martines and Labbate testified that they had previously placed signs and other devices adjacent to or upon the cable blocking the entrance to their property in order to warn of its presence, but that vandals had removed or destroyed such warnings. Although plaintiff testified that he saw no warning signs prior to his accident, plaintiff stated in his deposition, "I don't think that somebody put the cable up to hurt somebody...." Absent a showing that the acts of defendants contributing to plaintiff's injuries were willful or malicious, the immunity extended to landowners under the statute bars plaintiff's action herein.

II. CLAIM OF EASEMENT

Plaintiff also argues that material disputed factual issues existed concerning whether a prescriptive easement in favor of the general public existed over the dirt road leading into the drag strip and raceway area leased by the corporation, and that defendants negligently obstructed such easement.

Applying the analysis discussed above, we conclude that the district court properly awarded summary judgment as to this claim. It is undisputed that the land on which plaintiff was injured was owned by the state and leased to the corporation. Absent a statute permitting the creation of an easement over lands owned by the state, an easement cannot be acquired against the state, its subdivisions or persons holding thereunder, no matter how long continued. *See Burgett v. Calentine,* 56 N.M. 194, 242 P.2d 276 (1951). Moreover, even if we were to assume, arguendo, that the road leading into the lands of the corporation was a public roadway, off-highway motor vehicles are required to be operated exclusively off the public highways of the state. NMSA 1978, § 66–3–1011 (Repl.Pamp.1989); *see also* NMSA 1978, § 66–1–4(B)(42) (Repl.Pamp.1989).

CONCLUSION

The order of the district court granting summary judgment is affirmed.

IT IS SO ORDERED.

ALARID, C.J., and MINZNER, J., concur.

825 P.2d 231

STATE of New Mexico,
Plaintiff-Appellee,

v.

Melanie THOMAS, Defendant-Appellant.

No. 12591.

Court of Appeals of New Mexico.

Nov. 18, 1991.

Certiorari Denied Jan. 7, 1992.

Tom Udall, Atty. Gen., Max W. Shepherd, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Hollis Ann Whitson, Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

APODACA, Judge.

Defendant appeals from the trial court's orders entered in two separate criminal proceedings. Finding that defendant had violated the conditions of her probation, the trial court revoked probation and resentenced defendant. The court then suspended the sentence on certain conditions. In doing so, the court granted and denied defendant credit against her sentence for certain periods of time. Defendant has briefed only one of the two issues listed in the docketing statement. The issue not briefed is deemed abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985). The remaining issue is whether the trial court properly denied defendant credit for a certain period of time served on probation. The resolution of this issue, in turn, depends on whether or not defendant was a fugitive during all or a part of that period.

Additionally, the parties have briefed the issue concerning the appropriate disposition or remedy in the event this court determined that the trial court improperly denied credit. We hold that the trial court's finding with respect to defendant's fugitive status was error. We therefore remand with instructions to the trial court to conduct a hearing on the issue of credit and to enter an amended judgment and sentence consistent with this opinion.

BACKGROUND

This case originated in the trial court as two separate criminal causes (referred to respectively in this opinion as Causes 1 and 2). In Cause 1, defendant pled guilty to two counts of possession with intent to distribute cocaine. The judgment and sentence in that cause sentenced her to nine years with two years mandatory parole on each count, to be served concurrently. The trial court then suspended the sentence and placed defendant on probation for five years with certain conditions. The only condition relevant to this appeal was the requirement that defendant enter and successfully complete the Delancey Street drug rehabilitation program (Delancey Street program).

In Cause 2, defendant pled guilty to one count of issuing a worthless check with intent to defraud. She was sentenced to a one-year confinement with one year mandatory parole, to be served concurrently with the sentence in Cause 1. The trial court then suspended the sentence and placed defendant on probation for one year, subject to the same conditions as in Cause 1.

Defendant signed a probation order in both causes and was apparently released from custody on September 23, 1988. On December 8, 1988, the state filed a motion to revoke her probation in each cause. The

motion alleged that defendant had violated the conditions of her probation by leaving the Delancey Street program on November 17, 1988. The motion also requested that the trial court find that defendant was a fugitive from justice and issue a warrant for her arrest. The court entered an order finding that defendant was a fugitive, and separate warrants were issued about a week apart in both causes.

More than a year later, on December 22, 1989, defendant was arrested. After several hearings, the trial court entered its order revoking probation and reimposing probation subject again to the condition that defendant enter and successfully complete the Delancey Street program. The trial court's order credited defendant for some of the time served on probation and for presentence confinement, but denied her credit for the period between November 17, 1988, the day she left the Delancey Street program, and December 22, 1989, the day she turned herself in to the San Juan County Sheriff and was arrested. It is this denial of credit that gave rise to this appeal.

DISCUSSION

I. *Was Credit Properly Denied?*

The parties do not dispute that defendant is entitled to credit for all the time served on probation unless the trial court determined that she was a fugitive. *See* NMSA 1978, § 31–21–15(B) & (C) (Repl.Pamp.1990); *State v. Apache,* 104 N.M. 290, 720 P.2d 709 (Ct.App.1986); *State v. Kenneman,* 98 N.M. 794, 653 P.2d 170 (Ct.App.1982). With respect to Cause 1, the issue raised on appeal affects only the amount of time remaining on the nine-year sentence. However, with respect to Cause 2, the issue has jurisdictional implications because, if the entire credit was improperly denied, then defendant would necessarily be deemed to have fully served the one-year probationary term on September 23, 1989, before the trial court attempted to revoke her probation. Under that posture, the trial court would have lacked jurisdiction to revoke that term of probation. *See State v. Travarez,* 99 N.M. 309, 657 P.2d 636 (Ct.App.1983). Nonetheless, the fact that the issue has jurisdictional implications does not necessarily allow us to consider the issue raised for the first time on appeal. *See State v. Cutnose,* 87 N.M. 307, 532 P.2d 896 (Ct.App.1974) (where jurisdictional issue depends on facts, issue appearing for the first time on appeal without factual support in the record would not be entertained).

Because the trial court is authorized to make the "fugitive from justice" determination and to deny credit on that basis, and because defendant did not raise the issue argued on appeal in the trial court, we should address the issue in the context of fundamental, rather than jurisdictional, error. In a series of recent cases, our supreme court has expressed a preference to move away from the concept of jurisdictional error in areas that previously were called "jurisdictional" and instead, to analyze the issues under the rubric of fundamental error. *See State v. Ortega,* 112 N.M. 554, 817 P.2d 1196 (1991) (analyzing a failure to instruct on an essential element of the crime as fundamental, not jurisdictional, error); *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991) (fundamental error is present when the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or when the court considers it necessary to avoid a miscarriage of justice); *see also State v. Trevino,* (N.M.Ct.App.1991) [No. 12,375, filed July 2, 1991] (citing *Osborne* and indicating that the term "jurisdictional error" should be confined to instances in which the court where the error occurred was not competent to act, and that it is inappropriate to equate jurisdictional error with all instances in which error may be raised for the first time on appeal). In this appeal, the trial court was clearly authorized by Section 31–21–15(C) to determine whether defendant was a fugitive and to deny credit on that basis. Thus, we proceed to determine whether fundamental error is present in this appeal.

The state has the burden of proving that a defendant is a fugitive within the meaning of the statute. *See Baca v. Bueno Foods,* 108 N.M. 98, 766 P.2d 1332 (Ct.

App.1988) (one who seeks relief under a statute has the burden of proving the given situation is within its terms); *see also State v. Apache* (Section 31-21-15(C) requires that the court determine, as a factual matter, that warrant could not be served); *State v. Kenneman* (implying that issue of fugitive status needs to be raised by the state in the trial court to be preserved on appeal); *State v. Murray,* 81 N.M. 445, 468 P.2d 416 (Ct.App.1970) (where record fails to show whether proper credit had been given on issue of defendant's fugitive status, defendant is entitled to an evidentiary hearing on remand, and, in the absence of such proof, defendant is entitled to credit for all the time served on probation, from the date probation commenced until the date probation was revoked). These cases suggest that the matter of denying credit when defendant is a fugitive must be raised and shown by the state. We need not decide in this appeal the form that the showing must take. *See State v. Smith,* 110 N.M. 534, 797 P.2d 984 (Ct.App.1990) (where defendant did not call to the trial court's attention the lack of formal evidence, appellate court would not decide the question of whether formal evidence was required to prove factual basis for enhanced sentence). In this appeal there was an insufficient showing that defendant was a fugitive.

A probationer is a fugitive within the meaning of the statute if the trial court finds that "a warrant for [his or her] return ... cannot be served...." Section 31-21-15(C); *State v. Apache.* A bare showing that the warrant was issued but not served is not sufficient to establish that a probationer is a fugitive. Instead, we believe the state is required, at a minimum, to show that the state attempted to serve the warrant but was unable to or that it would have failed to serve the warrant if it had attempted to do so. *See State v. Apache* (officer testified that standard procedures were followed and bulletins were sent to city of defendant's last known address and to the National Crime Information Center); *cf. State v. Murray* (warrant should be promptly executed against a probation violator while location is known or could be known with due diligence and whose return is possible).

Defendant argues that the only finding of record that bears on defendant's fugitive status is in the state's motion (requesting the issuance of a warrant for defendant's arrest) and the order issued as a result of that motion, which expressly finds defendant to be a fugitive. The state concedes that the finding made in the order is not binding on defendant because the order was issued in ex parte proceedings. *See State v. Apache* (holding that the judicial determination of fugitive status must be made only after the probationer has been found and brought before the court, regardless of whether this occurs before or after the date on which probation was originally to have expired). We agree with the state's concession and disregard the finding contained in the trial court's order. On the other hand, we disagree with defendant's implied assertion that the determination of fugitive status cannot be made after the date originally set for the expiration of probation. *See id.*

The lack of an explicit, expressed finding that defendant was a fugitive is not, by itself, reversible error. *See State v. McDonald,* 113 N.M. 305, 825 P.2d 238 (Ct.App.1991); *State v. Baca,* 101 N.M. 415, 683 P.2d 970 (Ct.App.1984) (formal finding of guilt is not necessary when trial court accepts plea and orders presentence report). The issue on appeal is not whether the formal finding was made, but whether the finding that is implicit in the trial court's actions is supported by the required showing. *See State v. Baca; State v. Garcia,* 98 N.M. 186, 646 P.2d 1250 (Ct.App. 1982). Consequently we must examine the record to determine whether there was a sufficient showing to support the trial court's implicit finding that the warrant could not be served on defendant.

The evidence before the trial court on this issue was as follows. Defendant, testifying at the hearing held on June 1, 1990, admitted that she had violated the conditions of her probation by leaving the Delancey Street program in November of

1988. When she left the program, she went to Durango, Colorado, where she found employment. While there, defendant contacted the director of the Delancey Street program. It is not clear from the record whether she told the director where she was and whether he contacted her probation officer to tell him that defendant had contacted him.

In any event, in February of 1989, she returned to Farmington, called the local probation officer, and discovered that she had a new probation officer. The probation officer incorrectly informed her that she would have to go to prison for eighteen years for violating her probation and that she should turn herself in immediately. Hearing this, defendant lied to him, telling him that she was "snowed in" in Colorado and could not travel to Farmington. Following that discussion, defendant apparently stayed in Farmington. Defendant also testified that the director of the Delancey Street program wrote to her on October 5, 1989, asking her if she wanted to return to the program. Defendant replied, declining the invitation. From the record, we cannot determine the address to which the director mailed the letter or, for that matter, from what address defendant replied. Nor can we ascertain whether, after this correspondence, the director contacted defendant's probation officer.

These facts were the only showing presented to the trial court in connection with defendant's whereabouts from the time she left the Delancey Street program until she was arrested. We must determine whether these facts were sufficient to support the trial court's implied finding that defendant was a fugitive. To do so, we must resolve all disputed facts in favor of the trial court's decision, indulge all reasonable inferences in support of that decision, and disregard all inferences to the contrary. *State v. Apache.* Applying this standard, we hold that the trial court's determination that defendant was a fugitive during the period in question was not sufficiently supported by the matters shown to the trial court.

The record in this appeal does not show that the state made any showing whatsoever concerning its efforts to serve the arrest warrant on defendant. If this court were to uphold the trial court's determination of defendant's fugitive status in this appeal, we would essentially be ruling that the mere issuance of a warrant, coupled with a lack of service, for whatever reason, raises a reasonable inference that the warrant could not be served with reasonable diligence. We decline to so hold.

The state relies on *Apache,* arguing that that case is similar factually to this appeal. We disagree because, in *Apache,* there was specific evidence of record concerning the state's efforts to locate the defendant: testimony from the probation officer concerning attempts to locate defendant either at his sister's house or at his last known address; a police officer's testimony that, after the warrant was issued, a bulletin was sent to the most recent address available for defendant, and, when no response was received, a second bulletin was sent to the same town six months later. Additionally, the officer testified that the warrant was listed with the National Crime Information Center. In *Apache,* defendant's argument on appeal was only that the evidence was insufficient because there was no testimony that the bulletin was received in the town to which it was sent. By contrast, here, there was absolutely no showing concerning what efforts, if any, were made to locate defendant or to serve the warrant at any time during a period exceeding one year.

II. *What is the Appropriate Remedy?*

Having concluded that there was an insufficient showing to support the trial court's finding, we must now determine the appropriate remedy. Defendant proposes that we simply remand to the trial court with express instructions to enter an amended judgment and sentence that essentially gives her full credit for the subject period. In support of her proposal, defendant relies on *State v. Kenneman,* as well as on principles of double jeopardy. The state contends that *Kenneman* is distinguishable and that double jeopardy does

not apply to prevent redetermination of the issue of credit against the sentence. The state also argues that the principle of collateral estoppel would not bar relitigation of the credit issue. However, because defendant has not argued collateral estoppel, we need not address that issue.

We first address defendant's reliance on *Kenneman.* There, the defendant argued that the trial court had incorrectly denied him fourteen days of credit against his sentence. The state conceded on appeal that the denial of credit for that period of time was incorrect. The state argued, however, that the case should be remanded for a redetermination of the defendant's fugitive status. Defendant correctly notes that, instead, this court remanded the case with instructions that the trial court add fourteen days to the credit for time served. Defendant argues that our holding in *Kenneman* was based on the fact that the state had not raised the issue of the defendant's fugitive status in the trial court. Defendant reasons that, because the state did not raise the issue in this appeal as well, the proper remedy here would be to remand with instructions to give defendant credit for the period of time for which there was no affirmative showing of her fugitive status. However, as a close reading of our opinion in *Kenneman* makes clear, our concern there was directed to the issue concerning relitigation of the credit and not to whether the issue of fugitive status was raised below. *Kenneman* did not hold that the state could not relitigate the issue of credit; instead, we did not reach that issue. *Id.* 98 N.M. at 798, 653 P.2d at 174. In contrast, in this appeal, the parties have fully briefed the issue and it is clear that the question will resurface on remand if not addressed at this juncture. Thus, we believe that considerations of judicial economy make it necessary to resolve the issue at this time.

Defendant next contends that the constitutional prohibition against double jeopardy prohibits relitigation of the credit issue. We disagree. In *State v. Linam,* 93 N.M. 307, 600 P.2d 253, *cert. denied,* 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979), our supreme court held that a habitual proceeding involved only sentencing considerations and not the trial of an offense. The court then remanded that case for a new hearing on the habitual criminal proceeding. Similarly, in this appeal, the issue of proper credit against the sentence is clearly a sentencing issue rather than one involving the trial of an offense. For that reason, we do not believe that double jeopardy bars relitigation of the issue of the appropriate credit to be given defendant against her sentence. *Accord Paul v. State,* 560 P.2d 754 (Alaska 1977); *In re Coughlin,* 16 Cal.3d 52, 545 P.2d 249, 127 Cal.Rptr. 337 (1976) (en banc); *State v. Chapman,* 111 Idaho 149, 721 P.2d 1248 (1986); *State v. Quarles,* 13 Kan.App.2d 51, 761 P.2d 317 (1988); *Marutzky v. State,* 514 P.2d 430 (Okla.Crim.App.1973); *State v. Eckley,* 34 Or.App. 563, 579 P.2d 291 (1978); *Cisneros v. State,* 697 S.W.2d 718 (Tex.App.1985); *Davenport v. State,* 574 S.W.2d 73 (Tex.Crim.App.1978) (en banc); *State v. Drake,* 16 Wash.App. 559, 558 P.2d 828 (1976).

CONCLUSION

We hold that the showing made to the trial court did not support the court's implicit finding of defendant's fugitive status. Additionally, we conclude that the proper remedy under the facts of this appeal is to remand for a hearing limited to the issue of the proper credit to be given against the sentence based on a determination of when, if at all, the warrant could not be served on defendant. On remand, the trial court shall conduct further proceedings, including a hearing, and shall enter an amended judgment and sentence containing specific findings and conclusions on the issues relating to the credit to which defendant is entitled. The amended judgment and sentence shall also contain appropriate findings and conclusions on the issue of whether defendant's one-year period of probation in Cause 2 (Cr. No. 87-347-3) had expired before the trial court revoked her probation. If such period had expired, the trial court shall enter an appropriate order in Cause 2.

IT IS SO ORDERED.

PICKARD, J., concurs.

HARTZ, J., specially concurring.

HARTZ, Judge, specially concurring.

I concur in the result.

A defendant who questions the factual support for a denial of credit pursuant to NMSA 1978, Section 31–21–15(C) "is entitled to an evidentiary hearing on the question of the propriety of the credit given." *State v. Murray,* 81 N.M. 445, 449, 468 P.2d 416, 420 (Ct.App.1970). The issue in this case is whether Defendant can raise the question for the first time on appeal. On this record, I believe that she can.

The rule of appellate procedure governing the preservation of questions for review provides, "[I]f a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him." SCRA 1986, 12–216(A). I would hold that Defendant did not have such an opportunity.

No one mentioned Section 31–21–15(C) at the revocation hearing. Although statements were made that may have been relevant to that statutory provision (such as the prosecutor's statement that Defendant had been hiding in Colorado for several months), those statements were directed at Defendant's suitability for probation, not to whether the requirements of Section 31–21–15(C) had been met. Even when the judge gave his ruling from the bench, he did not refer to the section, nor did he make any mention of credit for probation time.

As far as the record reflects, the only possible notice to Defendant that the section was at issue was the language in the state's motion requesting that a warrant issue for her arrest. In my view, that motion, filed more than a year before the revocation hearing, was not adequate notice that Section 31–21–15(C) was to be considered at the revocation hearing.

Thus, prior to the filing of the district court's sentence, Defendant did not have a fair opportunity to object to the district court's denial of probation credit pursuant to Section 31–21–15(C). Perhaps it would have been better if Defendant had promptly moved for reconsideration of the sentence, but the above-quoted language of Appellate Rule 12–216(A) would be meaningless if the failure to raise the issue by post-judgment motion precluded appellate review.

I do not join in the majority's application of fundamental-error doctrine because ordinarily we should not review a claim such as Defendant's if the Defendant had the opportunity to raise the question in district court. Aside from the usual reasons not to consider a question newly raised on appeal, there is a particular risk of sandbagging when the question is the applicability of Section 31–21–15(C). At sentencing proceedings the chief function of counsel is to appeal to the discretion of the court rather than to prove or disprove the occurrence of specific events. Defense counsel may find it tactically unwise to present a challenge on every possible issue. In this context we should not permit defense counsel to await the appeal before calling for an evidentiary hearing.

For example, the argument at Defendant's revocation hearing was directed to whether Defendant should be sent to jail for a lengthy period or be given another opportunity to avoid incarceration. Defense counsel may not have wanted to dilute the force of the argument in Defendant's favor by directing attention to Defendant's evasion of her probation officer during the months after the arrest warrant was issued, particularly if defense counsel knew from sources outside the record (such as a conversation with the prosecutor) that the state could establish to the court's satisfaction that Defendant had been a fugitive during the pertinent period. Or defense counsel, in making a pitch for probation rather than incarceration, may not have wanted to highlight any limitation on the time remaining for probation. Therefore, in this case if Defendant had clearly been on notice that either the state was seeking or the court was considering the application of Section 31–21–15(C), I would not consider a challenge raised for the first time on appeal concerning whether there

was a sufficient showing of Defendant's status as a fugitive.

On this record, however, we cannot know whether defense counsel would have decided not to challenge the applicability of Section 31–21–15(C). In the absence of a fair opportunity for Defendant to raise the question in district court, the proper disposition is to remand for an evidentiary hearing. I agree with the majority that such remand does not violate the constitutional prohibition against subjecting a defendant to double jeopardy.

825 P.2d 238

STATE of New Mexico, Plaintiff–Appellee,

v.

Scott W. McDONALD, Defendant–Appellant.

No. 12641.

Court of Appeals of New Mexico.

Nov. 18, 1991.

Certiorari Denied Jan. 7, 1992.

Tom Udall, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

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

OPINION

APODACA, Judge.

Defendant appeals from the trial court's order revoking his suspended sentence, imposing the balance of his original eighteen-month sentence, and enhancing the original sentence by one year under our state's habitual offender statute. On appeal, defendant argues that the trial court erred by enhancing defendant's sentence and revoking his suspended sentence after he had completed his underlying sentence. Defendant essentially raises three sub-issues under this argument: (1) the trial court did not make an explicit finding that defendant was a fugitive under NMSA 1978, Section 31-21-15 (Repl.Pamp.1990); (2) the state did not raise the issue of defendant's fugitive status below; and (3) the state failed to make a showing that the bench warrant could not be served. We hold that the trial court's order was proper and thus affirm on all issues.

BACKGROUND

Defendant pled guilty to a charge of unlawful taking of a motor vehicle. In November of 1987, he was sentenced to eighteen months in the penitentiary, to be followed by a one-year mandatory parole. The trial court then suspended all but six months of the sentence and placed defendant on probation. The judgment and sentence expressly stated that the state reserved the right to file a supplemental criminal information alleging any appropriate prior felony convictions for purposes of habitual criminal enhancement. Defendant signed a standard probation order and was released from confinement that same day. In March of 1988, the state filed a motion to revoke defendant's probation. The motion alleged that defendant had not reported to his probation officer since November of 1987, as he had been ordered to do, and that defendant had moved without leaving a forwarding address. A bench warrant was issued that same day, based on defendant's failure to comply with the conditions of his probation.

At some point between defendant's initial failure to report to his probation officer and March of 1988, he went to Arizona without notifying his probation officer. One condition of his probation was that he obtain permission from his probation officer before leaving the county of his residence. In September of 1988, defendant was convicted in Arizona of two felonies, attempted theft and criminal trespass. The Arizona order of confinement gave defendant credit for one hundred and eighty-five days of presentence confinement, indicating that defendant had been in jail in Arizona since approximately March 6, 1988. As a result of these convictions, defendant was committed to the penitentiary in Arizona to serve a four-year and a three-year sentence, to run concurrently.

The record does not reflect when exactly the district attorney in New Mexico became aware that defendant was incarcerated in Arizona, nor is it clear when the detainer was imposed on defendant's incarceration. There are indications that, as early as November 1988, defendant wrote to the trial court indicating his whereabouts and asking that he be brought before the trial court for a hearing on the parole revocation. Copies of this correspondence were sent by defendant to the district attorney. On December 14, 1989, defendant filed a pro se motion for speedy disposition of the detainer, which was denied.

When defendant completed his confinement in Arizona in June of 1990, the Arizona authorities released him to the Eddy County sheriff under authority of the detainer, and defendant was returned to New Mexico. That same month, defendant was arraigned on the petition to revoke and entered a plea of not guilty. Later, the state filed a supplemental criminal information, contending that defendant was a habitual criminal offender based on a prior felony conviction in the state of Washington.

Ultimately, defendant was found to have violated his probation and to be a habitual criminal offender. The suspended sentence

was revoked, and both the balance of the original eighteen-month sentence and a one-year enhancement were imposed. The trial court gave defendant credit against his sentence for certain periods of time, but explicitly denied any credit for the time from March 28, 1988, the date the warrant was issued on the probation violation, until June 4, 1990, the date defendant was turned over to the Eddy County Sheriff and returned to New Mexico. It is from this ruling that defendant appeals.

DISCUSSION

Defendant first argues that the trial court lacked jurisdiction either to revoke his probation or to impose the habitual offender enhancement because he completed the underlying sentence on November 3, 1988, the date that the probation agreement indicated his term of probation would end. *See State v. Gaddy,* 110 N.M. 120, 792 P.2d 1163 (Ct.App.1990) (trial court lacks jurisdiction to enhance a sentence once the sentence for the underlying conviction is completed); *State v. Travarez,* 99 N.M. 309, 657 P.2d 636 (Ct.App.1983) (trial court lacks jurisdiction to revoke probation after the term of the probationary period expires).

The state concedes that, had defendant completed the underlying sentence, the trial court would have lacked jurisdiction to proceed on either the probation revocation or the enhancement. The state argues however, that, on the facts of this appeal, the underlying sentence had not been completed. Thus, the critical question we must resolve is whether the underlying sentence was completed.

Defendant's argument that the probationary period and the underlying sentence were completed on November 3, 1988, depends *factually* on his contention that the trial court erred in denying him credit against his sentence for the time he was incarcerated in Arizona. Defendant correctly contends that he can be denied credit for this time only if he was a fugitive during the time in question. *See* § 31–21–15(B) and (C); *State v. Kenneman,* 98 N.M. 794, 653 P.2d 170 (Ct.App.1982). Defendant is a fugitive within the meaning of the statute if the trial court finds that "a warrant for [his] return ... cannot be served...." § 31–21–15(C); *State v. Apache,* 104 N.M. 290, 720 P.2d 709 (Ct. App.1986).

The state argues that defendant did not raise below, and thus did not preserve, the issue that the trial court lacked jurisdiction on the basis that the sentencing period had expired. Thus, the state contends, defendant should not be allowed to raise this issue for the first time on appeal. In support of this argument, the state contends that defendant's incarceration in Arizona precluded service of the warrant.

We agree with the state that the issue defendant has argued on appeal was not raised or argued below or in the original docketing statement. Neither is the issue jurisdictional in nature, thus permitting defendant to raise it for the first time on appeal. The facts of this appeal do not present us with a situation in which the sentence imposed is illegal. Instead, the sentence was authorized by law. In *State v. Thomas,* 113 N.M. 298, 825 P.2d 231 (Ct.App.1991) we addressed a similar claim in the context of fundamental error. The doctrine of fundamental error will be invoked by an appellate court only when the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or when the court considers it necessary to avoid a miscarriage of justice. *State v. Ortega,* 112 N.M. 554, 817 P.2d 1196 (1991). The application of the fundamental error doctrine was appropriate to prevent a miscarriage of justice in *Thomas* because there was an insufficient showing in the record to substantiate the trial court's denial of credit for time served on probation against defendant's sentence. We decline to apply the doctrine of fundamental error in this case for the following reasons.

Both parties agree on appeal that the trial court's order did not contain an explicit finding that defendant was a fugitive during the period of time that he was incarcerated in Arizona. To the extent that defendant contends that the lack of a formal finding is reversible error, we dis-

agree. *See State v. Baca,* 101 N.M. 415, 683 P.2d 970 (Ct.App.1984) (formal finding of guilty is not necessary when trial court accepts plea and orders presentence report). The issue on appeal is not whether the formal finding is made, but whether the finding that is implicit in the trial court's actions is supported by the requisite showing. *See State v. Baca; State v. Garcia,* 98 N.M. 186, 646 P.2d 1250 (Ct.App. 1982). In any case, defendant failed to make the claim concerning the lack of a formal finding in the trial court and, therefore, has waived it for purposes of appeal. SCRA 1986, 12–216.

We also disagree with defendant's contention that the state failed to raise the issue of defendant's fugitive status below. The state originally raised the issue in July of 1990, at the hearing on the probation revocation, by asking the court to deny defendant credit against his sentence during the period of time in question. It pursued the issue again at the combined hearing on the supplemental criminal information and sentence on August 3, 1990. In both instances, it was clear that the state was requesting the trial court to deny defendant credit against his sentence for the period when he was incarcerated in Arizona. Additionally, defendant did not object to the lack of notice during the proceedings below, and, thus, any error arising from such a claim has been waived. SCRA 1986, 12–216. On this point, then, the only issue to be resolved by us focuses on the question of whether, on the facts before the trial court, the court properly denied the credit.

■ To determine the propriety of the denial of credit, we first examine the statutes concerning probation revocation. Section 31–21–15 addresses the return of probation violators. In this appeal, the state proceeded under Section 31–21–15(A)(1), which permits a trial court to issue a warrant for the arrest of a probationer for violation of any of the conditions of release. Subsection (A)(1) also provides that the warrant shall authorize the return of the probationer to the custody of the court or to any suitable detention facility designated by the court. Section 31–21–15(B) provides that, once the defendant is before the court, the court shall hold a hearing on the violation. The statute also sets forth several possible dispositions if the violation is proved. *See also State v. Apache.* Section 31–21–15(C) provides that a probationer is a fugitive within the meaning of the statute if the warrant cannot be served. If defendant is a fugitive, the statute gives the trial court discretion to consider whether the time from the date of the violation to the date of the arrest shall be counted as time served on probation.

Additionally, the relevant rules of criminal procedure clearly contemplate that an arrest warrant is served by arresting the defendant, meaning by taking him into physical custody and bringing him before the court. *See* SCRA 1986, 5–210; *see also State v. Barreras,* 64 N.M. 300, 328 P.2d 74 (1958) (an arrest warrant directs the appropriate officer to arrest defendant and bring him before the court to answer charges). In some circumstances, the issuance and execution of the arrest warrant is necessary to establish the court's jurisdiction over a defendant. *State v. Barreras.*

■ Based on our understanding of the language contained in the pertinent statutes and our rules of criminal procedure, we hold that a defendant is a fugitive within the meaning of Section 31–21–15(C) if he cannot be taken into actual custody and brought before the court pursuant to the arrest warrant. It is undisputed in this appeal that defendant could not be taken into custody under authority of the warrant because he was incarcerated in Arizona. We thus hold that the trial court, in its discretion, properly denied defendant credit against his sentence for the period of time he was incarcerated in Arizona because the warrant could not be served.

Defendant nonetheless argues that the warrant could have been served on defendant while he was in prison in Arizona, either by serving him with a copy of the document or through other channels such as the National Crime Information Center and the detainer process. Alternatively, defendant argues that he had actual notice

and thus was served with the warrant while still incarcerated in Arizona.

The flaw in this argument, however, is that an arrest warrant is not served in the same manner as documents in a civil suit, but by taking a defendant into custody and bringing him before the court. *Compare* SCRA 1986, 5–210 *with* SCRA 1986, 1–004 (Cum.Supp.1990). Defendant cites no authority for the proposition that actual notice rather than an arrest is sufficient to serve an arrest warrant, nor has our research disclosed any such authority.

Defendant next argues that the state could and should have extradited defendant once it was aware of his whereabouts. We note that both New Mexico and Arizona have adopted the Uniform Criminal Extradition Act. *See* Ariz.Rev. Stat.Ann. §§ 13–3841 to –3869 (1989); NMSA 1978, §§ 31–4–1 to –31 (Repl.Pamp.1984). Arizona has held that this Act does provide for extradition of defendants to face charges of probation violation. *See Mathieu v. Dupnik,* 129 Ariz. 322, 630 P.2d 1054 (Ct.App.1981). We assume, without deciding, that New Mexico law likewise provides for such extradition. *See Ex parte Nabors,* 33 N.M. 324, 267 P. 58 (1928). However, the issue before us is not whether the state could have extradited defendant, but whether it was required to do so. We find nothing in the statutes that would support such a requirement. On the contrary, the plain language of the statutes is framed in terms of service of an arrest warrant, and not in terms of extradition. Consequently, we conclude that the statute did not require efforts to extradite defendant if he was incarcerated outside New Mexico.

Defendant contends that incarceration in another jurisdiction is not, in itself, a sufficient reason for delay in a criminal trial. *See State v. Harvey,* 85 N.M. 214, 510 P.2d 1085 (Ct.App.1973) (discussing the right to a speedy trial in criminal cases). However, defendants in original criminal proceedings are afforded substantially greater protections than defendants in probation revocation proceedings. *Compare Smith v. Hooey,* 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969) (holding that diligent good faith efforts to extradite are required by the sixth amendment), *with Moody v. Daggett,* 429 U.S. 78, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976) (holding that under federal law the right to a prompt hearing on a parole revocation petition does not attach until defendant is taken into custody by the revoking jurisdiction).

Additionally, this court has held that the sixth amendment right to a speedy trial does not apply to probation revocation proceedings. *State v. Sanchez,* 94 N.M. 521, 612 P.2d 1332 (Ct.App.1980). Defendant does not argue that his rights to due process were violated, and thus we do not consider the due process implications under the facts of this appeal.

In arguing against our holding in this opinion, defendant contends that such a holding would give the state incentive to delay execution of arrest warrants for probation violations. We observe, however, that our holding is limited to the facts of this case—where a defendant absconds to another jurisdiction, commits a crime there, and, as a result, is ultimately incarcerated there. We recognize that the pendency of the probation violation proceedings may well affect a defendant's conditions of incarceration during the period he is serving the intervening sentence in another jurisdiction. For example, due to the detainer of the trial court, defendant's privileges in the Arizona prison were largely limited. However, as the United States Supreme Court has noted, the consequences of unresolved revocation proceedings are not as significant as the consequences of unresolved criminal charges. *See Carchman v. Nash,* 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985).

As *Carchman* points out, a revocation proceeding is usually based on the alleged occurrence of a subsequent crime, which narrows the issues and makes the outcome substantially predictable. Thus, the effect of resolving the matter usually would mean that a defendant's probation or parole might be revoked, and the detainer would continue in effect to secure his return to the paroling state, once his incarceration

was completed. Thus, as a practical matter, a speedy resolution of the proceedings is less important than in criminal cases where the outcome is not so predictable. Additionally, defendant's policy argument ignores the time and expense involved in extradition proceedings.

Relying on *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 finally argues that the trial court erred in denying his motion for speedy disposition under the Interstate Agreement on Detainers Act as adopted in New Mexico. *See* NMSA 1978, § 31–5–12 (Repl.Pamp.1984). However, the Act does not apply to probation revocation proceedings. *Carchman v. Nash; State v. Sparks,* 104 N.M. 62, 716 P.2d 253 (Ct.App. 1986).

CONCLUSION

In summary, we hold that the trial court did not err in denying defendant credit for the time he was a fugitive in Arizona, reimposing his suspended sentence, and enhancing his sentence as a habitual offender. We thus affirm the trial court's order.

IT IS SO ORDERED.

PICKARD, J., concurs.

HARTZ, J., specially concurring.

HARTZ, Judge, specially concurring.

I concur in the result.

Because the state clearly claimed the applicability of NMSA 1978, Section 31–21–15(C) in the district court and Defendant did not challenge its application, I would hold that Defendant did not preserve the issue raised by his appeal and we should not consider it. *See State v. Thomas,* 113 N.M. 298, 825 P.2d 231 (Ct.App.1991) (Hartz, J., concurring).

As for the merits, I agree with the majority "that a defendant is a fugitive within the meaning of Section 31–21–15(C) if he cannot be taken into actual custody and brought before the court pursuant to the arrest warrant." By that standard, absence from New Mexico was enough to make Defendant a fugitive. An arrest warrant issued by a New Mexico court carries no authority to seize the person named in the warrant in another state and return that person to New Mexico. *See* 5 Am.Jur.2d *Arrest* §§ 18, 20 (1962).

825 P.2d 243

STATE of New Mexico, Plaintiff–Appellee,

v.

Ricardo ESGUERRA, a/k/a Gary Richard Scholl, a/k/a Gary Richard Schull, a/k/a Frank Garcia, Defendant–Appellant.

No. 12373.

Court of Appeals of New Mexico.

Dec. 20, 1991.

Tom Udall, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Paul J. Kennedy, Albuquerque, for defendant-appellant.

OPINION

FLORES, Judge.

Esguerra (defendant) appeals his conviction for trafficking (by possession with intent to distribute) cocaine. Defendant pled guilty to the charge, expressly reserving his right to appeal the trial court's ruling denying his motions to suppress evidence. On appeal, he argues that the trial court erred in its determination that he lacked standing to challenge the search of his automobile, hotel room, and knapsack. We reverse the trial court's ruling that defendant lacked standing to challenge the search of his automobile and hotel room, and we affirm the trial court's ruling that defendant lacked standing to challenge the search of the knapsack. We remand for a hearing to determine whether the evidence obtained from defendant's automobile and hotel room is admissible. If the evidence is determined to be admissible, the trial court should re-enter its judgment and sentence. If, however, it is determined that the evidence in question is not admissible, defendant should be given the opportunity to withdraw his guilty plea.

Facts

Defendant, operating under several aliases including Gary Richard Scholl, Gary Richard Schull, and Frank Garcia, became a target of the Albuquerque Police Department Repeat Offender Project (ROP) in October 1988. On November 3, 1988, ROP detectives entered and searched defendant's apartment and vehicle. A search warrant had been issued and the affidavit in support of the warrant described defendant's apartment as follows:

> The premises to be searched is [sic] Apartment #F at 5300 Eubank NE, Building # 6. The complex is located on the northwest corner of Eubank and Spain NE. Building # 6 is located in the northwest corner of the complex and is just east of Eubank NE. The apartment is located on the north side of the building and the apartment faces (door) to the west. The building is of wood and stucco construction with a pitched roof. The stucco is a beige color and the roof is dark brown. The apartment door has a white letter, approximately two inches high, "F".

The description quoted above is the only language contained in the "premises to be searched" portion of the affidavit for search warrant. Defendant's automobile was not included in the "premises to be searched" portion of the affidavit. Defendant's automobile was identified solely in the section of the affidavit setting forth the facts supporting issuance of the search warrant. In the last sentence of the affidavit, affiant requested that the search warrant be granted for "Esguerras' [sic] residence, curtilage and vehicle." During the search of defendant's apartment several items of contraband were found, including one-eighth to one-fourth ounce of cocaine, over $4500, a shotgun, cutting agent, packaging materials, and two triple beam scales. The ROP detectives then proceeded to search defendant's automobile located in the parking lot of the apartment complex. A loaded revolver was discovered under the dashboard of the driver's side of the automobile. Inspection of the trunk revealed a locked briefcase later found to contain $8428 and what was described as a "white, powdery substance." Defendant was absent during the search of his apartment and his automobile.

Four days after the search, on November 7, 1988, a confidential source informed ROP detectives that defendant had returned to his apartment. When detectives arrived, an unidentified bystander related that defendant had left the complex in an Albuquerque Yellow Cab. A phone call to Albuquerque Yellow Cab revealed defendant's destination as the Howard Johnson's Plaza Hotel located at 6000 Pan American N.E. Upon arrival at the hotel, detectives observed a person matching defendant's description entering the elevator. From a photograph, the desk clerk identified defendant as the man who had just checked into room 411. The detectives proceeded to room 411, knocked on the door, and identified themselves as the police. There was no answer. The hotel security guard then unlocked the door, and the detectives entered the room. Defendant was not in the room; however, the detectives observed a set of open glass doors leading to the balcony.

Surmising that defendant had "spidermanned" down from the balcony, Detective Lovato searched the immediate area surrounding the hotel and discovered a blue knapsack in the parking lot. The knapsack was opened and found to contain clothing and two square-shaped bundles tightly packed in brown plastic garbage bags. Detective Lovato then closed the knapsack and returned to the hotel to ask the desk clerk if defendant had arrived with any luggage. The clerk related that defendant had indeed been carrying a blue knapsack. A search warrant was then obtained for both room 411 and the knapsack, and a full search ensued. The search of the hotel room produced a suitcase containing clothing; identification cards in defendant's aliases of Lopez, Garcia, and Scholl; and a camera. A subsequent drug analysis of the contents of the bundles found in the knapsack showed they contained 2.005 kilograms of cocaine.

The record shows the existence of an outstanding felony warrant for defendant under the alias of Gary Scholl. The warrant, dated September 9, 1987, charged defendant with aggravated burglary, aggravated assault, conspiracy, and false imprisonment. On November 9, 1988, defendant was arrested pursuant to the outstanding felony warrant as well as for three counts of trafficking cocaine.

Standard of Review

The appropriate standard of appellate review of rulings on suppression motions is whether the law was correctly applied to the facts, viewing them in the manner most favorable to the prevailing party. All reasonable inferences in support of the court's decision will be indulged in and all inferences or evidence to the contrary will be disregarded. *State v. Boeglin,* 100 N.M. 127, 666 P.2d 1274 (Ct.App.1983). Under this standard, while we find that the trial court correctly applied the law to the facts regarding the knapsack, we find it failed to do the same with respect to defendant's automobile and hotel room.

Standing to Challenge Search of Automobile

Defendant challenges the trial court's ruling that he lacked standing to assert a fourth amendment claim against the search of his automobile. The state concedes that the trial court erred in its ruling. We agree.

The trial court based its ruling that defendant lacked standing to challenge this search by reference to his failure to satisfy the test set forth in *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). In *Rakas,* the Court found that the defendants lacked standing to object to the lawfulness of the search of the car in which they traveled because they conceded that they did not own the car or the evidence obtained therein. The Court held that absent this possessory interest, the defendants lacked legitimate expectations of privacy in the areas which were the subject of the search. *Rakas v. Illinois,* 439 U.S. at 148–49, 99 S.Ct. at 432–33. On issues involving challenges to searches and seizures, the term "standing" is often used interchangeably with the phrase "legitimate expectation of privacy." *See State v. Waggoner,* 97 N.M. 73, 636 P.2d 892 (Ct. App.1981). The question of legitimate expectation of privacy involves two inquiries: "(1) has the individual by his conduct exhibited an actual (subjective) expectation of privacy; and (2) is this individual's subjective expectation one that society is prepared to recognize as reasonable." *State v. Clark,* 105 N.M. 10, 727 P.2d 949 (Ct. App.1986) (citing *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)). It is generally recognized, however, that one who owns, controls, or lawfully possesses property thereby has a legitimate expectation of privacy in that property protected by the fourth amendment. *Rakas v. Illinois,* 439 U.S. at 143–44 n. 12, 99 S.Ct. at 430–31 n. 12; *State v. Villanueva,* 110 N.M. 359, 365, 796 P.2d 252, 258 (Ct.App.1990).

Unlike the defendants in *Rakas,* defendant's property interest in the automobile searched in this case was clearly established by undisputed evidence before the trial court in the form of police records. The record contains an affidavit stating that police checked the license plate with the National Crime Information Center, which revealed defendant as the registered owner of the automobile. We therefore conclude that defendant had the requisite legitimate expectation of privacy to assert a fourth amendment challenge to the search of his automobile by virtue of his status as its owner.

Standing to Challenge Search of Hotel Room

Defendant challenges the trial court's ruling denying him standing to assert a fourth amendment claim against the search of the hotel room. The state concedes that the trial court erred in its ruling. We agree.

A person's dwelling receives the highest degree of protection from unreasonable intrusion by the government and a defendant's standing to assert his rights with respect to his home is well established in

our fourth amendment jurisprudence. *See McDonald v. United States,* 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948); *State v. Clark.* This court has held that a motel room is the equivalent of a dwelling for fourth amendment purposes. *State v. Copeland,* 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct.App.1986) (citing *Stoner v. California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964)). Evidence before the trial court unequivocally showed that defendant was the registered guest in room 411. As a registered guest, defendant was entitled to the same rights he would have possessed had his private residence been searched rather than his hotel room. The trial court erred in ruling that defendant had no standing to challenge the search of his hotel room.

Standing to Challenge Search of Knapsack

Defendant contests the trial court's ruling that his knapsack had been abandoned, thus denying him standing to challenge its search. When an individual's behavior indicates an intent to abandon his possessions, he is divested of any expectation of privacy, and the fourth amendment will no longer protect him against a warrantless search. *State v. Clark,* 105 N.M. at 12–13, 727 P.2d at 951–52. Abandonment is a factual determination based upon a combination of acts and intent, and the burden lies with the state to affirmatively show that abandonment has occurred. *Id.* at 13, 727 P.2d at 952. "The showing must be by clear, unequivocal and decisive evidence." *Id.*

Upon review of the evidence presented below, we hold that the trial court could find, based on substantial evidence, that defendant intended to abandon the knapsack based on the fact that he left it behind in a public parking lot. *See State v. Boeglin,* 100 N.M. at 132, 666 P.2d at 1279 (reviewing court will not disturb trial court's denial of motion to suppress if supported by substantial evidence). Therefore, under *Clark,* the trial court was correct in denying defendant standing to challenge the search of his knapsack.

We reject defendant's attempt to distinguish his case from the case upon which the state bases its abandonment theory. The state relies on *State v. Everidge,* 77 N.M. 505, 424 P.2d 787 (1967), in which the New Mexico Supreme Court held that a search of the contents of a package dropped from a hotel window to the ground below was valid because the package was not obtained through either a search or seizure. The package was outside the appellant's hotel room and was in a public place where the officers' right to be matched that of the appellant. The court noted that the officers' conduct was proper and permitted under the circumstances. *State v. Everidge,* 77 N.M. at 512, 424 P.2d at 794. Defendant distinguishes *Everidge* by claiming that the police conduct leading to the discovery of his knapsack was *not* "proper and permitted under the circumstances." Defendant contends that the police pursuit which forced him to flee and leave his knapsack behind was conducted without a search warrant for his hotel room, thereby coating the evidence with the taint of the illegal entry into the hotel room. The trial court never reached the merits on this issue; however, in *State v. Garcia,* 76 N.M. 171, 413 P.2d 210 (1966), the New Mexico Supreme Court directly addressed the question whether an illegal pursuit leading to abandonment of property requires the exclusion of that property from evidence. It does not.

In *Garcia,* the defendant had thrown a package containing marijuana from his car window as police forced him to pull aside. The supreme court affirmed the lower court's denial of the defendant's motion to suppress the drugs as being the fruits of an illegal search. The court cited the following language to uphold the admission of the abandoned package:

> "It is not a search to observe that which occurs openly in a public place and which is fully disclosed to visual observation. There was no seizure in disregard of any lawful right when the officers retrieved and examined the packets which had been dropped in a public place. As the evidence was obtained prior to and independent of arrest, *the arguments of counsel as to the legality of the arrest merit no consideration.*" [Emphasis added.]

State v. Garcia, 76 N.M. at 175, 413 P.2d at 214 (quoting *Trujillo v. United States,* 294 F.2d 583 (10th Cir.1961)); *see also California v. Hodari D.,* — U.S. —, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (cocaine abandoned by defendant prior to being tackled by a police officer pursuing defendant without probable cause was not the fruit of a seizure and was therefore admissible); *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) (there is no seizure in the sense of the law when the government examines property that has been abandoned by defendant, regardless of the legality of the pursuit leading to abandonment).

Standard of Particularity

The state contends that although defendant has proper standing to challenge the search of his car and hotel room, his motions to suppress do not meet the specificity requirements set forth in *State v. Goss,* 111 N.M. 530, 807 P.2d 228 (Ct.App. 1991), and therefore preclude remand for further determination. We disagree. *Goss* relies on 4 Wayne R. LaFave, *Search and Seizure* § 11.2(a), 214 (2d ed. 1987), for its contention that "motions to suppress must set out with particularity the grounds relied on for the relief sought." *Goss,* 111 N.M. at 533, 807 P.2d at 231. LaFave, in turn, cites to *State v. Miller,* 17 Or.App. 352, 521 P.2d 1330 (1974), which states the following:

> In *State v. Johnson/Imel* we held that "a written motion to suppress evidence must specify with particularity the grounds upon which the motion is based." 98 Adv.Sh. at 1386, [16 Or.App. 560] 519 P.2d [1053] at 1054. By way of illustration, we stated that *a motion claiming "there was no probable cause to arrest" could be sufficient.* 98 Adv. Sh. at 1392, 519 P.2d at 1057. Applying that standard, we here conclude that while the motion and supporting documents are, as the state correctly points out, generally conclusory, they do contain the minimum specificity required by *Johnson/Imel.* [Emphasis added.]

State v. Miller, 521 P.2d at 1332.

Defendant's motion to suppress the evidence discovered in his hotel room states "[t]hat *without probable cause or a [s]earch [w]arrant* * * * officers of the Albuquerque Police Department did violate [d]efendant's constitutional rights by searching [r]oom 411 * * *." (emphasis added). Defendant's motion to suppress the evidence seized from his automobile asserts that "officers, *without a [s]earch [w]arrant or exigent circumstances,* broke into an automobile owned by the [d]efendant * * * * *Without probable cause or a [w]arrant,* officers then * * * broke into the locked briefcase * * *." (emphasis added). Given the language of the motions, we determine that defendant has met the standard of particularity set forth in *Goss.*

Conclusion

Error in the admission of evidence in a criminal trial must be held prejudicial rather than harmless if there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Clark v. State,* 112 N.M. 485, 816 P.2d 1107 (1991) (citing *State v. Trujillo,* 95 N.M. 535, 541, 624 P.2d 44, 50 (1981)). If defendant's decision to plead guilty was influenced by the trial court's prior admission of the evidence found in his car or hotel room, there is a fair inference that the evidence might have contributed to the conviction. Therefore, we now remand for a full hearing on defendant's motions to suppress the evidence obtained from his automobile and hotel room. Should the trial court determine that the evidence is indeed admissible, the trial court should reenter its judgment and sentence. If, however, the trial court determines that the evidence in question is not admissible, defendant should be given the opportunity to withdraw his guilty plea.

IT IS SO ORDERED.

ALARID, C.J., and PICKARD, J., concur.

825 P.2d 249

STATE of New Mexico, Plaintiff–Appellee,

v.

Karl GROSSMAN and Leonard Grossman, Defendants–Appellants.

No. 12515.

Court of Appeals of New Mexico.

Dec. 23, 1991.

Tom Udall, Atty. Gen. and Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Theodore C. Baca, Albuquerque, for defendants-appellants.

OPINION

CHAVEZ, Judge.

Defendants appeal their conviction for trafficking of marijuana by cultivation. Three issues have been raised on appeal: 1) whether evidence seized by law enforcement officers pursuant to a civil writ of assistance is the fruit of a warrantless, illegal search; 2) whether the trial court erred in finding that defendant Karl Grossman consented to a search of his property; and 3) whether defendants reserved their right to appeal the denial of their motion to suppress evidence. In their briefs, defendants provide evidence in support of Issue 3, and the state concedes that the right to appeal the motion to suppress evidence was preserved for purposes of appeal. Therefore, we do not address Issue 3. Issues listed in defendants' docketing statement, but not briefed, are deemed abandoned. *See State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985). For the reasons stated below and under the particular circumstances involved in this case, we affirm the decision of the district court.

FACTS

Judgment was awarded against Leonard Grossman (hereinafter referred to as Leonard) in a civil case. A writ of assistance (writ) was issued and executed on December 1, 1988, in connection with property at 2627 (2627) and 2623 (2623) Sixth Street in Albuquerque. Leonard's brother and business partner, Karl Grossman (Karl), occupied the property at 2629 (2629) Sixth Street. The writ stated that a special master had located property at 2623 and 2627 belonging to Leonard that included six motor vehicles, two trailers, and a mobile home as shown in Exhibit A. Exhibit A was not attached to the writ that was used to seize the property when that writ was introduced into evidence below.

On December 1, after finding no one present at 2627 or 2623, the special master and the accompanying law enforcement officers proceeded to Karl's home at 2629. The officers provided Karl with a copy of the writ after which they explained that they were attempting to locate assets belonging to Leonard. The officers told Karl that they had seen property on his lot and asked his permission to look more closely at the property to determine ownership of that property. Karl invited the officers onto his property but stated that nothing on his property belonged to Leonard. According to the evidence, Karl was very cooperative and amicable during the search. As a result of the search, the officers discovered marijuana on a table inside a travel trailer and marijuana plants in a shed located on Karl's property.

Following the discovery on Karl's property, the officers and the special master proceeded to Leonard's property. Access was gained after a locksmith was employed. While comparing vehicle identification numbers from a list of assets owned by Leonard with the numbers on the vehicles located on Leonard's property, the officers discovered marijuana in a vehicle. A further search revealed marijuana located in a shed on the property.

In response to a motion to suppress the evidence, the trial court found that entry on the lot at 2629 was by invitation of Karl and the discovery of marijuana was inadvertently made while legitimately searching for assets belonging to Leonard. The trial court found entry on the lot at 2627 to be pursuant to a valid writ and the discovery of marijuana on that property to be inadvertent. Defendants' motion to suppress evidence was denied.

WRIT OF ASSISTANCE

On appeal, defendants claim that the writ was invalid, making the search illegal. Because we find the writ valid, we need not decide whether an invalid writ will make the search illegal. Defendants' claim involves several subparts: (a) failure to provide notice; (b) failure to provide security; (c) failure of proper service of the writ on Leonard; (d) failure to direct defendants to file a response; (e) failure to set a hearing; and (f) failure to contain a concise statement of the relief sought, thereby making the writ the functional equivalent of a prohibited general search warrant. *See* SCRA 1986, 1–065. Our standard of review of a trial court's denial of a motion to suppress is whether the law was correctly applied to the facts, viewing them in the manner most favorable to the prevailing party. *See State v. Boeglin,* 100 N.M. 127, 666 P.2d 1274 (Ct.App.1983). On appeal, we will not disturb the trial court's decision if it is supported by substantial evidence. *Id.* We separately address each subpart of this issue below.

(a) Under Rule 1–065(G)(1) and (2), notice can be waived for good cause. In the motion and application for the writ, plaintiff in the civil case alleged that he had encountered difficulty in locating assets belonging to Leonard where those assets had been previously traced and concealed before they could be seized. Plaintiff feared that the items would be moved again if Leonard was given notice of the writ. The judge included these reasons in the body of the writ and ordered the sheriff to use force if necessary in executing the writ. Under these circumstances, good cause was shown for not providing Leonard with prior notice of the writ.

(b) Although defendants outlined the specific areas with respect to their allegations of non-compliance with Rule 1–065 in their written motion to suppress the evidence, there was no mention of failure to include security during the motion to suppress hearing. Accordingly, we question whether this issue was properly preserved. *See State v. Lopez,* 84 N.M. 805, 508 P.2d 1292 (1973). Moreover, defendants do not allege any damages from the failure to include security. Therefore, they cannot claim prejudice as a result of this omission. *See State v. Wright,* 84 N.M. 3, 498 P.2d 695 (Ct.App.1972) (for error to be reversible, it must be prejudicial).

(c) The contention that Leonard was not served with the writ is not borne out by the record. According to his own testimony at trial, Leonard was served with copies of the writ. Therefore, we do not address this contention.

(d) and (e) With respect to complaints that the writ failed to require a response or to set a hearing, the writ substantially put defendants on notice about the nature of the property to be seized and the reasons for the seizure. The writ stated that, after execution, the sheriff and the special master would make reports to the court to be presented by plaintiff at an "early hearing date" at which the defendant would be allowed to respond. Rule 1–065(E) states that the writ is to serve in lieu of summons. The functions of a summons are to show that a defendant is within the power of the court and to give notice of the proceeding against him. *See Clark v. LeBlanc,* 92 N.M. 672, 593 P.2d 1075 (1979). The omissions from the writ in this case did not prevent these functions from being served.

Although the language of the rule appears mandatory with respect to the form of the writ, the substance of the writ substantially complied with the intent of the supreme court in ensuring that defendants are put on notice. *Cf. Security Trust v. Smith,* 93 N.M. 35, 596 P.2d 248 (1979) ("shall" is mandatory unless inconsistent with intent of the legislature); *Citizen's Bank, Farmington v. Robinson Bros. Wrecking,* 76 N.M. 408, 415 P.2d 538 (1966) (substance, not form, is controlling where a writ was served instead of a summons). Similarly, we note that the power to enter and search property has been upheld in New Mexico where omissions or erroneous descriptions have been included in search warrants. *See, e.g., State v. Perea,* 95 N.M. 777, 626 P.2d 851 (Ct.App.1981)

(search warrant sufficient where residential address different than mailing address); *State v. Aragon,* 89 N.M. 91, 547 P.2d 574 (Ct.App.1976) (search warrant sufficient where description of property erroneous). Based on the above, we hold that the particular omissions from the writ issued in this case did not serve to invalidate the writ. We hold that, in this respect, a writ is like a summons or a search warrant, and that substantial compliance with the function it is designed to serve is sufficient.

(f) Defendants contend that the writ was deficient in that it did not contain a statement of the relief sought, contrary to Rule 1–065(E). As a corollary to this argument, defendants contend that the writ was tantamount to a general search warrant. The factual basis for defendants' argument is that the writ authorized the special master to seize the property described on Exhibit A. Neither the motion for the writ nor the writ introduced into evidence at the motion to suppress hearing had Exhibit A attached to it. Thus, defendants' argument is premised on the allegation that Exhibit A was never attached.

The issue of whether Exhibit A was attached to the motion or the writ was never litigated at the motion to suppress hearing. There was no testimony about whether Exhibit A was attached or not. The first time defendants relied on the alleged fact that Exhibit A was not attached was in their brief filed in the district court after the hearing. We believe that raising a factual issue at this time, when the state does not have the opportunity to rebut it, is insufficient to require the district court to find that Exhibit A was not attached. *Cf. State v. Sisneros,* 98 N.M. 201, 647 P.2d 403 (1982) (raising factual issues in motion for rehearing is too late); *State v. Young,* 91 N.M. 647, 579 P.2d 179 (Ct.App.) (defendant cannot raise insanity defense after it is too late for state to rebut it), *cert. denied,* 439 U.S. 957, 99 S.Ct. 357, 58 L.Ed.2d 348 (1978). In the absence of any requirement that the district court find that Exhibit A was not attached, we can presume that Exhibit A was attached. Under these circumstances, defendants' issue lacks a factual basis, and when an issue lacks a factual basis we do not address it. *See State v. Jacobs,* 102 N.M. 801, 805, 701 P.2d 400, 404 (Ct.App.1985).

Viewing, in a manner most favorable to the state, the trial court's position that the search of Leonard's property was pursuant to a valid writ, we hold that the writ was in substantial compliance with the requirements of the rule and the denial of the motion to suppress evidence was proper. *See State v. Boeglin.*

VOLUNTARINESS OF CONSENT TO SEARCH

Defendant Karl, through his attorney, claims that he was coerced by threat of a court order into giving consent to the officers to enter and search his property. Whether consent is voluntary is a question of fact to be determined from the totality of the circumstances and by a three-part test. *See State v. Valencia Olaya,* 105 N.M. 690, 736 P.2d 495 (Ct.App.1987). Viewed with a presumption against waiver of constitutional rights, the testimony must show that the consent was unequivocal and specific and given without coercion. *Id.* "In a suppression hearing it is for the trier of fact to determine the weight and sufficiency of the evidence, including all reasonable inferences." *See State v. Keyonnie,* 91 N.M. 146, 571 P.2d 413 (1977). A valid consent may obviate the need for the ordinarily required warrant and probable cause. *State v. Bedolla,* 111 N.M. 448, 806 P.2d 588 (Ct.App.1991).

Karl was given a copy of the writ prior to inviting the officers onto his property. Therefore, we fail to see how the fact that the officers showed Karl the writ can be considered coercive. The officers explained the reasons for wanting to look around Karl's property. Officer Peterson testified that Karl then invited the officers onto his property, acting in an amicable manner. Herbert Grossman contradicted the officer's testimony on this point. Karl did not testify that he was coerced or that the search was not consensual. The evidence showed that Karl's consent was unequivocal and specific and given without coercion. *See State v. Valencia Olaya;*

State v. Boeglin. Under these facts, we hold that there is sufficient evidence to uphold the trial court's finding of consent. Accordingly, we hold that Karl's consent was voluntary, making the search of his property valid. *See State v. Valencia Olaya.*

As discussed above, the officers' entry onto Leonard's property was pursuant to a valid writ and the entry onto Karl's property was pursuant to valid consent given by Karl. Once they were on the properties, the evidence shows that the officers' discovery of the marijuana was inadvertent. *See State v. Crenshaw,* 105 N.M. 329, 732 P.2d 431 (Ct.App.1986). Therefore, the seizure of the marijuana was proper. *Id.* Based on the foregoing, we affirm the decision of the district court.

IT IS SO ORDERED.

PICKARD and FLORES, JJ., concur.

825 P.2d 611

Rosita BOYD, individually and as mother and personal representative of the Estate of Tracy Shain Boyd, her son, deceased, Plaintiff–Appellant,

v.

PERMIAN SERVICING COMPANY, INC., Defendant–Appellee.

No. 19792.

Supreme Court of New Mexico.

Feb. 5, 1992.

Rehearing Denied March 2, 1992.

Hanratty Law Firm, Kevin J. Hanratty, Artesia, for appellant.

Sterling & Harris, Bonnie M. Stepleton, William E. Singdahlsen, Albuquerque, for appellee.

OPINION

RANSOM, Chief Justice.

Rosita Boyd sued Permian Servicing Company, Inc. to recover damages for the wrongful death of her son, Tracy Shain Boyd, who died from injuries incurred while working for Permian. Permian filed a motion to dismiss for lack of subject matter jurisdiction under SCRA 1986, 1–012(B)(1), contending the case was governed by the Workers' Compensation Act.[1]

1. The New Mexico Workers' Compensation Act, NMSA 1978, §§ 52–1–1 to 52–6–25 (Repl.Pamp.1987), provides that its procedures and remedies are exclusive for job related injuries and death, and that the employer and employee are conclusively presumed to have sur-

Plaintiff claimed that the Act did not apply because her sixteen-year-old son was working illegally on a power-driven hoisting device in violation of Sections 212, 215, and 216 of the Fair Labor Standards Act of 1938. 29 U.S.C. §§ 201 to 219 (1988 & Supp.1989).

The trial court, based on evidence outside the pleadings, found that Boyd was legally employed by Permian and that the injuries arose out of and in the course of Boyd's employment. Based on those findings the court concluded that the requirements of coverage under the Act had been met, and that it lacked subject matter jurisdiction. Consequently, the court dismissed plaintiff's claims.

Permian's motion should have been considered as one for dismissal under SCRA 1986, 1–012(B)(6), alleging failure to state a claim upon which relief could be granted. The suit was filed as a claim for wrongful death over which the district courts in New Mexico clearly have jurisdiction. While a death case under the Workers' Compensation Act cannot be brought originally in the district court, that is not because the legislature has removed jurisdiction from the district court over death cases, but rather because the exclusivity provision of the Act is a total bar to an action by an employee against an employer. Further, because the court heard evidence outside the pleadings, the motion should have been analyzed as a motion for summary judgment. SCRA 1986, 1–012(B).

The parties agree the employment of Boyd was not a violation of the New Mexico Child Labor Law. Therefore, we are asked to decide whether employment in violation of the Federal Fair Labor Standards Act would affect exclusivity when there is not a violation of state law.

We affirm the dismissal. In New Mexico, a minor employed under a contract made invalid by the State Child Labor Law may sue for personal injury under the common law. *Maynerich v. Little Bear Enters.*, 82 N.M. 650, 652, 485 P.2d 984, 986 (Ct.App.1971). New Mexico case law does not deal with illegality under federal law, and the question of whether a contract of employment made invalid under federal law would affect the exclusivity of workers' compensation is a matter of first impression. The three jurisdictions apparently deciding this question to date have held violation of the Federal Fair Labor Standards Act is not controlling so as to render employment voidable and outside of the exclusivity of workers' compensation laws.

Most recently, in *Bruley v. Fonda Group, Inc.*, 595 A.2d 269 (Vt.1991), a divided court held:

> Although plaintiffs cite numerous cases holding that illegally employed minors who have been injured may sue the employer in a damage suit, all involve violations of *state* child labor laws. No Vermont statute was violated here. Moreover, plaintiffs cite no cases holding that the child labor provisions of the federal Fair Labor Standards Act apply in determining whether employment of a minor is lawful for purposes of workers' compensation coverage. To the contrary, two courts have explicitly rejected application of the federal act. *See Estep* ... [and] *Gaston*....

Id. at 271 (citations omitted).

In *Estep v. Janler Plastic Mold Corp.*, 11 Ill.App.3d 551, 297 N.E.2d 341 (1973), *aff'd*, 57 Ill.2d 395, 312 N.E.2d 618 (1974), *cert. denied*, 419 U.S. 1109, 95 S.Ct. 781, 42 L.Ed.2d 805 (1975), the court had simply stated:

> We cannot accept plaintiff's contention that the federal Fair Labor Standards Act definition of the term "oppressive child labor" is controlling in our interpretation of the Illinois Workmen's Compensation Act's use of the term "illegally employed minor." Rather do we look for such assistance to the Illinois Child Labor Law which provides that a minor under 16 years of age cannot be lawfully employed to do the kind of work engaged

rendered their rights to procedures and remedies other than those provided in the Act.

NMSA 1978, § 52–1–6.

> in by plaintiff. Since plaintiff was 17 at the time of the injury, he was not an "illegally employed minor."

Id. 297 N.E.2d at 342–43 (citation omitted).

In *Gaston v. San Ore Construction Co.*, 206 Kan. 254, 477 P.2d 956 (1970), the court specifically asked whether the Federal Fair Labor Standards Act and the child labor provisions thereunder control as to the legality of employment under the Kansas Workmen's Compensation Act. Noting that the Kansas Supreme Court had held to the contrary in *Neville v. Wichita Eagle, Inc.*, 179 Kan. 197, 294 P.2d 248 (1956), the court quoted, with approval, from that opinion:

> We hold that the test of the minor's capacity to enter into an employment contract is that fixed by the laws of this state; that the employment was a lawful one under our workmen's compensation act, and that the liabilities of the employer for injury resulting in the workman's death are measured by that act.

Gaston, 477 P.2d at 958 (quoting *Neville*, 294 P.2d at 252). The court went on to reiterate that "the test of whether employment is lawful under the provisions of our Workmen's Compensation Act is determined by the laws of our state and not those of the federal government." *Gaston*, 477 P.2d at 958.

Also, the United States Court of Appeals for the Fifth Circuit, in a diversity case on appeal from summary judgment that a wrongful death claim was barred by Georgia workmen's compensation law, held in four lines that: "Appellants argue ... that their state law wrongful death claim is not precluded by the Georgia workmen's compensation statute. The ... contention is without merit...." *Breitwieser v. KMS Industries, Inc.*, 467 F.2d 1391, 1392 (5th Cir.1972) (the entire opinion actually being directed to denial of any separate basis for liability under the Federal Fair Labor Standards Act which was held not to create an independent cause of action for wrongful death), *cert. denied*, 410 U.S. 969, 93 S.Ct. 1445, 35 L.Ed.2d 705 (1973).

None of these cases enunciate rationale for their holdings. Notable is the dissent of Justice Dooley in *Bruley:*

> Illegality is a matter of contract law. Where illegality is based on a violation of statutory law, the statute can be state or federal. Thus, it makes no difference whether the employment is illegal under the Vermont Child Labor Law or the federal Fair Labor Standards Act, as long as it is illegal.

Bruley, 595 A.2d at 271 (citation omitted). The question, however, is not simply one of illegality—it is one of whether the illegality allows for the avoidance of the exclusivity of workers' compensation under state policy.

The workers' compensation statutes of some states specifically provide that illegally employed minors are included within the exclusivity of workers' compensation, *e.g.*, *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 350 S.E.2d 83, 85 (1986), or that the minor is given an option of which remedy to pursue, *e.g.*, *Thompson v. Family Godfather, Inc.*, 212 N.J.Super. 270, 514 A.2d 875, 876 (Ct.Law Div.1986). It is a matter of state workers' compensation policy. That is clear. When the legislature has made no specific provision, the courts have inferred a state policy either in favor of exclusivity, *e.g.*, *Jensen v. Sport Bowl, Inc.*, 469 N.W.2d 370 (S.D.1991), or in favor of the worker's right to sue at common law. *E.g.*, *Maynerich*, 82 N.M. at 652, 485 P.2d at 986.

The New Mexico Legislature has enacted child labor laws under which the employment in question is legal for sixteen-year-old workers. NMSA 1978, § 50–6–4 (Repl.Pamp.1988) (no child *under* the age of sixteen shall be employed, *inter alia*, on or around a power-driven hoisting apparatus). On this point, the state and federal laws are in conflict. When employment that is illegal under federal penal statutes is not the subject of specific state legislative policy to the contrary, we likely will be disposed to apply the *Maynerich* doctrine in favor of the worker's option. We would infer that to be the intention of the legislature. We cannot, of course, recognize a

policy inconsistent with a declaration of the legislature. Here, we conclude the legislature's specific consideration of the employment of sixteen-year-old workers was sufficient to reflect an intent that the exclusivity of the Workers' Compensation Act apply to such employment. Accordingly, we affirm the district court's dismissal of this wrongful death action as falling within the exclusivity of the Workers' Compensation Act.

IT IS SO ORDERED.

BACA, J., and COLE, District Judge, concur.

825 P.2d 614

STATE of New Mexico, Plaintiff-Appellee,

v.

John Paul SHEETZ, Defendant-Appellant.

No. 12710.

Court of Appeals of New Mexico.

Dec. 23, 1991.

Tom Udall, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Robert J. Jacobs, Taos, for defendant-appellant.

OPINION

PICKARD, Judge.

Defendant appeals his convictions for two counts of trafficking in controlled substances, one for heroin and one for cocaine. Among the issues he raises are that he was entrapped as a matter of law under the objective standard set forth in *Baca v. State*, 106 N.M. 338, 742 P.2d 1043 (1987), and, if not, then at least the court below should have instructed the jury in accordance with his proposed instruction relying on *Baca's* objective standard. Because we believe the evidence raised credibility issues, we cannot say defendant was entrapped as a matter of law. However, defendant's testimony in this case, if credited, showed that the police exceeded the standards of proper investigation under *Baca*. Accordingly, we reverse and remand for further proceedings and for a new trial, if necessary. Because of our disposition, we need not discuss the other issues defendant raises.

The issue of entrapment was raised solely by defendant's testimony, although nothing in the state's case directly cast doubt on that testimony. Indeed, the state's police witnesses admitted that there was an informant who was probably paid $100 on this case.

Defendant testified that he was an oilfield worker when he was introduced, by a co-worker, to Jerry Allan Mabrey in June of 1989. A few days later, Mabrey stopped by defendant's house and offered him heroin. Defendant had used heroin several times in the past, the last time being about a year before this incident. Defendant's former girlfriend was a user.

Defendant accepted Mabrey's offer and the two used the heroin Mabrey brought. During the rest of the summer, Mabrey continued to bring heroin to defendant and the two used it. Sometimes Mabrey would go to defendant's house every day; sometimes it was every few days. The frequency of the visits increased as the summer progressed. By September, defendant was addicted and was buying his own heroin from his former girlfriend's supplier.

In early August, Mabrey asked defendant to get some drugs for Mabrey's friend Milt. Unbeknown to defendant, Milt was an undercover detective. Defendant refused. Later, however, Mabrey began to make repeated requests to defendant to obtain drugs for Milt. Mabrey reminded defendant of all the heroin Mabrey had given defendant. Mabrey had the idea that defendant could overcharge Milt for the drugs and thereby obtain money to buy drugs for Mabrey and defendant to use. At this time, Mabrey was experiencing withdrawal symptoms. Also, defendant was intimidated by Mabrey, whom he considered to be a violent person.

Ultimately, defendant purchased drugs for Milt on two occasions in September. On each occasion, Milt was overcharged. On the cocaine transaction, defendant used the extra money to buy heroin for himself and Mabrey. On the heroin transaction, defendant "pinched" some heroin off the heroin he gave Milt, and defendant and Mabrey used this heroin.

This case requires us to decide whether *Baca* is limited to its facts and, if

not, who decides issues under the objective standard for entrapment. These issues arise because, when defendant moved for a directed verdict below, the court below denied the motion, ruling that there were credibility issues involved. However, when defendant requested a non-Uniform Jury Instruction in accordance with *Baca,* the court below would not give such an instruction, believing *Baca* was limited to its facts. This was incorrect, as the state acknowledges.

In *Baca,* the facts were that defendant acted as a mere conduit after the informant arranged a transaction in which Baca did nothing more than get drugs from one police agent and give them to another. There is nothing in the *Baca* opinion itself indicating that its holding is limited to circular transactions. Its holding is that:

> [A] criminal defendant may successfully assert the defense of entrapment, *either* by showing lack of predisposition to commit the crime for which he is charged, *or,* that the police exceeded the standards of proper investigation, as here where the government was both the supplier and the purchaser of the contraband and defendant was recruited as a mere conduit. [Emphasis in original.]

Id. at 341, 742 P.2d at 1046. This language indicates that the circumstance of a circular transaction is but one of many instances in which the police could exceed the standards of proper investigation. Thus, the fact that Mabrey did not coax defendant into a circular transaction is not fatal to this appeal.

■ Nor do we agree with the state's argument that Mabrey was not an agent of the police. *United States v. Busby,* 780 F.2d 804 (9th Cir.1986), on which the state relies, is distinguishable because the informant in that case was not working as an informant at the time of the relevant transaction. Here, in contrast, the officers admitted that Mabrey was an informant at the relevant time and was probably paid $100 for this case. Thus, the informant here was an agent of the police. *See Sherman v. United States,* 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); *State v. Padilla,* 91 N.M. 451, 575 P.2d 960 (Ct.App. 1978); *cf. State v. Lopez,* 109 N.M. 578, 787 P.2d 1261 (Ct.App.1990) (private investigator not working for police).

Having determined that *Baca*'s objective standard, focussing on the misconduct of the police, potentially applies to this case, we must next determine (1) whether this case, as *Baca,* calls for a determination as a matter of law by this court that defendant was entrapped; (2) whether the trial court is the proper entity to make the decision; or (3) whether the decision is best left to the jury. In *Baca,* the facts were undisputed that the transaction occurred in a circular fashion, with defendant acting as a mere conduit. Thus, there were no factual issues to decide, and the appellate court could hold as a matter of law that Baca was entrapped. *See also, e.g., State v. Sainz,* 84 N.M. 259, 501 P.2d 1247 (Ct.App. 1972).

■ In this case, however, as the court below noted in denying defendant's motion for directed verdict, there were credibility issues. The court below did not, as the state contends, rule that defendant's testimony was incredible as a matter of law. Nonetheless, defendant's entrapment defense was made by his own testimony, and the state attempted to cast doubt on defendant's testimony by arguing that his story did not ring true. Why, asked the state, would Mabrey provide defendant with hundreds of dollars of heroin in return for a mere $100 payment from the police? The court below was correct that this argument raised a credibility issue. Thus, this is not an appropriate case for this court to find entrapment as a matter of law.

The next question is whether the trial court or the jury should decide the issue, both on remand in this case and in future cases. In our view, both the trial court and the jury should decide, in a manner similar to that in which voluntariness of a confession is decided. *See State v. Burk,* 82 N.M. 466, 483 P.2d 940 (Ct.App.) (jury passes on voluntariness only after judge has independently resolved the issue against the accused), *cert. denied,* 404 U.S. 955, 92 S.Ct. 309, 30 L.Ed.2d 271 (1971). Thus,

even though we hold that there was no entrapment as a matter of law, the court below, on remand in this case, will be able to resolve the issue as a matter of fact. Our ruling on this matter is based on the policies underlying our supreme court's readoption of the doctrine of entrapment under an objective standard, *see Baca v. State,* and our supreme court's recent reaffirmation of the importance of the jury's role in the criminal justice system, *see State v. Sanchez,* 109 N.M. 428, 786 P.2d 42 (1990).

Several jurisdictions that utilize the objective definition of entrapment view the issue as a matter to be resolved by the court without the jury. *See, e.g., Grossman v. State,* 457 P.2d 226 (Alaska 1969); *People v. Turner,* 390 Mich. 7, 210 N.W.2d 336 (1973); *see also* Paul Marcus, *The Entrapment Defense,* §§ 5.06, 5.08 (1989); Bennett L. Gershman, *Prosecutorial Misconduct,* § 1.2(d) (1989); Model Penal Code § 2.13(2); 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 5.3(b) (1984). There are two reasons for this perspective. First, objective entrapment raises issues concerning the sound administration of justice, which is the unique responsibility of the courts. Second, judges decide cases by written opinions that offer guidance to law enforcement. *See People v. D'Angelo,* 401 Mich. 167, 257 N.W.2d 655 (1977).

Other states hold that the issue may be decided by the trial court if the facts relating to the issue are not disputed; however, when the facts are in dispute and the determination involves matters of credibility, objective entrapment is an issue to be submitted to the jury. *See, e.g., State v. Mullen,* 216 N.W.2d 375 (Iowa 1974); *State v. Powell,* 68 Haw. 635, 726 P.2d 266 (1986); *Rodriguez v. State,* 662 S.W.2d 352 (Tex. Crim.App.1984) (en banc); *State v. Wilkins,* 144 Vt. 22, 473 A.2d 295 (1983). This view is based on the view that determinations of credibility are traditionally the province of the jury. In addition, since the issue turns on both the nature of the inducement used by the police and its effect on people, there is some feeling that the jury should be allowed to determine the issue. *See* 1 LaFave & Israel, *supra.*

Because entrapment is uniquely a matter of state law, *Baca v. State,* we believe we are free to adopt a hybrid approach that draws on the strengths of both views. Thus, we hold that the issue should first be resolved by the trial court. The resolution will involve two inquiries. First, what are the factual circumstances involved in the case? Second, do these factual circumstances amount to objective entrapment? *Cf. Aguilar v. State,* 106 N.M. 798, 751 P.2d 178 (1988) (confession case). It is helpful to analyze the second step first. The second step of the analysis is not appropriately a jury issue in the first instance. The determination of the proper standards of police investigation is a question of law and policy to be decided by the courts in the first instance. *People v. Stanley,* 68 Mich.App. 559, 243 N.W.2d 684 (1976); *see also United States v. Russell,* 411 U.S. 423, 441, 93 S.Ct. 1637, 1647, 36 L.Ed.2d 366 (1973) (Stewart, J., dissenting).

This question of law should be decided by the trial courts with their conclusions being freely reviewable by the appellate courts. *Cf. Aguilar v. State.* In this case, if on remand the court below finds the facts to be as defendant testified, then it should find entrapment under the objective standard of *Baca* and should dismiss the charges against defendant. The basis for our holding is our understanding of *Baca,* which holds that a defendant is entrapped when the police activity exceeds the proper standards of investigation. We believe that this occurs when the police use undue persuasion or enticement in an unfair manner to induce the defendant to commit a crime when, without such conduct upon the part of the police agent, a reasonable person in defendant's position would not have committed the crime. We derive this standard from prior decisions of this court and the supreme court, as well as the decisions of other states that have adopted an objective view of entrapment.

Prior to *Baca,* New Mexico cases recognized that when the police have a good-

faith belief that the law is being violated by a particular individual, the police may properly provide that person with an opportunity to commit a crime. However, it was "not permissible for an officer to initiate the criminal act, nor to use undue persuasion or enticement to induce the defendant to commit a crime, when without such conduct upon the part of the officer the defendant would not have committed such crime." *State v. Roybal,* 65 N.M. 342, 346, 337 P.2d 406, 409 (1959). This general rule was repeated in a number of cases decided by our supreme court and later this court. *State v. Akin,* 75 N.M. 308, 404 P.2d 134 (1965); *State v. Romero,* 79 N.M. 522, 445 P.2d 587 (Ct.App.1968); *State v. Sanchez,* 79 N.M. 701, 448 P.2d 807 (Ct.App.1968). *See also State v. Sena,* 82 N.M. 513, 484 P.2d 355 (Ct.App.1971) (entrapment does not occur unless the criminal activity is the product of creative activity of law enforcement officials).

In the 1970s, New Mexico's law concerning entrapment began to change. At this time, the determination of entrapment involved weighing the objective indicia of police involvement in the activity against defendant's subjectively determined state of mind. *See State v. Jackson,* 88 N.M. 98, 537 P.2d 706 (Ct.App.1975); *State v. Sainz.* Under this hybrid standard, this court held that:

> When the state's participation in the criminal enterprise reaches the point where it can be said that except for the conduct of the state a crime would probably not have been committed or because the conduct is such that it is likely to induce those to commit a crime who would normally avoid crime, or, if the conduct is such that if allowed to continue would shake the public's confidence in the fair and honorable administration of justice, this then becomes entrapment as a matter of law. [Citations omitted.]

Id. 84 N.M. at 261, 501 P.2d at 1249. *See also State v. Jackson; State v. Fiechter,* 88 N.M. 437, 540 P.2d 1326 (Ct.App.1975), *reversed,* 89 N.M. 74, 547 P.2d 557 (1976). However, this view of entrapment was ultimately rejected, and *Sainz* and *Jackson* were overruled by our supreme court in 1976. *See State v. Fiechter,* 89 N.M. 74, 547 P.2d 557 (1976). In so holding, our supreme court emphasized that the focal issue in entrapment was defendant's predisposition to commit the crime, solely a subjective test. *Id.*

In *Baca,* our supreme court stated that *Fiechter* "needs to be expanded to make allowance for an objective standard." 106 N.M. at 339, 742 P.2d at 1044. Thus, the supreme court did not overrule *Fiechter;* instead, it held that both the subjective and objective views of entrapment would be recognized in New Mexico. We believe that in so holding, the supreme court contemplated that the holdings of *Sainz* and *Jackson,* concerning the objective view of entrapment, would once again become good law.

This view of objective entrapment brings our law closer to the law of other states that have adopted the objective view of entrapment. While the language of the test varies slightly, the focus in these states is whether the methods of persuasion or inducement used by law enforcement officers or their agents are such as to create a substantial risk that the offense would be committed by persons other than those who are ready to commit it. *See State v. Powell; State v. Cripps,* 692 P.2d 747 (Utah 1984); *State v. Wilkins; accord People v. Barraza,* 23 Cal.3d 675, 153 Cal. Rptr. 459, 591 P.2d 947 (1979) (en banc); *State v. Mullen; Grossman v. State; People v. Turner,* 390 Mich. 7, 210 N.W.2d 336 (1973); *Rodriguez v. State; see also* Model Penal Code § 2.13(1)(b).

We believe that under this interpretation of the law, defendant's testimony, if believed, was sufficient to establish that he was entrapped within the meaning of *Baca.* The essence of defendant's version of events is that Mabrey, the informant in this case, gave him free heroin until he was addicted and then played on defendant's

addiction to persuade defendant to purchase heroin and cocaine for an undercover police agent. We believe that an informant's addicting someone to heroin and then convincing him to sell heroin to satisfy the craving and to avoid the sickness of withdrawal is an unfair method of persuasion that creates a substantial risk that the crime of trafficking will be committed by persons not otherwise ready and willing to traffic in controlled substances. In addition, we do not believe that the war on drugs should be waged by creating more addicts; such tactics offend our notions of fundamental fairness. *See State v. Sainz.*

However, if on remand the court below does not find the facts to be as defendant testified, the jury should be given the opportunity, under appropriate instructions, to decide the issue. In this case, this means that defendant shall be granted a new trial. We believe that allowing this matter to be decided by the jury is consistent with defendant's right to a jury trial in criminal cases. *See State v. Sanchez,* 109 N.M. 428, 786 P.2d 42. It is also consistent with SCRA 1986, 14–5160, which requires entrapment under the subjective standard to be submitted to the jury when it is at issue. Deciding this case in this manner is consistent with our supreme court's decision in *Baca,* as well as with other supreme court cases in analogous areas. *See Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973).

Summarizing, in future cases when defendant raises an issue of whether the police exceeded the standards of proper investigation, the trial court should view the facts in the light most favorable to defendant, and if the facts do not raise an issue of misconduct of state agents exceeding the standards of proper investigation, then the entrapment issue is to be submitted to the jury under UJI Crim. 14–5160, the subjective instruction. If the facts are undisputed or if the trial court, after resolving the facts, believes that they establish misconduct of state agents of the sort described herein or in *Baca* or *Sainz,* the court shall dismiss the charges. If the trial court, after resolving the factual issues, does not find they establish such misconduct on the part of state agents but is of the opinion that another fact finder could so find, it shall submit the matter to the jury under instructions that place the burden of proof on the state, consistent with other defense jury instructions. *State v. Lopez. See also, e.g.,* SCRA 1986, 14–5101 (insanity); 14–5130 (duress); 14–5160 (subjective entrapment).

Although defendant's requested instruction on objective entrapment was sufficient to preserve the issue we decide, a more complete instruction, and one more in line with the details of our analysis, would be the following:

> Evidence has been presented that the defendant was induced to commit the crime by law enforcement officials or their agents using unfair methods of persuasion that created a substantial risk that the crime would be committed by a reasonable person in defendant's circumstances who was not otherwise ready and willing to commit the crime. For you to find the defendant guilty, the state must prove to your satisfaction beyond a reasonable doubt that the defendant was not induced to commit the crime by such methods.

We recognize that it is not this court's function to draft jury instructions. *See Alexander v. Delgado.* However, when a uniform jury instruction does not cover a subject, one similar in style to the uniform instructions should be drafted. *See* General Use Note to Uniform Jury Instructions—Criminal. Because *Baca* expanded the defense of entrapment in a manner analogous to the way *State v. Pierce,* 110 N.M. 76, 792 P.2d 408 (1990) altered the elements of the criminal sexual contact crime, we believe that it is helpful to give guidance in the form of a suggested instruction. *Cf.*

State v. Osborne, 111 N.M. 654, 808 P.2d 624 (1991) (court suggested a suitable instruction).

Accordingly, this case is reversed and remanded. In accordance with this opinion, the court below should decide whether it believes defendant's testimony. If so, it should dismiss the charges. If, on the other hand, the court below resolves the objective entrapment issue against defendant, it shall grant a new trial at which the jury shall be given an instruction on objective entrapment similar to that appearing above.

IT IS SO ORDERED.

ALARID, C.J., and APODACA, J., concur.

825 P.2d 1241

James William ROTH, d/b/a Bill Roth Plastering, Plaintiff–Appellant,

v.

Carolyn THOMPSON, Leland Peach, Carolyn Sue Thompson Revocable Trust, Defendants–Appellees.

No. 19708.

Supreme Court of New Mexico.

Jan. 23, 1992.

Campbell, Carr, Berge & Sheridan, P.A., William P. Slattery, Santa Fe, for plaintiff-appellant.

Sommer, Udall, Othmer, Hardwick & Garcia, P.A., Jack N. Hardwick, Santa Fe, for defendants-appellees.

OPINION

FRANCHINI, Justice.

In this appeal we consider the statutory proviso that contractors comply with licensing requirements as a prerequisite to utilizing the courts to file or foreclose mechanic's liens. Plaintiff Roth was the qualifying party for a GS-30 license held by Rocky Mountain Plastering until January 1982, at which time he was deleted as the qualifying party and the license expired. A GS-30 license holder may perform plastering, stuccoing, and lathing services.

In November 1987, defendants Peach and Thompson (Thompson Defendants) entered into a contract with LaFortune for construction of a residence on real property owned by the Carolyn Sue Thompson Revocable Trust. In April 1988, LaFortune subcontracted with Roth to perform plastering work on the Thompson residence. Roth performed under the subcontract until July 1988, at which time LaFortune ceased work on the residence due to a dispute with the Thompson Defendants.

During June and July of 1988, Roth sat for and passed the tests required for a new GS-30 license. On August 9, 1988, the Construction Industries Division of the New Mexico Regulation and Licensing Department (CID) received an application for a GS-30 license from Roth for a business known as Bill Roth Plastering. On August 29, 1988, the CID issued a GS-30 license to Bill Roth Plastering with Roth as the qualifying party.

Roth filed a Claim of Lien for $6,750.00 upon the Thompson residence on August 9, 1988, the same day his license application was received by CID. In August 1989, Roth filed an action in district court against the Thompson Defendants seeking to foreclose the lien. On the Thompson Defendants' motion, the district court entered summary judgment against Roth, finding no genuine issue of material fact to preclude a holding that Roth did not substantially comply with NMSA 1978, Section 60-13-30 (Repl.Pamp.1989).

On appeal Roth argues: (1) the trial court applied the incorrect legal standard in determining he had not substantially complied with Section 60-13-30; and (2) the trial court erred in determining there was no genuine issue of material fact as to whether he had substantially complied with the licensing act. We affirm the trial court's grant of summary judgment.

DISCUSSION

Whether the trial court applied the correct legal standard in determining Roth had not substantially complied with Section 60-13-30.

Section 60-13-30 provides:

> A. No contractor shall act as an 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.
>
> B. Any contractor operating without a license as required by the Construction Industries Licensing Act shall have no right to file or claim any mechanic's lien as now provided by law.

The chief aim of statutory construction is to give effect to the intent of the legislature. *In re Rehabilitation of Western Investors Life Ins. Co.*, 100 N.M. 370, 373, 671 P.2d 31, 34 (1983). We recently discussed the purpose of the Construction Industries Licensing Act, NMSA 1978, Sections 60-13-1 to 60-13-59 (Repl.Pamp.1984) (the Act), in *Mascarenas v. Jaramillo*, 111 N.M. 410, 806 P.2d 59 (1991). In *Mascarenas*, we determined:

> [t]he object sought to be accomplished by the Act is a healthy, ordered market in

> which consumers may contract with competent, reliable construction contractors who have passed the scrutiny of a licensing division. The wrong to be remedied is the exploitation of the public by incompetent and unscrupulous contractors who are unable or unwilling to obtain a license.

Id. at 413, 806 P.2d at 62. In order to protect the public, our legislature has chosen to harshly penalize unlicensed contractors by denying them access to the courts to collect compensation for work performed. *Triple B Corp. v. Brown & Root, Inc.*, 106 N.M. 99, 102, 739 P.2d 968, 971 (1987). This is true even with respect to work which has been fully and satisfactorily performed. *Id.* at 101, 739 P.2d at 970.

This court, however, has been reluctant to construe the licensing statute more broadly than necessary to accomplish the purpose of the Act. In *Peck v. Ives*, 84 N.M. 62, 499 P.2d 684 (1972), we characterized the statutory provisions then in place, which were identical to the provisions of Section 60–13–30, as bar-to-suit provisions and, following *Latipac, Inc. v. Superior Court of Marin County*, 64 Cal.2d 278, 49 Cal.Rptr. 676, 411 P.2d 564 (1966), adopted the doctrine of substantial compliance to determine whether a contractor has complied with the licensing requirements to the degree necessary to avoid being barred from bringing suit. The elements of the substantial compliance doctrine are: (1) the contractor held a valid license at the time of contracting; (2) the contractor readily secured a renewal of that license; and (3) the responsibility and competence of the contractor's managing officer were officially confirmed throughout the period of performance of the contract. *Peck*, 84 N.M. at 65, 499 P.2d at 687.

We find nothing in the record before us to indicate that the trial court inappropriately applied the substantial compliance doctrine. The court recognized the public policy considerations in requiring adherence to licensing requirements and the legislative intent in promulgating those requirements that the public be protected from incompetent and irresponsible builders. *Id.* at 66, 499 P.2d at 688. While the trial court placed great emphasis on the fact that Roth was unlicensed at the time he entered into the contract with LaFortune, we find no error in such emphasis. That a contractor held a valid license at the time the contract was entered into is a crucial element of the substantial compliance doctrine. *Id.* at 65, 499 P.2d at 687.

Additionally, Roth contends that his cause of action did not arise until after he had satisfied all of the requirements necessary to obtain a new GS–30 license, and thus he was in substantial compliance. This argument hinges on the language of Subsection 60–13–30(A) which bars suit absent allegation and proof that the "contractor was a duly licensed contractor at the time the alleged cause of action arose." Roth correctly observes that the licensing provision at issue does not define when the cause of action arises, suggests a conflict in New Mexico case law as to the circumstances giving rise to the cause of action, and claims substantial compliance under any of the conflicting scenarios.

The Thompson Defendants argue that it is inconsequential when the cause of action arose, give primacy to the language of Subsection 60–13–30(B) which prohibits any contractor operating without a license from filing or claiming any mechanics lien, and urge that under Subsection 60–13–30(B) Roth never had a valid cause of action in the first place since he was not licensed either when he entered into the contract or performed the work.

To adopt Roth's position would effectively vitiate the general language of Subsection 60–13–30(B), while recognition of the Thompson Defendants' position tends to render the requirements of Subsection 60–13–30(A) surplusage. The flaw in the parties' analysis is their failure to consider the provisions of Section 60–13–30 as a whole. *General Motors Acceptance Corp. v. Anaya*, 103 N.M. 72, 76, 703 P.2d 169, 173

(1985) (in discerning legislative intent we examine a statute in its entirety and construe each part in connection with every other part to produce a harmonious whole).

To resolve this problem, we first return to Roth's suggestion that New Mexico case law is in conflict with regard to when the cause of action arises in mechanic's lien litigation. Roth identifies several early cases in support of the proposition that the cause of action arises upon the filing of the lien. *Ackerson v. Albuquerque Lumber Co.*, 38 N.M. 191, 193, 29 P.2d 714, 716 (1934) (in New Mexico the lien arises upon the filing of a claim for record); *Ford v. Springer Land Ass'n*, 8 N.M. 37, 48–49, 41 P. 541, 544 (1895) (notice of claim of lien characterized as the foundation of the action), *aff'd on other grounds*, 168 U.S. 513, 18 S.Ct. 170, 42 L.Ed. 562 (1897); *Texas S.F. & N. R.R. v. Orman*, 3 N.M. 652, 654, 9 P. 595, 596 (1886) (notice and claim of lien prerequisites to the creation and enforcement of any lien whatever). In contrast to Roth's position, we do not read these cases as addressing when the cause of action actually arises, so much as they emphasize the necessity to comply with the statutory requirements to perfect a mechanic's lien.

A second view is that the cause of action arises upon the performance of the work or furnishing of the materials which are the subject of the lien. *Weggs v. Kreugel*, 28 N.M. 24, 26, 205 P. 730, 730 (1922). The court's conclusion in *Weggs* was based on consideration of statutory language similar to NMSA 1978, Section 48–2–2 (Cumm. Supp.1991), which provides that "[e]very person performing labor upon, providing or hauling equipment, tools or machinery for, or furnishing materials to be used * * * has a lien upon [the subject property] * * * for the work or labor done * * * *" The court concluded "[t]hat a claim of lien be prepared and filed is an essential requisite under the statute, but it is by no means the foundation of the lien * * * * The lien is really founded upon the doing of the work or the furnishing of the material * * * *" *Weggs*, 28 N.M. at 26, 205 P. at 730 (citation omitted).

A fundamental rule of statutory construction is that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent. *Quintana v. New Mexico Dep't of Corrections*, 100 N.M. 224, 225, 668 P.2d 1101, 1102 (1983). We find further support for the *Weggs* analysis in NMSA 1978, Section 48–2–5(A) (Cumm. Supp.1991), which establishes preference over other encumbrances which "may have attached subsequent to the time when the building, improvement or structure was commenced, work done or materials were commenced to be furnished * * * *" The legislature's determination that the commencement of performance is the act that establishes preference over other encumbrances is consistent with the position that the cause of action arises at the same instance.

This position also lends itself to a reading of Section 60–13–30 which gives meaning to both Subsections (A) and (B). The general language of Subsection (B) which bars suit by any contractor "operating" without a license is not limited or vitiated by Subsection (A) when performance is understood as the determinative event in the accrual of the cause of action. We therefore hold that a contractor's cause of action for the collection of compensation arises upon performance and distinguish *Ackerson, Ford,* and *Orman* to the extent they may be construed to hold otherwise.

Whether the trial court erred in determining there was no genuine issue of material fact as to whether Roth had substantially complied with the licensing requirement.

Summary judgment is proper 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, 665, 726 P.2d 341, 342 (1986). The movant need only make a prima facie showing that he is entitled to summary judgment. *Goodman v. Brock*, 83 N.M. 789, 792, 498 P.2d 676, 679 (1972). Upon the

movant making a prima facie showing, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits. *Dow v. Chilili Coop. Ass'n,* 105 N.M. 52, 54, 728 P.2d 462, 464 (1986). On review, we consider the whole record for evidence that puts a material fact at issue. *Gardner-Zemke Co. v. State,* 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990). If the facts are not in dispute, and only their legal effects remain to be determined, summary judgment is proper. *Id.*

As our recitation of the facts reveals, the essential facts in this case are not in dispute. We also conclude that the trial court properly determined the Thompson Defendants were entitled to summary judgment as a matter of law. Roth fails to satisfy any of the elements of the substantial compliance doctrine set forth in *Latipac* and *Peck.* He was not licensed at the time he entered into the contract, his efforts to secure a new license when his performance under the subcontract was near completion do not satisfy the requirement that he readily secure "renewal" of his license. With regard to the third element, Roth's efforts to secure a license did not confirm his responsibility and competence throughout the period of performance. In *Latipac,* this element was satisfied because, although the contracting company's license had lapsed, the managing officer of that company was the qualifying party for a separate corporation possessing a valid contractor's license throughout the period of performance in that case. *Latipac,* 49 Cal.Rptr. at 682, 411 P.2d at 570. Here, there is no evidence of a managing officer or other entity officially confirming Roth's competence.

For all of the above reasons, the entry of summary judgment in favor of the Thompson Defendants is affirmed.

IT IS SO ORDERED.

BACA and FROST, JJ., concur.

825 P.2d 1245

STATE of New Mexico, Plaintiff-Appellee and Cross-Appellant,

v.

Joe ARMENDAREZ, Defendant-Appellant and Cross-Appellee.

No. 18080.

Supreme Court of New Mexico.

Jan. 27, 1992.

Sammy J. Quintana, Chief Public Defender, Sheila Lewis, Appellate Defender, Santa Fe, for Joe Armendarez.

Tom Udall, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for the State.

OPINION

RANSOM, Chief Justice.

Joe Armendarez appeals from his conviction of first-degree murder. NMSA 1978, § 30–2–1(A) (Repl.Pamp.1984). He argues first that the State created error by successfully seeking an instruction, inconsistent with the defense theory presented, on the lesser included offense of second-degree murder, and then, in closing, arguing to the jury that it could not possibly find defendant guilty of the lesser offense. Next he contends that other comments made by the State during closing argument were misstatements of the law and the evidence, and thus were improper.

Facts. On the evening of September 29, 1985, defendant, fifteen-year-old Denise De Los Santos, Raphael Martinez, and Ruby Gonzales spent time together drinking beer and driving in Raphael's car. Later, at the home of Ruby's sister, Cindy Gonzales, they played a drinking game known as "quarters." During the evening defendant and Denise were together, laughing and hugging each other. Sometime between 11:00 and 11:30 that night, defendant borrowed Raphael's car and left the house with Denise. Defendant later appeared at the house he shared with Rosemary Garcia and asked her to return Raphael's car. Rosemary left defendant at the house and took the car to Cindy's house. Raphael and Ruby took Rosemary back home.

The next morning Denise's body was found near State Road 2 south of Roswell. Several beer cans, a broken knife, and a blood-covered part of an automobile jack were found near the body. The victim had been struck numerous times and stabbed in the abdomen. Medical testimony indicated the wound resulting from the fatal blow matched the jack part. Testimony indicated that the jack part is compatible with the jack belonging to Raphael's car. The corresponding part was missing from Raphael's car, but no witness was able to say with certainty that the part found near the body belonged to the jack in Raphael's car.

In the information, the State charged defendant only with first-degree murder. At the close of the evidence, in addition to an instruction on deliberate-intent murder—a form of first-degree murder requiring a deliberate intent to kill—the State tendered an instruction on the lesser included offense of second-degree murder, which requires only knowledge of a strong probability of death or great bodily harm. NMSA 1978, § 30–2–1(B). Defendant objected to the instruction on second-degree murder. The court overruled the objection and instructed the jury on both degrees of murder.

■ *Right to a fair trial not violated by State's first securing lesser included offense instruction and then arguing against lesser included offense at closing.* At the outset, we clarify the issues the defendant does not raise. He does not contend (nor could he) that second-degree murder is not a lesser included offense of first-degree murder, *see* § 30–2–1(B); nor does he contend that he did not have notice of possible conviction on a lesser included offense.

As best we can discern, defendant's primary argument is that the perceived inconsistency between the State seeking a lesser included offense instruction and then, in closing, arguing there was no evidence to support such instruction, is reversible error. The inconsistency apparently lies in the fact that, in order to obtain the lesser included offense instruction, the prosecution must have contended that there was some evidence establishing the lesser offense (or that the lesser offense could reasonably be found to be the highest degree of the crime committed).

The State argued in closing that "nobody in his right mind" possibly could conceive that striking a person with the jack part was done with anything but a deliberate intent to kill. Therefore, the State argued, the jury could infer from the facts a deliberate intent to kill. Defendant's attorney responded by telling the jury it should find not only that the State failed to prove beyond a reasonable doubt that defendant killed Denise De Los Santos, but that the State also had failed to prove whoever killed her had acted with deliberate intent.

Defendant argues that the focus of the jury's deliberations, as a result of the instruction and the State's argument, shifted from a question of guilt or innocence to a question of whether to convict on first- or second-degree murder. That may be so, but we fail to see that the State acted outside the bounds of propriety and with inconsistency when, on the one hand, it requested instructions on a lesser included offense that the jury reasonably might find to be the highest degree of crime committed and, on the other hand, focused its argument entirely on the highest degree of crime charged.

Defendant claims that evidence was available to both sides, but used by neither, that would have bolstered a conviction of second-degree murder instead of the greater offense. Defendant, however, stops short of arguing that his trial strategy would have changed had charges of both first- and second-degree murder appeared in the information. The unused evidence was available to defendant in his defense against first-degree murder. He made the decision not to bring in this evidence because it might have hurt his alibi defense. He has not given any indication that his strategy would have differed had the for-

mal charge included both degrees of murder. Defendant chose as his trial strategy the all-or-nothing approach of an alibi defense. The State sought a conviction on first-degree murder, yet wanted to give the jury a fall-back position in case they failed to find the deliberate intent necessary for a first-degree murder conviction. In every trial each side makes strategy decisions that later, with the benefit of hindsight, can be argued to have altered the outcome of the case. That he chose not to present available evidence when he had notice that the jury might consider second-degree murder is not a ground for reversal. We cannot allow a defendant who has made such a choice to claim on appeal that his strategy did not work and therefore allow him another trial in which to use a different strategy that might result in a conviction on an offense of less severity.

Alleged misstatements of the law and the evidence in the State's closing argument do not require reversal. Defendant claims that other statements made by the State in its closing were misstatements of law and of the evidence. We review comments made in closing argument in the context in which they occurred so that we may gain a full understanding of the comments and their potential effect on the jury. *State v. Compton,* 104 N.M. 683, 687–92, 726 P.2d 837, 841–46, *cert. denied,* 479 U.S. 890, 107 S.Ct. 291, 93 L.Ed.2d 265 (1986).

Defendant first attacks, as a misstatement of law, the prosecutor's comment to the jury that if they found the murder was done "consciously, knowingly, intentionally, deliberately, with premeditation, however you want to call it" then they could find defendant guilty of first-degree murder. The terms to which defendant objects are "knowingly" and "however you want to call it." There was no objection to this comment at trial and, therefore, any error was waived unless it amounts to fundamental error. *State v. Chamberlain,* 112 N.M. 723, 730, 819 P.2d 673, 680 (1991). Although we review the claimed error because of the gravity of a conviction for first-degree murder, we find that any alleged misstatement of the law falls well short of fundamental error.

Defendant argues that "knowingly" is descriptive of the mens rea for second-degree murder. The instruction for second-degree murder, when that is the lowest degree of homicide to consider, requires the jury to find that defendant "knew that his acts created a strong probability of death or great bodily harm." SCRA 1986, 14–211. The first-degree, deliberate-intent instruction, on the other hand, calls for a finding that the "killing was with the deliberate intention to take away the life" of the victim. SCRA 1986, 14–201.

The jury was given written copies of the proper instructions and was instructed that arguments made by the attorneys during closing were not evidence. In order to find prejudice to defendant we would have to accept that the jury took the comments made during closing and applied them as the law of the case, ignoring the written instructions. The comments were a very brief part of a lengthy closing argument. Elsewhere in its argument the State stressed the term "deliberate intent" and used that term or forms of it instead of the terms to which defendant objects. The State also emphasized that the jury was to be the sole judge of the facts of the case. We presume that the jury followed the written instructions and did not rely for its verdict on one very brief part of the State's closing remarks. *Folz v. State,* 110 N.M. 457, 474, 797 P.2d 246, 263 (1990) (Montgomery, J., specially concurring).

Defendant argues that the State was trying to "instruct" the jury. However, upon reviewing the argument we find that the State merely was explaining the instructions given by the court, just as defendant's counsel explained instructions to the jury during the defense closing. The comments do not constitute fundamental error when viewed in context.

Defendant did object to an alleged misstatement of the evidence at trial. The court overruled the objection. Both the state and the defendant are given latitude in argument, and the court has wide discretion in controlling argument. *State v. Venegas,* 96 N.M. 61, 63, 628 P.2d 306, 308 (1981). We therefore review this comment in the context of the closing argument under an abuse of discretion standard.

In discussing a possible motive for the killing, the State set out a hypothetical scenario that it argued could be inferred from the evidence. Defendant made a timely objection, apparently out of concern that the State was about to discuss evidence that had been excluded. The judge, in his ruling, noted he would overrule the objection as far as the State had gone to that point. Defendant objected before any inappropriate comment was made, and any reference to the inadmissible evidence was avoided completely, if in fact one was about to be made. The court understood what was being asked and made a qualified ruling that sufficed to prevent any inappropriate reference to the excluded evidence. We do not see any abuse of the court's discretion.

As to defendant's claim of cumulative error, we do not find his right to a fair trial to have been compromised. *See State v. Martin,* 101 N.M. 595, 600–01, 686 P.2d 937, 942–43 (1984) (holding cumulative error requires reversal of conviction only when cumulative impact of errors was so prejudicial that defendant was deprived of fair trial). The judgment of the trial court is affirmed.

IT IS SO ORDERED.

FRANCHINI and FROST, JJ., concur.

825 P.2d 1249

Ernest Jose GALLEGOS, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 20060.

Supreme Court of New Mexico.

Feb. 10, 1992.

Sammy J. Quintana, Chief Public Defender, Susan Roth, Asst. Appellate Defender, Santa Fe, for petitioner.

Tom Udall, Atty. Gen., William McEuen, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

RANSOM, Chief Justice.

We granted certiorari to review an unpublished opinion of the court of appeals affirming defendant's convictions of third-degree larceny, NMSA 1978, Section 30–16–1 (Repl.Pamp.1984), conspiracy to commit larceny, NMSA 1978, Section 30–28–2 (Repl.Pamp.1984), and aggravated assault, NMSA 1978, Section 30–3–2 (Repl.Pamp. 1984). Arguing the value of the property stolen was $900, defendant tendered an instruction for fourth-degree larceny as a lesser included offense of third-degree larceny. The trial court refused the instruction. Citing *State v. Isiah,* 109 N.M. 21, 781 P.2d 293 (1989), and *State v. Johnson,* 103 N.M. 364, 707 P.2d 1174 (Ct.App.), *cert. quashed,* 103 N.M. 344, 707 P.2d 552 (1985), the court of appeals affirmed, stating that "The trial court did not err in refusing a lesser included offense instruction that was a misstatement of the applicable law." On different rationale, we affirm.

Under Section 30–16–1, larceny over $100 but not more than $2,500 is a fourth-degree felony,[1] and it is a third-degree felony if over $2,500 but not more than $20,000. The testimony adduced at trial indicated that the cash box Gallegos had stolen contained $900 in cash and approximately $3,200 in checks. The checks were neither stamped for deposit nor endorsed. Gallegos sought the instruction on fourth-degree larceny on the theory that the checks were worthless. We disagree. The generally followed rule in jurisdictions that have decided this issue is that the value of a check, in the absence of proof to show a lesser value, is measured by what the owner of the check could expect to receive for the check at the time of the theft, *i.e.,* the check's face value. *People v. Marques,* 184 Colo. 262, 520 P.2d 113, 116 (1974) (en banc) (5–2 decision) (the prima facie value of a check is its face value); *Bigbee v. State,* 173 Ind.App. 462, 364 N.E.2d 149, 153 (1977) (2–1 decision) (the amount written upon the face of a negotiable bearer instrument is competent evidence relating to its value); *State v. Evans,* 669 S.W.2d 708, 712 (Tenn.Crim.App.1984) (value of the check here is presented by the face amount of the check); *State v. McClellan,* 82 Vt. 361, 73 A. 993, 994 (1909) (value of check is the amount it represents if the check is good); *see also* Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.4(b), at 353 ("In the case of property of intrinsically small value which represents a contract or property right of much greater value ... it is the latter value which is important in larceny cases.") (1986). There being no evidence to suggest that fourth-degree larceny was the highest degree of the offense charged, refusal of that instruction was not erroneous. *See State v. Escamilla,* 107 N.M. 510, 512, 760 P.2d 1276, 1278 (1988) (lesser included offense instruction proper only if there is evidence tending to establish the lesser offense and if there is some view of the evidence which could sustain a finding that the lesser offense was the highest degree of the crime committed).

The rationale employed by the court of appeals in affirming the trial court appears, however, to have been based on failure of defendant to preserve error under Rule 5–608:

> [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 to object or tender instructions, on the record and in the presence of the court.

1. A 1987 amendment to Section 30–16–1 substituted $250 for $100 in defining the fourth-degree felony. NMSA 1978, § 30–16–1 (Repl. Pamp.1991). That amendment postdates the charge under consideration here.

SCRA 1986, 5–608(D). The court of appeals relied on a use note to Uniform Jury Instruction 14–1601 that, if the charge is a third-degree felony, the instruction should read "market value over $2,500," and, if it is a fourth-degree felony, then "market value over $100." SCRA 1986, 14–1601. In his requested instruction for the fourth-degree felony, defendant substituted "under $2,500" for the term "over $100." The court of appeals held:

> If defendant wished the jury to consider lesser larceny offenses, and to consider his theory that the checks stolen were non-negotiable and therefore had no market value, then his tendered instruction should have included the essential elements of the lesser crime (i.e., value of property stolen over $100). The tendered instruction did not allow the jury to determine whether a petty misdemeanor or a fourth degree felony was committed. *See* [*Isiah* and *Johnson*]. Thus, the jury instruction was fatally flawed because it failed to contain an essential element of the crime. *See State v. Southerland,* 100 N.M. 591, 673 P.2d 1324 [(Ct.App.), *cert. denied,* 100 N.M. 689, 675 P.2d 421 (1983)]. The trial court did not err in refusing a lesser included offense instruction that was a misstatement of the applicable law. *See State v. Isiah* [, 109 N.M. at 31, 781 P.2d at 303]. Moreover, the trial court was required to give an unmodified uniform instruction defining the elements of the crime. *See id.*
>
> We have stated that tendered jury instructions must be totally, not merely partially, correct. *State v. Stettheimer,* 94 N.M. 149, 607 P.2d 1167 (Ct.App. 1980). Moreover, an error in failing to list an essential element of the crime would enable defendant, if convicted of the lesser offense, to claim jurisdiction error on appeal. Courts are not required to give instructions containing such error. *See State v. Smith,* 104 N.M. 729, 726 P.2d 883 [(Ct.App.), *cert. denied,* 104 N.M. 702, 726 P.2d 856 (1986)].

Defendant contends that his proffered instruction included the correct elements of the larceny crime, and that his modification of the uniform jury instruction was minor and therefore inconsequential. We agree. The issue was whether the value of the stolen property was $4,100 or $900, *i.e.,* whether the value was more or less than $2,500. There was no issue whether the value was over $100. If supported by the evidence, the court should have given the fourth-degree felony instruction, either modified as requested or as stated in the use note to UJI 14–1601.

But a "correct written instruction" is not the issue here. True, the court of appeals specifically refused to consider defendant's argument that the checks were worthless: "Because we hold that the proffered instruction was incorrect, we need not reach defendant's argument of whether a lesser included offense instruction should have been given because the checks stolen were not negotiable, and, therefore, the value of the property stolen was less than $2,500." Clearly, however, the defendant's position on that point was made known to the trial court, and, had the court erred in denying as a matter of law the argument that the checks were worthless, such error would have been preserved regardless of any technical application Rule 5–608(D).

Furthermore, as to Rule 5–608(D), we reject any notion that, in case of failure to instruct on any issue, the phrase "a correct written instruction must be tendered before the jury is instructed" has any application when refusal of the instruction on a lesser included offense depends upon a requested modification of the uniform jury instruction. If the court believes no modification is appropriate, the court should instruct in the exact language of the uniform jury instruction. The party requesting the modification can preserve error by alerting the mind of the court to any vice claimed to be present in the uniform jury instruction. The phrase "correct written instruction" must be read in light of the purpose of the Rule, which is to allow the court an opportunity to decide a question whose dimensions are not open to conjecture or after-the-fact interpretation.

Defendant's convictions are affirmed on the rationale herein stated, and on the rationale of the memorandum opinion of the court of appeals with respect to other issues raised.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

825 P.2d 1252

STATE of New Mexico, Plaintiff–Appellee,

v.

Robert Lino TREJO, Defendant–Appellant.

No. 12657.

Court of Appeals of New Mexico.

Dec. 12, 1991.

Certiorari Denied Jan. 22, 1992.

Tom Udall, Atty. Gen., Elizabeth Major, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Hugh W. Dangler, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BIVINS, Judge.

Defendant was indicted in June 1989 for crimes arising out of two separate incidents involving separate victims. Both incidents involved the same charges of attempted criminal sexual penetration and false imprisonment. The first incident was alleged to have occurred on April 24, 1989, the second, on May 26, 1989. The trial court tried the two incidents separately and the counts arising from the May 1989 incident were tried first, resulting in Defendant's conviction. The case before us involves the second trial of counts arising from the April 1989 incident, which also resulted in Defendant's conviction. The trial court entered one judgment for convictions in the two trials. Defendant now appeals. We affirm Defendant's convictions from the first trial involving the May 1989 incident because Defendant raises no issues regarding these convictions. Defendant's appeal of the judgment and sentence from the second trial claims that the trial court erred in allowing the State to impeach Defendant with the verdicts rendered by the trial court based on the May 1989 incident. The trial court allowed the State to use the verdicts from the first trial for impeachment as a prior conviction under Rule 609 of the New Mexico Rules of Evidence, SCRA 1986, 11–609(A)(1). We address only this issue as Defendant has failed to brief any other issues listed in the docketing statement. *See State v. Fish,* 102 N.M. 775, 777, 701 P.2d 374, 376 (Ct. App.) (issues raised in docketing statement but not briefed are deemed abandoned), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985). We also affirm the convictions from the second trial.

A. STATEMENT OF FACTS

In the trial at issue here, Defendant was charged with one count of attempted criminal sexual penetration in the second degree and one count of false imprisonment. The central evidence in the trial was provided by the victim and Defendant. Defendant and the victim went out on a date two days after they first met. There is evidence that both individuals were drinking during their date. Defendant drove the two of them up a dirt road near Hyde Park, where they left his truck to go for a walk. Both the victim and Defendant testified that they kissed for a while. At this point their stories diverge. While the victim claimed that Defendant got on top of her, saying, "We're going to do it right here," Defendant raised a defense of consent to the sexual activity. When Defendant dropped the victim off at her home, she ran.

B. ADMISSIBILITY OF PRIOR CONVICTIONS UNDER RULE 609

1. "Prior" Convictions

Defendant initially contends that the "prior" convictions were inadmissible

because the underlying acts took place after the acts for which he was on trial. He has failed, however, to cite any authority directly supporting his argument. *See In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (issues raised on appeal not supported by authority will not be reviewed). Further, the language of Rule 11–609 contains no such limitation. The only time limitation is ten years since the date of the prior conviction. *See* Rule 11–609(B). Admission under Rule 11–609(A)(1) of prior felony convictions not involving deceit is premised on the notion that the jury is entitled to know " 'what sort of person is asking them to take his word.' " *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) (quoting *State v. Duke,* 100 N.H. 292, 123 A.2d 745, 746 (1956)). This purpose is not served by limiting the admissibility of convictions to those based on acts occurring prior to the acts for which the Defendant is on trial. The issue is not the witness's character for truthfulness at the time of the prior offense but such character at the time of trial. We conclude that the trial court did not err in admitting the convictions on this basis. *See also State v. Keener,* 97 N.M. 295, 297–98, 639 P.2d 582, 584–85 (Ct.App.1981) (convictions admitted under Rule 11–609 for crimes committed at same time as those being tried), *cert. denied,* 98 N.M. 50, 644 P.2d 1039 (1982).

2. Failure to Engage in Required Balancing

Defendant next argues that the trial court erred in admitting the convictions because it failed to engage in the balancing test required by Rule 11–609(A)(1) and SCRA 1986, 11–403. *See State v. Day,* 91 N.M. 570, 576, 577 P.2d 878, 884 (Ct.App.) (admissibility of prior convictions under Rule 11–609(A)(1) also requires balancing under Rule 11–403), *cert. denied,* 91 N.M. 491, 576 P.2d 297 (1978). Rule 11–609(A) of the New Mexico Rules of Evidence prior to January 1, 1991, stated:

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.

Defendant relies on two decisions of this court predating our adoption of the Federal Rules of Evidence. In *State v. Waller,* 80 N.M. 380, 456 P.2d 213 (Ct.App.1969), and *State v. Coca,* 80 N.M. 95, 451 P.2d 999 (Ct.App.1969), we held that a trial court must "properly perform its affirmative duty of weighing the legitimate probative value of the cross-examination against the illegitimate tendency to prejudice." *Waller,* 80 N.M. at 381, 456 P.2d at 214. We reversed in *Coca* and *Waller* because the records revealed that the trial courts had failed to exercise their discretion. *Coca,* 80 N.M. at 97, 451 P.2d at 1001; *Waller,* 80 N.M. at 381, 456 P.2d at 214.

Defendant contends that the record in this case similarly demonstrates that the trial court did not exercise its discretion. After hearing argument of counsel, the trial court simply stated that Rule 11–609 permitted the impeachment evidence offered by the State. We do not agree that the record demonstrates a failure by the trial court to exercise its discretion by engaging in the balancing test required. A distinction should be made between failure to exercise discretion and failure to articulate the exercise on the record. As we read *Waller* and *Coca,* the trial courts in those cases completely failed to exercise their discretion. In the case before us, we believe the trial court did exercise its discretion; it just did not put it on the record.

The reason we believe the court exercised its discretion is that the ruling came following defense counsel's argument setting out the concerns, i.e., the prior convictions arose from an incident that occurred later; the prejudice outweighed the probative value; and there had been no final adjudication of the prior convictions. The trial court rejected the latter argument, citing case law, and announced that Rule 11–609 does permit the kind of impeachment in question. This suggests to us that the trial court did balance the probative value and relevance against the prejudicial effect in deciding to admit the evidence. To the extent the two cases relied on by Defendant can be read to require articulation on the record of the exercise of discretion, we believe later cases discussed below dilute that requirement.

Notwithstanding *Waller* and *Coca,* this court has held it unnecessary for a trial court to always announce it has reached its decision pursuant to an exercise of its discretion. *State v. Victorian,* 84 N.M. 491, 496–97, 505 P.2d 436, 441–42 (1973). More recently, in *State v. Ferguson,* 111 N.M. 191, 803 P.2d 676 (Ct.App.), *cert. denied,* 111 N.M. 144, 802 P.2d 1290 (1990), we discussed the meaning of the exercise of judicial discretion. We noted that the better practice for a judge relying upon discretionary authority is to place on the record the circumstances and factors critical to the decision. *Id.* at 193, 803 P.2d at 678 (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 Syracuse L.Rev. 635, 665–666 (1971)). At the same time, we held that it is not reversible error in every case when a trial court fails to state its reasons on the record. *Id.* In some cases, there will be no need for the trial court to articulate its reasons because the reasons supporting the ruling will be so strong and so apparent from the evidence or argument. *Id.* In other cases, where it is evident that there existed reasons for and against the ruling, we may indulge in the usual appellate presumptions to affirm the trial court. *Id.* We believe the record in this case presents an example of the latter proposition.

Having determined the trial court did exercise its discretion, we must decide if it abused that discretion. To do so we consider factors that bear on the question of whether the trial court abused its discretion in admitting the evidence.

3. Factors for Consideration by the Court

The supreme court's adoption of Rule 11–609 is essentially a determination that such evidence bears on the issue of credibility. *See Lucero,* 98 N.M. at 313, 648 P.2d at 352. Some of the factors relevant to a trial court's decision whether to admit prior convictions not involving dishonesty for impeachment purposes are:

> (1) the nature of the crime in relation to its impeachment value as well as its inflammatory impact; (2) the date of the prior conviction and witness's subsequent history; (3) similarities, and the effect thereof, between the past crime and the crime charged; (4) a correlation of standards expressed in Rule 609(a) with the policies reflected in Rule 404, N.M.R.Evid., N.M.S.A.1978; (5) the importance of the defendant's testimony, and (6) the centrality of the credibility issue.

Id. at 313–14, 648 P.2d at 352–53 (citing *United States v. Mahone,* 537 F.2d 922 (7th Cir.1976); *United States v. Luck,* 348 F.2d 763 (D.C.Cir.1965); 3 *Weinstein's Evidence,* ¶ 609[04] (1981) [hereinafter Weinstein]). While these factors may be useful in aiding a court to fairly determine whether to admit certain prior convictions, they are not to be considered mechanically or in isolation. The court should make every effort to strike a reasonable balance between the interests of the public and those of the defendant in disposing of the charges in accordance with the truth, keeping in mind the high degree of prejudice often associated with introduction of a pri-

or conviction at trial. *See generally* Weinstein, *supra,* ¶ 609[02]–[04].

(a) *Nature of the Crime*

Rule 11–609 limits the purpose for admissibility of prior convictions to that of attacking the credibility of the witness. In general, therefore, conviction for crimes of violence has less bearing on an individual's honesty than conviction for crimes of fraud or deceit. At the same time, however, even if the alleged crime did not involve dishonesty, there is proven dishonesty when the defendant goes to trial, denies the offense, and then is convicted. *See Gordon v. United States,* 383 F.2d 936, 940 n. 8 (D.C.Cir.1967), *cert. denied,* 390 U.S. 1029, 88 S.Ct. 1421, 20 L.Ed.2d 287 (1968).

(b) *Date of the Conviction*

The remoteness or nearness of the acts giving rise to the prior conviction is an important factor to be considered by the court. An act occurring several years before the trial and followed by years of lawful conduct is less probative because of its remoteness. The prior conviction in the instant action, however, was obtained only three months before trial.

(c) *Similarity of the Crimes*

Defendant argues that his prior convictions were inadmissible because they were identical to the charges for which he was being tried. To be sure, convictions for the same crime should be admitted sparingly. *See Gordon,* 383 F.2d at 940. Nevertheless, we have held that evidence of a prior offense is not prohibited for impeachment purposes solely on the basis of its similarity with the presently charged crime. *State v. Hall,* 107 N.M. 17, 22, 751 P.2d 701, 706 (Ct.App.1987) (evidence of defendant's prior conviction for assault with a deadly weapon upon a peace officer properly admitted in defendant's trial for murdering a peace officer with a firearm), *cert. denied,* 107 N.M. 16, 751 P.2d 700 (1988).

(d) *Correlationship with Rule 404*

This factor does not appear in the authorities relied on in *Lucero.* We give this factor little weight. We note, however, that our review of the evidence in the prior trial (which we do not deem it necessary to discuss) suggests that evidence of the other offense may well have been admissible in this trial under Rule 404(B). Therefore, to the extent that this factor is considered, it weighs in favor of admission.

(e) *Importance of Defendant's Testimony*

Defendant asserts that the convictions should have been excluded because of the importance of his testimony. We agree that because of the nature of the charges and lack of evidence, Defendant may have felt impelled to testify. Defendant, however, took no action to limit possible prejudice, such as requesting that the jury not be informed of the names of the crimes. *Cf. State v. Gardner,* 103 N.M. 320, 323, 706 P.2d 862, 865 (Ct.App.) (prejudice normally subject to cure by cautionary instruction to jury), *cert. denied,* 103 N.M. 287, 705 P.2d 1138 (1985).

(f) *Centrality of Credibility Issue*

Finally, the parties agree that the credibility issue was critical to the case. The accounts of the victim and Defendant were similar up to a point. However, Defendant denied getting on top of the victim or restraining her against her will. On cross-examination, Defendant stated that the victim lied. The trial essentially boiled down to a swearing match between Defendant and the victim. Under such circumstances, it became more, not less, compelling to explore "all avenues which would shed light on which of the two witnesses was to be believed." *Gordon,* 383 F.2d at 941; *see also Hall,* 107 N.M. at 23, 751 P.2d at 707 (where defendant's version of events conflict with state witness, defendant's credibility as a witness is placed in issue and subject to impeachment). This court has previously stated:

> When an accused takes the witness stand he is in the same position as any other witness. He is not entitled to have his testimony falsely cloaked with reliability by having his credibility protected against the truth-searching process of cross-examination.
>
> * * * * * *
>
> If the jury is to be fair and impartial, and if it is to accomplish its purpose of arriving at the truth, then it is entitled to consider all legitimate evidence bearing upon the issues and upon the credibility of all witnesses testifying on these issues.

State v. Lindsey, 81 N.M. 173, 181, 464 P.2d 903, 911 (Ct.App.1969) (citation omitted), *cert. denied,* 81 N.M. 140, 464 P.2d 559, *cert. denied,* 398 U.S. 904, 90 S.Ct. 1692, 26 L.Ed.2d 62 (1970), *cited with approval in State v. Cawley,* 110 N.M. 705, 711, 799 P.2d 574, 580 (1990).

While the trial court could have properly exercised its discretion in favor of excluding the prior conviction under the facts of this case, we decline to substitute our judgment for that of the trial court. We do not find that the trial court's ruling is "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.

C. CONCLUSION

We review the trial court's ruling for abuse of discretion. *See, e.g., id.* at 314, 648 P.2d at 353; *see also State v. Williams,* 76 N.M. 578, 582, 417 P.2d 62, 65 (1966) (appellate court will not disturb trial court's exercise of discretion in controlling extent of cross-examination of accused unless obviously erroneous, unwarranted, or arbitrary).

For these reasons, we are unable to say the trial court abused its discretion in admitting Defendant's prior convictions for impeachment purposes. While the trial court did not articulate the basis for its ruling, or perform an on-the-record balancing of probative versus prejudicial value, there were sound reasons for admitting the convictions. *See Ferguson,* 111 N.M. at 193, 803 P.2d at 678. Accordingly, we affirm Defendant's convictions.

IT IS SO ORDERED.

HARTZ and PICKARD, JJ., concur.

HARTZ, Judge (concurring.)

I concur in Judge Bivins' opinion. I write separately only to indicate why my concurrence does not constitute a retreat from the views expressed in my dissent in *State v. Ferguson,* 111 N.M. 191, 196, 803 P.2d 676, 681 (Ct.App.), *cert. denied,* 111 N.M. 144, 802 P.2d 1290 (1990). It is proper in this case to presume that the district court exercised its discretion in admitting the evidence under SCRA 1986, 11–609 because (1) defense counsel correctly argued to the district court that it needed to consider whether the improper prejudice outweighed the probative value of the impeachment, (2) the district court stated that it was admitting the evidence pursuant to Rule 11–609, which explicitly requires a balancing of the prejudice against the probative value, and (3) the district court's decision was well within the bounds of proper discretion.

825 P.2d 1257

STATE of New Mexico ex rel. Paskell L. VAUGHN, Petitioner–Appellant,

v.

BERNALILLO COUNTY BOARD OF COUNTY COMMISSIONERS, et al., Respondents–Appellees.

No. 11710.

Court of Appeals of New Mexico.

Dec. 27, 1991.

Dale Walker, Michael B. Browde, Albuquerque, for petitioner-appellant.

Ira Robinson, Asst. County Atty., Albuquerque, for respondent-appellee Bernalillo, County Bd. of County Com'rs.

OPINION

PICKARD, Judge.

This is an appeal from the district court's final order affirming the decision of the Bernalillo County Board of County Commissioners to revoke a special-use permit issued to Paskell Vaughn. The appeal also challenges the district court's order on rehearing that reaffirmed its prior ruling. Vaughn has presented three issues for review: (1) that the order of the district court should be reversed because the Board had no authority to revoke the permit, which was granted "for the life of the use"; (2) that even if the Board had such authority, the Board's action in this case amounted to an unconstitutional taking in violation of due process; and (3) that the district court erred in failing to provide Vaughn with a full evidentiary hearing. Because we find issue one to be dispositive and reverse on that point, we do not reach issues two and three.

This case involves a piece of property located in the northwest section of Albuquerque. Since the late 1960s, the property had been used continuously as a contrac-

tor's yard, first by Vaughn, and then, since 1981, by Vaughn's lessee, the Groendyke Corporation. In 1973, Bernalillo County granted Vaughn a special-use permit to operate his contractor's yard, thereby "grandfathering" Vaughn's prior use of the property, which had been rendered nonconforming by the passage of the county's Comprehensive Zoning Ordinance in that same year. In 1976, an amended special-use permit was issued to Vaughn to allow him to add a warehouse to the site. The permit was expressly granted "for the life of the use." Vaughn's construction business remained active until the early 1980s, when he moved the operation to Las Cruces and leased the Albuquerque property to Groendyke, the current tenant, for the operation of its contract hauling business. The county zoning administrator, who was informed of the lease and the nature of Groendyke's business, determined that Groendyke's use fell within the scope of the special-use permit.

In October 1987, Vaughn was charged with zoning ordinance violations relating to "mobile-Home, Construction and land use w/o a zoning Permit plus 1 sign w/o zoning permit." A hearing was held before the Bernalillo County Planning Commission. Neighbors complained at the hearing about Vaughn's failure to properly screen the property and about excessive dust, noise, odors, and night operations. Based on the complaints, the commission voted to cancel Vaughn's permit on December 2, 1987. The Board affirmed that decision on February 16, 1988.

Vaughn petitioned the district court to issue its writ of certiorari and overturn the Board's decision. The district court upheld the Board's action and reaffirmed that ruling on rehearing, specifically finding that the Board's decision to revoke Vaughn's special-use permit was not "beyond [its] zoning authority."

The district court is empowered to review the decision of a zoning authority to determine whether the zoning body acted within the scope of its authority. *Downtown Neighborhoods Ass'n v. City of Albuquerque,* 109 N.M. 186, 189, 783 P.2d 962, 965 (Ct.App.1989). On appeal, we conduct the same review as the district court. *Id.*

We begin with the premise that the power of local government to zone does not derive from common law; rather, such power can only be exercised pursuant to statutory authority and in conformity with a lawfully adopted ordinance. *See Temple Baptist Church, Inc. v. City of Albuquerque,* 98 N.M. 138, 142, 646 P.2d 565, 569 (1982); *cf. Public Serv. Co. v. New Mexico Envtl. Improvement Bd.,* 89 N.M. 223, 549 P.2d 638 (Ct.App.1976) (administrative bodies have no common law power and can only act within scope of power conferred on them). Because zoning statutes and ordinances are in derogation of the common law, they are to be strictly construed. *Nesbit v. City of Albuquerque,* 91 N.M. 455, 575 P.2d 1340 (1977). Thus, in determining the scope of such statutes and ordinances, a reviewing court may not read into the law "language which is not there, particularly if it makes sense as written." *Burroughs v. Board of County Comm'rs,* 88 N.M. 303, 306, 540 P.2d 233, 236 (1975).

In this case, the Board's action was governed by NMSA 1978, Section 3-21-10(B) (Repl.Pamp.1985), and Sections 18(H)(1) and 26 of the Bernalillo County, N.M., Comprehensive Zoning Ordinance 213 (1988) (effective May 17, 1973). Section 3-21-10(B) grants zoning authorities the power to institute appropriate proceedings to restrain, correct, or abate violations of properly enacted ordinances. Bernalillo County Zoning Ordinance, Section 18(H), states:

> *Violation of any requirement* imposed by the Bernalillo County Planning Commission in approving an application [for a special-use permit] filed under this section *shall constitute a violation of this ordinance and shall be subject to the same penalties as any other violation*

of this ordinance. Any requirement imposed by the Bernalillo County Planning Commission shall become effective and shall be strictly complied with immediately upon execution or utilization of any portion of the rights and privileges authorized by approval of an application.

1. *In the event a use authorized by a Special Use Permit is discontinued, the Special Use Permit may be cancelled* and removed from the official zone maps by the Planning Department 60 days after notification by certified mail to the property owner shown on the records of the Bernalillo County Assessor. Such action will be taken if the property owner does not declare in writing within the 60–day period, his intent to continue said permit. [Emphasis added.]

Subsection 18(H)(1) directly addresses cancellation of special-use permits and appears to allow cancellation only on the ground of abandonment of the use and, then, only after following certain procedures. Bernalillo County Zoning Ordinance, Section 26, specifically provides that violation of any provision of the ordinance is punishable as a misdemeanor offense, subject to fine or imprisonment or both.

Thus, nothing in the applicable statute or ordinance specifically allows for the cancellation, due to zoning-ordinance violations, of special-use permits that are granted for the life of the use. Moreover, we are unpersuaded by the Board's attempt to find such authority in Bernalillo County Zoning Ordinance, Section 18(A)(5). That subsection states:

> The Planning Commission must review the application and progress of development three (3) years from the date of approval of the application and each year thereafter until completion of the plan, and if needed make a positive recommendation to the County Commission with respect to rezoning.

The language quoted immediately above is part of the introductory section on special-use permits. The section provides that the Board may authorize special uses that do not otherwise conform to the ordinance. The section further provides that the Board may impose various conditions on the permits. The section concludes with the language at issue.

Section 18 of the Bernalillo County Comprehensive Zoning Ordinance must be read as a whole. *See Security Escrow Corp. v. State Taxation and Revenue Dep't,* 107 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct.App. 1988). This section is comprehensive and organized logically. Subsection A begins with the power of the county to grant and condition special-use permits. The section concludes with subsection H, which deals with the consequences of violations. Analyzing subsection 18(A)(5) in context, then, we agree with Vaughn that this provision is not intended to address the consequences of violations but instead provides authority for the planning department to oversee complex and lengthy development plans and to make appropriate recommendations to the county commission. We thus construe subsection 18(A) as only providing that if the county imposes conditions on the granting of a special-use permit, then the County Planning Commission "must review the application and progress of development ... and if needed make a positive recommendation to the County Commission with respect to rezoning."

For example, in this case, there was a development plan referred to in the special-use permit document. The development plan concerned a requirement to screen the property from view by the use of certain types of fencing. While the parties dispute whether there was compliance with this or other alleged conditions on the special-use permit, there is an insufficient factual basis in the record for this court or the district court to say that the plan was not completed or that what the Board did was "rezoning." The record reflects that the County Planning Commission cancelled the special-use permit "based on the reason that the use is out of character with the surround-

ing area" and that the Board upheld the cancellation.

Nor are we persuaded by the Board's argument that we should defer to the administrative interpretation of Section 18(A)(5) provided by its zoning administrator, who appeared to be of the opinion that this subsection authorized yearly review of all special permits and authorized cancellation whenever the special use "gets out of hand." Courts will not follow incorrect administrative interpretations. *New Mexico Pharmaceutical Ass'n v. State,* 106 N.M. 73, 738 P.2d 1318 (1987). Strictly construing the express language of the foregoing provisions as we are bound to do, *Burroughs v. Board of County Comm'rs,* we hold that the Board was without authorization to revoke Vaughn's special-use permit as it did.

In so holding, we note that, when confronted with violations, the Board has other options in pursuing relief, such as seeking an injunction, *see Village of Skokie v. Almendinger,* 5 Ill.App.2d 522, 126 N.E.2d 421 (1955), filing an abatement action, *see City of Albuquerque v. Jackson Bros.,* 113 N.M. 149, 823 P.2d 949 (Ct.App. 1991), or seeking penalties pursuant to the ordinance in quasi-criminal proceedings, *see City of Santa Fe v. Baker,* 95 N.M. 238, 620 P.2d 892 (Ct.App.1980). While one or more of these options may have been available as a remedy against Vaughn, revocation of his special-use permit was beyond the scope of the Board's authority. For this reason, we reverse the district court's order and remand to the district court with directions to set aside the cancellation of the special-use permit.

IT IS SO ORDERED.

BIVINS and BLACK, JJ., concur.

826 P.2d 574

In the Matter of DOMINICK Q., a child, Defendant-Appellant.

No. 13048.

Court of Appeals of New Mexico.

Jan. 14, 1992.

Certiorari Denied Feb. 18, 1992.

Tom Udall, Atty. Gen., Elizabeth Major, Asst. Atty. Gen., Santa Fe, for state of N.M.

Sammy J. Quintana, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

CHAVEZ, Judge.

The child appeals an order of the children's court transferring this case to the district court. He argues that the delinquency petition should be dismissed because the transfer hearing was not held within thirty days. He also argues that there was insufficient evidence for the court to find that there were reasonable grounds to believe that he had committed the alleged delinquent act of murder. We affirm.

The incident which gave rise to the murder charge in this case arose from a fight between Dominick Q. and another juvenile which occurred on June 30, 1990. The petition alleging delinquency of Dominick Q. was filed on July 30, 1991. He was not detained after the incident or after the petition was filed. Meanwhile, on August 18, 1990, Dominick Q. was involved in another incident which gave rise to a separate charge of aggravated assault. At that time, the child was taken into detention.

On August 22, 1990, the child was brought before the court on three petitions: 89-17-CH and 89-38-CH, consolidated (revocation of probation), 90-78-CH (murder) and 90-91-CH (aggravated assault). Although the murder was alleged to have been committed on June 30, the state did not file its petition on that charge until July 30 and did not seek to detain the child until he allegedly committed the aggravated assault. Thus, the August 20 hearing was a first appearance for all cases and a detention hearing on the aggravated as-

sault case. After hearing argument of counsel, the court ordered detention. The state made clear, for the record, that the child was being detained pursuant to the aggravated assault case and not the murder case. The court agreed and specified that it was ordering detention in the aggravated assault case.

On August 28, 1990, the state filed a motion to transfer the murder case to the district court. On October 25, 1990, the child moved to dismiss the petition, alleging that the transfer hearing had not been held within thirty days as required by SCRA 1986, 10–223(A). The court denied the motion to dismiss, finding that the hearing on the motion to transfer was timely held.

The children's court rules contain two time schedules applicable to cases of children who are alleged to be delinquent and in need of supervision. One schedule, a shorter one, applies to those children in detention and one, a longer one, applies to those not in detention. The purpose is to expedite proceedings involving a child held in detention. The rules provide for quicker proceedings when a child is being held in detention prior to disposition. *See, e.g.,* SCRA 1986, 10–204; 10–226; 10–229.

The rule concerned here states that, "If the respondent is in detention, the transfer hearing shall be commenced within thirty (30) days from whichever of the following events occurs latest: (1) the date the motion for transfer is filed; ...." Rule 10–223(A). If the child is not in detention the transfer hearing must be held within ninety (90) days from the filing of the motion for transfer. SCRA 1986, 10–223(B). The child argues here that, because he was in detention, the hearing on the motion for transfer had to be held within thirty days. The problem arises from the fact that he was not in detention in the murder case but was detained in the aggravated assault case.

The child argues that the rule is unambiguous and does not need construction. He argues that the plain reading of the rule requires dismissal of the petition for delinquency on the charge of murder. We cannot agree that the rule is as unambiguous as the child argues. The rule is unambiguous only when there is only one case involved. We believe that, when there is more than one case at issue, the rule does not provide an answer, and it therefore requires construction. This court applies the same rules of construction to procedural rules adopted by the supreme court as it does to statutes. *State v. Eden,* 108 N.M. 737, 779 P.2d 114 (Ct.App.1989). "Our role is to discern and give effect to the author's intent." *Id.* at 741, 779 P.2d at 118. This is accomplished by adopting a construction that will not render the rule's application absurd, unreasonable, or unjust. *See State v. Santillanes,* 99 N.M. 89, 654 P.2d 542 (1982); *Otero v. State,* 105 N.M. 731, 737 P.2d 90 (Ct.App.1987).

The rules requiring expedited proceedings when a child is in detention demonstrate a concern by the rulemakers that a child should not be held in detention for a prolonged period at the pre-adjudicatory and pre-dispositional stages of the proceedings. The rules do not, however, evidence an intent that all possible charges against a child in detention must be filed. *See* Rule 10–204(C) (allowing only two days to file). The state argues that the intent of the abbreviated schedule for those cases where a child is in detention would not be furthered by requiring transfer hearings on every petition involving the child to be held within thirty days. It argues that such a requirement would lead to absurd results and complicate rather than simplify proceedings involving children.

We agree that such a construction would cause much confusion in applying the rules regarding time schedules. A common sense approach to the rules involving the abbreviated time schedules for a child in detention should be applied. *State v. Felipe V.,* 105 N.M. 192, 730 P.2d 495 (Ct.App. 1986). It goes against common sense to require that the state proceed on the shorter time schedule on a petition for which the child has not been detained.

The child argues that the fact that he is in detention requires the state to move along on all charges against him. He argues that it does not matter what offense

he is being held on, only that he is in detention. We are not convinced by this argument. The case in which the child is being detained must proceed on the abbreviated schedule. Either a transfer hearing or an adjudicatory hearing must be held within thirty days. The proceedings in cases for which he has been detained must be concluded expeditiously regardless of the status of any other proceedings involving the child. Because transfer depends in part on the amenability of the offender to rehabilitation, it must depend in part on the nature and context of the crime. *Cf. State v. Doe,* 99 N.M. 460, 659 P.2d 912 (Ct.App. 1983) (trial court retained right to reconsider order denying transfer when evidence of later crimes presented).

The child argues that the state's interpretation of the rule would require or allow a separate transfer hearing on each separate charge. We need not answer this contention to the extent it relates to different charges in the same case. The fact is that the rules provide for separate petitions or cases on separate charges. Charges should be joined only if they arise out of the same transaction, are of the same or similar character, or are part of a single scheme or plan. SCRA 1986, 10–107(A). In this case, the two charges arose out of two unrelated incidents occurring several weeks apart. Under the rule, the state was not required to join the separate charges in the same petition. Since the charges were brought separately, the matters may proceed separately. How and when things happen in one case does not affect how and when things happen in the other.

We hold that the fact that a child is in detention in one case does not ordinarily affect the time schedule of another different case alleging delinquency.

The child argues, pursuant to *State v. Franklin,* 78 N.M. 127, 428 P.2d 982 (1967), that there was insufficient evidence to support the finding that there were reasonable grounds to believe that he had committed the offense of murder. The fact that there was some evidence that he may have acted in self-defense does not negate the evidence that supports reasonable grounds to believe that the offense of murder was committed.

The witnesses all testified to a similar version of the incident. The child and the victim started an argument which escalated into a physical fight. The child pulled a gun and pointed it at the victim. The victim then pulled a knife and stabbed the child. The victim began to walk away, then turned around and was shot by the child. This is sufficient evidence to support the court's finding. *See State v. Doe,* 93 N.M. 481, 601 P.2d 451 (Ct.App.1979).

Holding that the transfer hearing was timely held and that there was sufficient evidence to support a finding that there were reasonable grounds to believe that the child had committed the offense of murder, we affirm the order of transfer.

IT IS SO ORDERED.

PICKARD and BLACK, JJ., concur.

826 P.2d 576

In the Matter of the Last WILL and Testament OF Wilhelmina Neat COE, Deceased.

Faidyne TONEY, Charles A. Toney, and Byron Ross Toney, Plaintiffs–Appellees,

v.

Ralph M. COE, Defendant–Appellant,

Byron Coe, Eldon A. Coe, Donald G. Coe, First National Bank in Albuquerque, Oliver B. Cohen, Nathaniel Wollman, James A. Hoffman, William F. Aldridge, The Peace Foundation, Inc. (1969), and The Peace Foundation, Inc. (1957), Defendants–Appellees.

No. 12434.

Court of Appeals of New Mexico.

Jan. 16, 1992.

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[redacted]

[redacted]

O.R. Adams, Jr., Albuquerque, for plaintiffs-appellees Faidyne Toney, Charles A. Toney and Byron Ross Toney.

John M. Eaves, John G. Baugh, Eaves, Bardacke & Baugh, P.A., Charles G. Berry, Charles G. Berry & Associates, P.A., Albuquerque, for defendant-appellant Ralph M. Coe.

Jack L. Love, Love and McClelland, Albuquerque, for defendants-appellees Peace Foundation, Inc., Nathanial Wollman, James A. Hoffman, Donald Coe and William F. Aldridge.

Oliver B. Cohen, pro se.

John A. Klecan, Butt, Thornton & Baehr, P.C., Albuquerque, for defendants-appellees William F. Aldridge and Oliver B. Cohen.

Robert M. St. John, Patricia M. Taylor, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendant-appellee First Nat. Bank in Albuquerque.

OPINION

DONNELLY, Judge.

Ralph M. Coe (Coe) appeals from a judgment denying his motion to set aside the last will and testament of his deceased wife, Wilhelmina Neat Coe (Wilhelmina), and dismissing his counterclaim, cross-claims and third-party claims. Coe sought, among other things, to have the Peace Foundation, Inc., a nonprofit corporation incorporated in 1957 (Foundation 1957), adjudicated to have been legally dissolved and to be a different entity from the nonprofit corporation bearing the same name, incorporated in 1969 (Foundation 1969). Coe also appeals from the district court's judgment quieting title in the name of the Foundation 1969 to certain realty, and denying his action seeking to quiet title in his name to property claimed by the Foundation 1969 and property held by the testamentary trust established under the will of his late wife. Two issues are presented on appeal: (1) whether a testamentary trust created under Wilhelmina's last will and testament is void and unenforceable; and (2) whether the Foundation 1969 legally obtained title to real property previously held in the name of the Foundation 1957. We affirm in part and reverse in part.

The events giving rise to this appeal are lengthy and complex. Coe and Wilhelmina were married in 1928. They were divorced in 1950. Pursuant to the terms of the decree of divorce, Wilhelmina received several parcels of realty as her separate property; she received additional real property from Coe in 1952, while the parties were single. In 1953 Coe and Wilhelmina remarried.

On December 23, 1957, Coe and Wilhelmina incorporated the Foundation 1957, a nonprofit corporation. Wilhelmina was named as president and Coe was named as vice-president of the corporation. As specified by the articles of incorporation, the objects of the Foundation 1957 were "[t]o assist and financially aid educations [sic], scientific, religious and charitable institutions, associations, and organizations, as well as to carry out such assistance in the broadest and most helpful manner," and to perform such other things necessary to attain the "wholly and exclusively" charitable and benevolent objects of the corporation.

On December 24, 1957, Coe and Wilhelmina executed a warranty deed conveying several tracts of realty to the Foundation 1957. The property described in the deed was, at the time of the deed's execution

and delivery, the separate property of Wilhelmina, and consisted of realty received by Wilhelmina under the decree of divorce and under a deed executed by Coe to her in 1952.

The December 24, 1957, deed executed by Coe and Wilhelmina recited, among other things, that the property described therein was being conveyed to the Foundation 1957:

> To Glorify the ONE GOD by the building of, [sic] an "ALL FAITHS CENTER" for the teaching & rehabilitation of the spiritually and physically handicapped. To encourage and help the churches in securing bibles and good books for their libraries. To help with the establishing of "Meditation Rooms" in hospitals, hotels & office buildings. * * * [T]o further the cause of world unity & international peace in truth, love & life, that all may live in brotherly love & peace the life abundant.

Following incorporation of the Foundation 1957, Coe served as its vice-president and secretary-treasurer until 1969. In 1969 the state corporation commission entered an order dissolving the corporation because of Coe's failure to file the annual corporate reports for the years 1966, 1967, and 1968 and to remit the required filing fee. On August 7, 1969, Coe and Wilhelmina, together with several other individuals, incorporated a new corporation called the "Peace Foundation, Inc." (Foundation 1969), with the same directors and officers as the Foundation 1957, and adopted the same corporate bank account number, principal place of business, and federal tax identification number. As evidenced by the articles of incorporation, the purposes of the Foundation 1969 differed in part from those of the Foundation 1957. The purposes of the Foundation 1969 were:

> [T]o assist and financially aid people and organizations in the broadest and most helpful manner. To acquire by purchase, exchange, lease, grant, gift, devise or bequest, or otherwise, real and personal property. To exercise all of the powers granted to associations not for profit by virtue of [Sections] 51–14–20 to 51–14–40 [NMSA 1953 (Repl. Vol. 8, Pt. 1)].

No deeds or assignments were executed transferring or conveying the assets of the Foundation 1957, following its dissolution, to the Foundation 1969; however, the officers and directors of the latter corporation took possession of and treated the assets of the dissolved corporation as belonging to the newly created corporation.

On June 1, 1970, after consulting with an attorney, Wilhelmina executed a last will and testament. The will provided for the disposition of certain assets to Coe and others, and directed that the residue of her estate be placed in a testamentary trust for the benefit of Coe and the "Peace Foundation, Inc." The will also provided that the trustee should pay over to Coe the sum of $500 per month from the income of the trust "or so much as may be necessary because of changed economic conditions"; additionally, the trustee was authorized in his discretion to "pay over to or apply for the benefit of ... COE so much of the principal" as deemed necessary, and that "[d]uring the lifetime of [Coe], to the extent available, and subject to the previous conditions of this will, the Trustee shall utilize so much of the trust estate as it deems desirable to aid in the work of the PEACE FOUNDATION, INC." The testamentary trust named twenty-eight individuals, consisting of relatives and friends of Wilhelmina, including Faidyne Toney (Wilhelmina's niece), and Faidyne's husband, Charles A. Toney, and their son, Byron Ross Toney (the Toneys), and specified that they "are to receive, free of charge, any services offered by The Peace Foundation, Inc., [including] sponsored clinics, health services, housing and social services." The will also provided that "[t]his trust shall terminate twenty-one years after the death of [Coe] and thereupon the remaining property held in trust shall be distributed, discharged of trust, to the PEACE FOUNDATION, INC., a New Mexico corporation, or its successor."

Wilhelmina died on December 28, 1970, and on February 5, 1971, Coe petitioned the district court for probate of her will and for

appointment as administrator. Thereafter, on February 11, 1971, Coe was appointed as special administrator of Wilhelmina's estate. The will was admitted to probate on March 10, 1971. The estate remained open until March 9, 1977, when pursuant to Coe's request the probate proceedings were closed. The order closing the estate specified that the court would retain jurisdiction to enter further pleadings, orders, and judgments therein.

In April 1982 the Toneys filed a civil action against Coe, the First National Bank in Albuquerque, and Oliver Cohen, as trustee of the testamentary trust, seeking an accounting of trust assets, an award of damages, and the removal of the trustee of the testamentary trust and the officers of the Foundation 1969. The complaint alleged, in part, that the estate had been improperly administered and that the Foundation 1969 had misused and failed to properly dispose of trust assets. The Toneys also filed a motion in the estate proceedings to reopen the probate action and sought an accounting of the estate assets. Thereafter, the district court dismissed both proceedings initiated by the Toneys for lack of standing. On appeal, our supreme court, in an unpublished decision dated May 31, 1984, consolidated the appeal in the two actions, reversed the orders entered by the district court, and held that the Toneys had standing to invoke the district court's aid to secure and preserve the assets of the trust estate and that Faidyne Toney had the right to obtain a trust accounting as a current or future trust beneficiary under NMSA 1978, Section 45–7–303.

In 1982 Coe petitioned the district court to reopen the proceedings in Wilhelmina's estate. The court granted the motion, accepted an amended final account and report filed by Coe, and ordered certain assets of the estate to be placed in the testamentary trust. On September 3, 1982, the district court entered an order approving the final account and report and again ordered that the estate be closed.

Following remand of the Toneys' appeal, the district court began a series of hearings on the relief sought by the Toneys and ordered that the Toneys' civil action be consolidated with the estate proceeding. In November 1988 Coe filed an amended counterclaim, cross-claims and third-party claims in the action brought by the Toneys. Coe alleged that his wife lacked testamentary capacity to execute her will dated June 1, 1970, that the will had been improperly executed, that the will was the product of fraud, undue influence, mistake and the wrongful acts of others, that the prior probate proceedings should be declared void, and requested that the court enter an order determining that Wilhelmina died intestate. Additionally, Coe sought to set aside the testamentary trust, to quiet title in himself to the property held by the testamentary trust for the estate, and to quiet title in himself as "trustee in liquidation" of the property held in the name of the Foundation 1957. Coe also asserted that his own mental incapacity and the alleged fraud of others had served to toll the applicable limitation periods in the estate proceeding.

At the conclusion of the evidentiary hearings, the district court issued extensive findings of fact and conclusions of law as to each of Coe's claims, reserved jurisdiction "over all matters relating to the Testamentary Trust * * *, and the award of costs and attorneys fees from the Testamentary Trust," and, among other things, denied Coe's motion to reopen the probate proceedings; upheld the validity of Wilhelmina's will and the testamentary trust; denied Coe's claims of fraud; denied that Wilhelmina was incompetent or that Coe was incapacitated; determined that Coe was barred and estopped from challenging the disposition of the property disposed of under the will or prior deed; and ordered that title to the property conveyed in the 1957 deed from Coe and Wilhelmina to the Foundation 1957 be quieted in the name of the Foundation 1969.

I. VALIDITY OF TESTAMENTARY TRUST

Under the terms of the last will and testament of Wilhelmina, the residue of her estate, consisting primarily of real estate located in Bernalillo County, was left in

trust for the benefit of Coe and the "Peace Foundation, Inc." The trust also provided that "[d]uring the lifetime of RALPH M. COE, to the extent available, and subject to the previous conditions of this will, the Trustee shall utilize so much of the trust estate as it deems desirable to aid in the work of the PEACE FOUNDATION, INC." The will additionally imposed an equitable charge on property given to the "Peace Foundation, Inc.," in favor of twenty-eight other individuals named in the trust.

Coe contends that the trust created under Wilhelmina's will is void and that the entire corpus of the trust passed to him as his wife's sole intestate heir. He asserts that the district court erred in refusing to determine that the testamentary trust failed for lack of certainty because the purposes of the trust are vague and incapable of enforcement, and that its provisions constitute an impermissible mixed private and charitable trust investing the trustee with uncontrolled discretion in disbursing trust funds for either charitable or noncharitable purposes, or both.

Relying in part upon *Grigson v. Harding,* 154 Me. 146, 144 A.2d 870 (1958), Coe argues that where a trustee is invested under the terms of a trust with the power to apply the trust corpus to either a charitable purpose or to a purpose which is noncharitable, the trust will fail for uncertainty. *See also In re Hayward's Estate,* 65 Ariz. 228, 178 P.2d 547 (1947); *Wilce v. Van Anden,* 248 Ill. 358, 94 N.E. 42 (1911); *Bank of Maysville v. Calvert,* 481 S.W.2d 24 (Ky.Ct.App.1972); *In re Long's Estate,* 190 Wash. 196, 67 P.2d 331 (1937).

In the instant case, the district court found that the testamentary trust created under Wilhelmina's will was valid, its terms were "clear and unambiguous," and that "its purposes are capable of being accomplished." We agree with the district court that the terms of the trust are sufficient to withstand the challenges of uncertainty and vagueness. *See Loco Credit Union v. Reed,* 85 N.M. 729, 516 P.2d 1112 (1973) (upholding validity of trust against claim that it lacked necessary certainty as to essential elements of the trust). *See also Golleher v. Horton,* 148 Ariz. 537, 715 P.2d 1225 (Ct.App.1985) (elements of a valid trust include a competent settlor and trustee, intent to create a trust, ascertainable trust res, sufficiently ascertainable beneficiary, legal purpose, and legal term).

Nor do we find the trust invalid because the trust is mixed, containing provisions which are both charitable and private in nature. *See Moskowitz v. Federman,* 72 Ohio App. 149, 51 N.E.2d 48 (1943) (validity of mixed trust upheld where provisions of trust provided it was to terminate after twenty years, with discretion in the trustee to distribute the property to the next of kin of the testator or to charitable organizations, or both); *Rice v. Morris,* 541 S.W.2d 627 (Tex.Ct.App.1976) (mixed private and charitable trust held valid where property was placed in trust for both the benefit of a definite class of beneficiaries and distinctly ascertainable private individuals). *See generally* IVA Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 398.1 (4th ed.1989).

A common impediment to the validity of a mixed trust is the rule against perpetuities. George T. Bogert, *Trusts* § 65, at 241 (6th ed.1987) ("If a trust is mixed, and the whole of it or the private part is limited in duration to lives in being and/or twenty-one years, there is no objection to it on the ground of duration."). *See generally* W.W. Allen, Annotation, *Gift to Charity as Affected by Conjoined Noncharitable Gift Invalid Under Rule or Statute Against Perpetuities or Rule Against Accumulations,* 170 A.L.R. 760 (1947). The trust herein complies with the rule against perpetuities because the terms of the trust provide that both the private and charitable portions of the trust are to terminate twenty-one years after the death of Coe. *See* NMSA 1978, § 47-1-2 (Repl.Pamp.1991).

Here, the trust purposes are clearly delineated and direct the trustee to carry out the terms of the private portion of the trust, with discretion to also distribute "so much of the trust estate as it deems desirable to aid in the work of the PEACE FOUNDATION, INC." Thus, we conclude

that the district court properly denied Coe's challenges to the validity of the testamentary trust. Moreover, the district court found that Coe's "motion to set aside the will is a claim against the estate of Wilhelmina Neat Coe and [he] is estopped to file such * * * claim by reason of his acceptance of benefits of the estate and his failure to resign as administrator of the estate." The court further found that there was no fraud, undue influence or wrongful conduct practiced upon Wilhelmina by her attorney regarding the preparation or execution of her will; that Coe was of sound mind and acted free of mistake, fraud, duress or undue influence at all material times; and that his claims seeking to set aside the will and trust were barred both by the applicable statute of limitations and the probate claims statute.

We agree with the district court that Coe's attack upon the efficacy of the will and the trust was also barred by the provisions of the applicable statute of limitations in effect at the time the probate proceedings were commenced and when the will was admitted to probate. *See* NMSA 1953, §§ 30–2–13, –21. Six months after entry of the order admitting the will to probate, the order became final and the statute of limitations for contesting the validity of the will expired. § 30–2–13. *See also Humphries v. Le Breton,* 55 N.M. 247, 230 P.2d 976 (1951); *Stitt v. Cox,* 52 N.M. 24, 190 P.2d 434 (1948). *Cf.* NMSA 1978, § 45–3–803(B) (Repl.Pamp.1989) (all claims arising against a decedent's estate are barred unless presented within four months after such claim arises). Moreover, under Section 45–3–803(B) (enacted by 1975 N.M.Laws, ch. 257, § 3–803), Coe had four months to contest the distribution of the property ordered by the court to be transferred to the testamentary trust on June 2, 1982, and failed to timely present such challenge.

Coe initially requested that Wilhelmina's will be admitted to probate, served as administrator of her estate, accepted the benefits provided for him under the will, and did not contest the validity of the will until April 16, 1987, more than sixteen years after its presentation for probate. The district court found that Coe's actions amounted to a ratification of the will and the testamentary trust. The record amply supports this finding. *See In re Estate of Johnson,* 39 Ill.App.3d 246, 350 N.E.2d 310 (1976) (a party accepting benefits under a will may be deemed to have ratified and confirmed the provisions of such instrument). The district court also found that Coe was competent at all times material to the proceedings herein. In sum, we conclude that Coe's challenges to the validity of Wilhelmina's will and the testamentary trust created thereunder were properly denied.

II. OWNERSHIP OF FOUNDATION PROPERTY

After dissolution of the Foundation 1957 by order of the state corporation commission in 1969, the officers and directors of the corporation formed and incorporated the Foundation 1969, utilizing the same corporate name and bank account of the former corporation. In its judgment entered May 3, 1990, the district court, inter alia, quieted title in the Foundation 1969, against the claims of all of the parties herein, to the real property previously held in the name of the Foundation 1957, and also quieted title to other realty held in the name of the testamentary trust.

On appeal, Coe challenges the propriety of the district court's judgment quieting title in the Foundation 1969 to the property held by the Foundation 1957 at the time of its dissolution. Coe argues that there was never any conveyance from the officers or directors of the Foundation 1957 to the Foundation 1969, nor has the latter corporation obtained any instrument evidencing color of title to the realty in question.

It is a familiar axiom of New Mexico law that although a quiet title action may be brought by anyone claiming an interest in real property, *Christy v. Petrol Resources Corp.,* 102 N.M. 58, 691 P.2d 59 (Ct.App.1984), nevertheless, a party seeking to quiet title to real estate must recover on the strength of his own title and cannot rely on the weakness of the title claimed by

his adversary. *Perea v. Martinez,* 95 N.M. 84, 619 P.2d 188 (1980); *Baker v. Benedict,* 92 N.M. 283, 587 P.2d 430 (1978); *Esquibel v. Hallmark,* 92 N.M. 254, 586 P.2d 1083 (1978). *See also* 2 Rufford G. Patton & Carroll G. Patton, *Patton on Land Titles,* § 538 (2d ed.1957) (decree quieting title in claimant must be supported by strength of claimant's own title, and function of decree is not to confer title but merely to confirm claimant's pre-existing title).

In the instant case, it is undisputed that there were no conveyances of the real estate claimed by the Foundation 1969 from the Foundation 1957, nor were there any other deeds to the Foundation 1969 from other individuals validly acting on behalf of the dissolved corporation. The Foundation 1969 claims title to the realty herein by virtue of operation of law, contending that as a result of its subsequent incorporation adopting the same name, general purposes, and having the same officers as the previously dissolved corporation, title vested in it as a successor corporation to all of the assets previously held in the name of the dissolved corporation. It also argues that the district court's findings that Coe waived or is estopped to deny ownership of the realty in question in the Foundation 1969 precludes any challenge on his part to the ownership of the property claimed by the successor corporation.

When an order dissolving a corporation is issued, what disposition may properly be made of realty or other assets held in the corporation's name? This issue has not been previously addressed by prior appellate decisions in New Mexico. As observed in *Vulcan Materials Co. v. United States,* 446 F.2d 690 (5th Cir.), *cert. denied,* 404 U.S. 942, 92 S.Ct. 279, 30 L.Ed.2d 255 *reh'g denied,* 404 U.S. 1006, 92 S.Ct. 564, 30 L.Ed.2d 559 (1971), in the absence of a statute providing otherwise, dissolution of a corporation is tantamount to corporate death and effectively terminates the existence of the corporation. *See also Metropolitan Bldg. Co. v. Ryan,* 141 Kan. 521, 41 P.2d 1002 (1935); *Platz v. International Smelting Co.,* 61 Utah 342, 213 P. 187 (1922). After dissolution, a corporation is without power to dispose of its property, except as specifically authorized by law or judicial order. *See Bradley v. Reppell,* 133 Mo. 545, 32 S.W. 645 (1895).

NMSA 1953, Section 51-14-28 (Repl.Vol. 8, Pt. 1), in effect at the time of the dissolution of the Foundation 1957 in 1969, required the filing of an annual corporate report and provided that after notice of such delinquency if the report is "not made and filed within ninety [90] days after such notice, the corporation shall forfeit its right to conduct its affairs * * * in accordance with the laws of this state relating to the organization and supervision of nonprofit corporations." Section 51-14-28 further provided that:

> Any nonprofit corporation which fails to make and file any such [annual] report within one [1] year following the due date thereof shall thirty [30] days after mailing of written notice by the state corporation commission stand dissolved, and the name of such nonprofit corporation shall be stricken from the files of the state corporation commission.

The district court specifically found that "[n]o assets of the dissolved Peace Foundation * * * were ever deeded or otherwise conveyed to any other corporation." With the exception of NMSA 1953, Section 51-14-34 (Repl.Vol. 8, Pt. 1), the Foundation 1969 has cited no statute or other authority supporting its claim that as a matter of law it was validly vested with title to the ownership of the realty held by the Foundation 1957 following the dissolution of the prior corporation. We find Section 51-14-34 inapposite under the situation presented here because it relates to the formation of a new corporation after the expiration of the prior corporation's term of existence and not to situations where a corporation has been involuntarily dissolved. *Cf. Metropolitan Bldg. Co. v. Ryan* (statutory provisions permitting revival of corporation after expiration of its term of existence do not apply to situations where a corporation has been involuntarily dissolved). Nor does the district court's finding that Coe waived or is estopped from challenging the validity of the judgment quieting title to the property

claimed by the Foundation 1969 and previously held by the dissolved corporation, operate to provide a basis for quieting title in the Foundation 1969, where the latter corporation has failed to establish ownership to the property on the strength of its own title. *See Perea v. Martinez.* The Foundation 1969 additionally contends that Coe is precluded from challenging the efficacy of the district court's judgment quieting title in its name because Coe has not challenged certain findings of fact adopted by the court below. Our review of the record indicates that this issue was properly preserved both in his docketing statement and his brief-in-chief. Under these circumstances, we conclude that the district court erred in entering its judgment quieting title in the Foundation 1969 as to realty previously held in the name of the Foundation 1957.

Coe also argues that if the district court's order quieting title to the property in the name of the Foundation 1969 is invalid, then such property must be held to have "reverted to the Grantors, Wilhelmina and Ralph Coe," or alternatively that such property is subject to distribution by Coe "as Liquidating Trustee for the Peace Foundation, formed in 1957." Although we agree with Coe's contention that the district court erred in quieting title to the realty in question in the name of the Foundation 1969, we disagree that the property held by the dissolved corporation reverted on its dissolution to him and the estate of his deceased wife, or that it is subject to distribution by him.

The statutes pertaining to New Mexico corporations in existence in 1969, the year the Foundation 1957 was dissolved, are barren of specific guidelines indicating the method or means controlling the distribution of the assets of a nonprofit corporation which has been involuntarily dissolved. In 1975 the legislature, by 1975 New Mexico Laws, Chapter 217, adopted the Nonprofit Corporation Act, which became effective July 1, 1976. NMSA 1953, Section 51–14–90 (Repl.Vol. 8, Pt. 1 (Pocket Supp.1975)) (now compiled as NMSA 1978, § 53–8–48 (Repl.Pamp.1983)), sets forth the mechanism for the distribution of the assets of a dissolved nonprofit corporation during the time in question. Subsection D of Section 53–8–48 directs that assets of the corporation which are not otherwise restricted by law as to their distribution "shall be distributed in accordance with the provisions of the articles of incorporation or the bylaws [of the corporation]." *Id.*

In the absence of a statute specifying the method of distribution of the assets of a dissolved corporation, " 'the articles of incorporation of the corporation control and are its fundamental and organic law.' " *Lurie v. Arizona Fertilizer & Chem. Co.,* 101 Ariz. 482, 421 P.2d 330, 333 (1966) (quoting *Trico Elec. Coop., Inc. v. Ralston,* 67 Ariz. 358, 196 P.2d 470, 475 (1948)) (unless statute directs manner of distribution of its assets on dissolution, corporate charter is an index to the objects for which it was created and powers to which it has been endowed). *See also Waggoner v. Laster,* 581 A.2d 1127 (Del.1990) (courts must give effect to intent of parties as revealed by language of certificate of incorporation and circumstances surrounding its creation and adoption); *In re Olympic Nat'l Agencies, Inc.,* 74 Wash.2d 1, 442 P.2d 246 (1968) (articles of incorporation govern the rights of parties, except as otherwise dictated by statute). Thus, Section 53–8–48 constitutes explicit legislative direction as to the manner by which the assets of a dissolved corporation are to be distributed and statutorily recognizes the rule that assets of a dissolved corporation, where not otherwise restricted by law, are to be distributed in the manner specified by the corporate bylaws or articles of incorporation. Thus, we determine that the articles of incorporation of the Foundation 1957 provide the framework for the distribution of the corporate assets held in the corporation's name at the time of its involuntary dissolution. *See Lurie v. Arizona Fertilizer & Chem. Co.; Waggoner v. Laster; In re Olympic Nat'l Agencies, Inc.*

Article VIII of the Articles of Incorporation of the Foundation 1957 provided:

> In the event, for any reason whatsoever, it should ever be found necessary to suspend further operation of this corporation, and to abandon the objectives for which it was founded, thereon, after the discharge of all lawful indebitness [sic] and obligations, the remaining assets of every kind and description shall be conveyed by this corporation, Acting [sic] through its proper officers, to such educational, scientific, religious or charitable institution or institutions, organizations [sic] or organizations, association or associations, as the board of trustees shall deem to be most nearly carrying on and accomplishing the objectives for which this corporation was organized and existed.

The district court adopted findings determining that Coe breached his duty as a corporate officer of the Foundation 1957 by failing to file required corporate reports and annual fees. The court also found, among other things, that Coe "knowingly used the Peace Foundation for his own purposes" and "personally received over $200,000 in distributions from the Peace Foundation, over $84,000 of which was knowingly and wrongfully taken by [him] for a nonexistent loan" which "has never [been] repaid." Similarly, the court found that Coe "took substantial amounts of money from the Peace Foundation and converted such funds to his own use, and by so doing, breached his trust as an officer and director of the Peace Foundation. [Those] funds have not been returned to the Peace Foundation * * *." Based upon these and other findings, the court concluded that Coe is "estoped [sic] from asserting a claim as liquidating trustee, to the Peace Foundation property." The court's findings and its conclusions determining that because of Coe's improper conduct and breach of fiduciary trust he is estopped from acting as liquidating trustee or asserting a claim to the property of the Peace Foundation are supported by substantial evidence in the record. *Sheraden v. Black,* 107 N.M. 76, 752 P.2d 791 (Ct.App.1988) (findings supported by substantial evidence are liberally interpreted 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) (findings are liberally construed and are deemed sufficient if a fair consideration of them, taken together, justifies the court's judgment). *See also Moss Theatres, Inc. v. Turner,* 94 N.M. 742, 616 P.2d 1127 (Ct.App.1980) (a party may, based upon his or her own conduct, be estopped from asserting a right otherwise conferred by law); *Lenning v. New Mexico State Bd. of Educ.,* 82 N.M. 608, 485 P.2d 364 (Ct.App.1971) (equitable estoppel is grounded in the maximum that a party should not profit by his or her own wrongdoing).

The relief requested by the Toneys, and which has yet to be ruled upon by the district court, sought, among other things, to have the court remove the officers of the dissolved corporation and replace them with court-appointed officers or trustees. Although Article VIII specifies that the distribution of the corporate assets shall be performed by the officers of the Foundation 1957, where there are no available officers to carry out this duty or where an officer has been disqualified or estopped from performing such responsibility, the district court, upon application of an interested party, is invested with the authority to protect and preserve the corporate assets, to appoint a receiver to take charge of and administer the assets of a dissolved corporation and to oversee the disposition of such assets in accordance with the articles of incorporation. *See* SCRA 1986, 1–066. *See also* Restatement (Second) of Trusts § 399 cmt. o, at 306 (1959) ("If gifts are made to a charitable corporation which is subsequently dissolved, the doctrine of cy pres will be applied, and the court may direct that the property be given to another corporation or association having similar purposes * * *."). *See generally* 19 C.J.S. *Corporations* § 866 (1990). *Cf.* NMSA 1978, § 53–8–56(C)(3) (Repl.Pamp.1983) (directing that the assets of a corporation subject to "liquidation, shall be transferred or conveyed to one or more * * * corporations, societies or organizations engaged in activities substantially similar to those of the dissolving or

liquidating corporation as the court may direct.").

Our determination that the Foundation 1969 did not obtain title to the assets of the Foundation 1957, and that the district court erred in quieting title in the Foundation 1969 to such assets, does not, however, affect the title of the Foundation 1969 to those assets received by it under the provisions of the testamentary trust created by Wilhelmina's will.

III. CONCLUSION

The judgment of the district court upholding the validity of the last will and testament and the testamentary trust of Wilhelmina Coe is affirmed. We also affirm the judgment of the district court: (1) denying Coe's individual claims of ownership to the property of the Foundation 1957 and 1969; (2) quieting title to the real property held in the name of the testamentary trust; and (3) the judgment of the district court dismissing each of Coe's claims raised in the proceedings below, except as to his rights as a life beneficiary of the testamentary trust of the estate of Wilhelmina Coe, and except as to that portion of the judgment which ordered that title to the assets of the Foundation 1957 be quieted in the name of the Foundation 1969. In all other respects the judgment entered below is affirmed. Each of the parties shall bear their own costs on appeal.

IT IS SO ORDERED.

ALARID, C.J., and FLORES, J., concur.

826 P.2d 962

Robert MARTINEZ, Plaintiff–Appellant,

v.

YELLOW FREIGHT SYSTEM, INC., Defendant–Appellee.

No. 19472.

Supreme Court of New Mexico.

Feb. 10, 1992.

Jeff Romero, Albuquerque, for plaintiff-appellant.

John A. Mitchell, Santa Fe, for defendant-appellee.

OPINION

BACA, Justice.

Plaintiff-appellant Robert Martinez appeals the judgment of the trial court in favor of defendant-appellee Yellow Freight System, Inc. (Yellow Freight). We affirm.

I. FACTS

On October 3, 1986, appellant was hired by Yellow Freight as a truck driver. Appellant was a probationary employee under the terms of the collective bargaining agreement between Yellow Freight and the union. Under Article 41 of this agreement, a probationary employee is given a thirty day trial employment without any claim to permanent employment.[1] During this thirty day period, a probationary employee may be terminated for any legal reason, without recourse.

At the time of his hiring, appellant was informed that he was required to have a physical examination during his probationary period. He was also informed that a satisfactory physical examination was an occupational qualification of permanent employment with Yellow Freight. In addition, appellant was required to pass written and driving tests to demonstrate his qualifications as a truck driver.

During the probationary period, appellant made approximately twenty-two trips for Yellow Freight. After he returned from his last trip on October 29, appellant was asked to report to Dr. Saltz for an employment physical examination. As a part of this examination, Saltz took a series of x-rays of appellant's back. On the same day, Saltz reported to Yellow Freight that these x-rays indicated that appellant had a back abnormality that would preclude his employment as a truck driver. On October 30, appellant was discharged by Yellow Freight. The only reason given for the termination was that it was pursuant to Article 41 of the collective bargaining agreement.

Shortly thereafter, appellant was examined by Dr. Goodwin, who found that appellant did not have a back abnormality. In an attempt to persuade Yellow Freight to overrule its termination decision, appellant tried to bring this information to the attention of Yellow Freight's terminal manager, Mr. Yeaman. When Yeaman refused to consider this information and reinstate him, appellant filed a complaint with the New Mexico Human Rights Commission. This complaint alleged that Yellow Freight terminated appellant in violation of the New Mexico Human Rights Act. *See* NMSA 1978, Sections 28–1–1 to –14 (Repl.Pamp.1991).[2] The Human Rights Commission found that appellant's dismissal did not violate the New Mexico Human Rights Act.

1. The portion of Article 41 relevant to this case reads as follows:

Probationary Employees

(a) A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty-day trial basis with the individual Employer, during which period he may be discharged without further recourse; provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty days the employee shall be placed on a regular seniority list.

2. The briefs of the parties are unclear as to whether this case was tried under the 1983 or 1987 version of the Human Rights Act. However, for the purposes of this appeal, the relevant portions of these statutes are identical to the 1991 version. Compare NMSA 1978, §§ 28–1–1 to –14 (1983 Repl.Pamp.), *with* NMSA 1978, §§ 28–1–1 to –14 (1987 Repl.Pamp.), *and* NMSA 1978, §§ 28–1–1 to –14 (1991 Repl.Pamp.). Therefore, for consistency and clarity, we will cite only the 1991 statute.

Appellant appealed the Human Rights Commission's decision to the district court and the case was tried to the court without a jury. At trial, appellant's theory was that he was terminated, at least in part, because Yellow Freight perceived that he was handicapped. The trial court concluded that appellant was not terminated because of an actual or perceived handicap and that Yellow Freight did not engage in any discriminatory practice in its hiring and termination of appellant. This appeal followed.

II. DISCUSSION

Appellant contends that the trial court erred because it failed to apply the test as set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to the facts of this case. Appellant also contends that the trial court erred when it found that Yellow Freight had not terminated him, at least in part, because of a perceived handicap and when it found that Yellow Freight had articulated a legitimate, nondiscriminatory reason for appellant's termination. Appellant urges us to reverse the court below and remand this action for a determination of damages.

A. Did the trial court err in failing to apply the *McDonnell Douglas* framework to the instant case?

In *Smith v. FDC Corp.,* 109 N.M. 514, 787 P.2d 433 (1990), we used the evidentiary methodology developed in *McDonnell Douglas,* 411 U.S. at 802–05, 93 S.Ct. at 1824–26, to provide guidance in interpreting the New Mexico Human Rights Act.[3] Under the framework adopted in *Smith,* the plaintiff in an employment discrimination case must establish a prima facie case of discrimination. *Smith,* 109 N.M. at 518, 787 P.2d at 437. The plaintiff meets this burden if he or she shows (1) that he or she is a member of a protected class;[4] (2) that he or she was qualified to continue employment; (3) that his or her employment was terminated; and (4) that his or her position was filled by someone not in the protected class. *Smith,* 109 N.M. at 518, 787 P.2d at 437. If the plaintiff is successful in establishing a prima facie case of discrimination, the burden " 'shifts to the employer to articulate some legitimate, nondiscriminatory reason' " for the employment decision. *Id.* at 517 n. 1, 787 P.2d at 436 n. 1 (quoting *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824). If the defendant articulates a nondiscriminatory reason for the termination, the plaintiff has the opportunity to show that the articulated reason was merely a pretext for a discriminatory action. *Id.* The burden of showing that the employer's actions were a pretext merges with the plaintiff's ultimate burden of proving a discriminatory employment practice. *Id.* (citing *Texas Dep't of Community Affairs v. Burdine,*

3. Because the Federal Civil Rights Act of 1964, 42 U.S.C.A. § 2000e–2 (West 1981), is worded similarly to the New Mexico Human Rights Act, NMSA 1978, § 28–1–7 (1991 Repl.Pamp.), we cite federal precedent for guidance. *Smith,* 109 N.M. at 517, 787 P.2d at 436.

> 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.

Id.; see also Lowery v. Atterbury, —— N.M. ——, ——, 823 P.2d 313, —— (1992) (federal cases regarding dismissal under Fed.R.Civ.P. 41(b) are persuasive, but not binding, authority when considering dismissal under similarly worded New Mexico rule, SCRA 1986, 1–041(B)).

4. The New Mexico Human Rights Act prohibits discrimination based on a physical handicap, as well as discrimination based on "race, age, religion, color, national origin, ancestry, sex, * * * mental handicap or medical condition." NMSA 1978, § 28–1–7(A) (1991 Repl.Pamp.).

The Act defines a physical handicap as a "physical * * * impairment that substantially limits one or more of an individual's major life activities. An individual is also considered to be physically * * * handicapped if he * * * is regarded as having a physical * * * handicap." NMSA 1978, § 28–1–2(M) (1991 Repl.Pamp.).

"Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." NMSA 1978, § 28–1–2(N) (1991 Repl.Pamp.).

450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981)).

Our opinion in *Smith* rejected the idea that the *McDonnell Douglas* framework was the only method of proving employment discrimination. As we stated in *Smith,*

> [t]his 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.
>
> * * * 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 * * *. [T]he 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 * * *. [I]f a plaintiff * * * 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.

109 N.M. at 518, 787 P.2d at 437 (citations omitted). Thus, in *Smith* we approved of at least two possible methods of proving employment discrimination—direct proof of a discriminatory motive or indirect proof of a discriminatory motive under the *McDonnell Douglas* framework.[5] In the instant case, the trial court did not explicitly apply the *McDonnell Douglas* framework as adopted in *Smith.* However, as our discussion below demonstrates, the trial court's findings are consistent with a proper application of the *McDonnell Douglas/Smith* employment discrimination framework. Thus, appellant's first contention is groundless.

B. Does the record contain substantial evidence to support the findings of the trial court?

Appellant next contends that the trial court erred because the record does not contain substantial evidence to support the findings of the trial court. Appellant specifically attacks the trial court's findings that (1) Yellow Freight did not consider appellant as having a handicap; and (2) Yellow Freight had a legitimate, nondiscriminatory reason for firing appellant.[6] In regard to these findings, appellant contends that he established a prima facie case of discrimination and that Yellow Freight failed to articulate a legitimate nondiscriminatory reason for terminating him. Thus, appellant asks us to reverse the trial court and remand this action for a determination of damages.

In the instant case, to establish a prima facie case of discrimination, appellant would have to demonstrate (1) that he was a member of a protected class, i.e., those persons having or being perceived as

5. In *Smith,* we also recognized that proof sufficient to satisfy each element of the *McDonnell Douglas* framework could vary with the particular facts of the case.

> 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.

Smith, 109 N.M. at 518, 787 P.2d at 437 (citing *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)).

6. Appellant attacks the trial court's Finding Nos. 5 and 7. These findings are worded as follows:

> 5. On October 30, 1986, Yeaman terminated [appellant] pursuant to Yellow Freight policies as a terminal rejection [under Article 41 of the collective bargaining agreement] because he determined that in his opinion
>
> a. [appellant] was not the type of person who should be made a permanent employee. This determination was made after consultation with his dispatchers.
>
> b. [appellant] had not been candid regarding his credit history.
>
> c. [appellant] had been indifferent toward taking a timely physical.
>
> * * * * * *
>
> 7. At no time did Yellow Freight consider [appellant] as having a physical impairment that substantially limited major life activities.

having a handicap;[7] (2) that he was qualified to continue employment as a truck driver; (3) that his employment was terminated by Yellow Freight; and (4) that Yellow Freight continued to need truck drivers after appellant was discharged. *See Smith,* 109 N.M. at 518, 787 P.2d at 437.[8] Evidence in the record shows that appellant was terminated only after his employment physical examination showed a disabling back condition. The results of this examination were received by Yellow Freight's manager on the day before appellant was terminated. This evidence raises the inference that he was perceived to have a handicap and fired, at least in part, because of this perception.[9] Appellant also demonstrated that he was qualified to be a truck driver by introducing evidence that he passed written and driving tests required by Yellow Freight.[10] In addition, there is no question that Yellow Freight continued to need qualified drivers after appellant was discharged. Thus, appellant met his initial burden of proof and established a prima facie case of discrimination.[11]

Appellant's prima facie case of discrimination created a rebuttable presumption that Yellow Freight impermissibly discriminated against him. *See Smith,* 109 N.M. at 518, 787 P.2d at 437; *see also Burdine,* 450 U.S. at 254, 101 S.Ct. at 1094. Yellow Freight could rebut this presumption by "articulat[ing] some legitimate nondiscriminatory reason" for discharging appellant. *Smith,* 109 N.M. at 517 n. 1, 787 P.2d at 436 n. 1 (citing *Burdine,* 450 U.S. at 253, 101 S.Ct. at 1093–94). Yellow Freight introduced evidence that appellant was dilatory in taking his employment physical examination, that appellant was slow in completing his paperwork, and that appellant was not candid in answering questions on his employment application.[12]

7. While our opinion in *Smith* concerned age and race discrimination, the same analysis is applicable to the instant case because the Human Rights Act also protects handicapped individuals and those individuals perceived to be handicapped against discrimination. NMSA 1978, §§ 28–1–7(A), 28–1–2(M) (Repl.Pamp.1991).

8. The elements of the *Smith* test are flexible to meet the facts of a particular case. *See Smith,* 109 N.M. at 518, 787 P.2d at 437. A slightly different formulation of the fourth element was used in *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824, and that formulation, as enunciated above, fits the facts of the instant case.

9. Appellant also contends that Yeaman admitted in his testimony that appellant was fired at least in part because of a perceived handicap. Appellant cites *Turner v. Silver,* 92 N.M. 313, 316, 587 P.2d 966, 969 (Ct.App.), *cert. denied,* 92 N.M. 260, 586 P.2d 1089 (1978), for the proposition that "[a]dmissions made by a party are the strongest kind of evidence. Such admissions are binding and conclusive [against the party] if uncontradicted and unexplained. *Hiniger v. Judy,* 194 Kan. 155, 398 P.2d 305 (1965)." Based on *Turner,* appellant argues that Yeaman's testimony is conclusive evidence of discrimination based on a perceived handicap.

However, the court of appeals has repudiated *Turner.* As the court of appeals later explained,

> *Turner v. Silver* * * * expresses only the opinion of its author, Judge Sutin; other members of the panel did not join in Judge Sutin's opinion. Thus, with respect to the effect of admissions, *Turner* is not a decision of the Court of Appeals. *Casias v. Zia Co.,* 94 N.M. 723, 616 P.2d 436 (Ct.App.1980). Judge Sutin's opinion is based on a Kansas decision. We apply New Mexico law. An admission in pleadings, or in testimony, is sufficient to support a finding. *Feldhut v. Latham,* 60 N.M. 87, 287 P.2d 615 (1955); *Lujan v. Gonzales,* 84 N.M. 229, 501 P.2d 673 (Ct.App.), *cert. denied,* 84 N.M. 219, 501 P.2d 663 (1972). However, an admission "is by no means conclusive * * *. [T]he admission is only one factor to be considered together with the other evidence." *Michael v. Bauman,* 76 N.M. 225, 413 P.2d 888 (1966). See also *Albright v. Albright,* 21 N.M. 606, 157 P. 662 (1916).

Southern Union Exploration Co. v. Wynn Exploration Co., 95 N.M. 594, 598, 624 P.2d 536, 540 (Ct.App.), *cert. denied,* 95 N.M. 593, 624 P.2d 535 (1981), *cert. denied,* 455 U.S. 920, 102 S.Ct. 1276, 71 L.Ed.2d 461 (1982). Thus, appellant's arguments to the contrary must fail.

10. Because we find that the record contains substantial evidence to support the trial court's finding that appellant was not terminated because of a perceived handicap, we need not reach the issue of whether appellant was physically qualified to continue in his employment with Yellow Freight.

11. We note here, as other courts have stated, that the burden of establishing a prima facie case of discrimination is not onerous. *See, e.g., Burdine,* 450 U.S. at 253, 101 S.Ct. at 1093–94.

12. As appellant contends, to rebut his prima facie case Yellow Freight must articulate a legitimate nondiscriminatory reason for the termination through "some admissible evidence."

This evidence raised the inference that the Yellow Freight management team felt that appellant demonstrated a poor attitude towards his employment and would have been a difficult employee. Thus, Yellow Freight articulated a legitimate, nondiscriminatory reason for terminating appellant, thereby rebutting the presumption that its actions were based on impermissible discrimination.

Because evidence was presented that rebutted the presumption of discrimination, appellant, to prevail on his claim, would have had to have presented evidence that the articulated reason was pretextual. *See Smith,* 109 N.M. at 519, 787 P.2d at 438; *see also McDonnell Douglas,* 411 U.S. at 804–05, 93 S.Ct. at 1825–26. Appellant's burden of showing that the articulated reason was merely a pretext merges with his ultimate burden of proof of intentional discrimination. *See Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095. In the instant case, the trial court made two findings relevant to the appellant's ultimate burden of proof: (1) that Yellow Freight did not perceive appellant to be handicapped; and (2) that Yellow Freight had a legitimate, nondiscriminatory reason for discharging appellant. Thus, the only remaining issue in this appeal is whether these findings are supported by substantial evidence. Because we find that the first finding is supported by substantial evidence, we need not examine the second finding.

Substantial evidence is any relevant evidence in the record that " 'a reasonable mind might accept as adequate to support a conclusion.' " *Smith,* 109 N.M. at 519, 787 P.2d at 438 (quoting *Toltec Int'l, Inc. v. Village of Ruidoso,* 95 N.M. 82, 84, 619 P.2d 186, 188 (1980)). In reviewing the record to determine whether substantial evidence supports a trial court's finding, "[w]e 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.*

In light of the above standard of review, we find that the record contains substantial evidence to support the trial court's finding that Yellow Freight did not perceive appellant to be handicapped. Mr. Robert Yeaman, Tucumcari terminal manager for Yellow Freight, testified on direct and cross-examination that appellant's firing was pursuant to Article 41 of the collective bargaining agreement and not due to a perceived handicap. Yeaman also testified that Yellow Freight's policies would preclude him from discharging appellant for failure to pass a physical. According to Yeaman's testimony, such a decision would have to come from Yellow Freight's Kansas City office. Mr. Bruce Daly, a dispatcher for Yellow Freight, testified that he recommended that Yellow Freight terminate appellant before the end of the probationary period. At the time that Daly made this recommendation, he was unaware of Dr. Saltz's report regarding appellant's back. Although conflicting evidence was presented at trial, the trial court apparently believed the testimony of Yeaman and Daly.

On appeal, this Court will not weigh conflicting evidence or determine the credibility of witnesses, *Forrest Currell Lumber Co. v. Thomas,* 81 N.M. 161, 163, 464 P.2d 891, 893 (1970), nor is it significant that there is evidence that supports appellant's view of the case. *McCauley v. Tom McCauley & Son, Inc.,* 104 N.M. 523, 527, 724 P.2d 232, 236 (Ct.App.1986). After a review of the evidence presented, we have determined that a reasonable mind could have found that Yellow Freight did not terminate appellant based on a perceived handicap. Because appellant failed to meet his ultimate burden of proof of discrimina-

Burdine, 450 U.S. at 255, 101 S.Ct. at 1094–96. Appellant complains that much of the testimony establishing these facts was hearsay and thus inadmissible. However, appellant failed to raise a timely objection to this testimony at trial and is therefore considered to have waived such objection. *See* SCRA 1986, 11–103(A)(1); *State v. Young,* 103 N.M. 313, 320, 706 P.2d 855, 862 (Ct.App.1985) (failure to object to unresponsive answer constitutes waiver); 1 John H. Wigmore, *Evidence* § 18 (Tillers rev. 1983) ("A rule of evidence not invoked is waived.").

tion, the decision of the district court is AFFIRMED.

IT IS SO ORDERED.

RANSOM, C.J., and FRANCHINI, J., concur.

826 P.2d 968

William E. BIXBY, Joanne C. Bixby, Robert J. Bickerstaff, Elaine Bickerstaff, Peter L. Asprey and Cynthia C. Asprey, Plaintiffs–Appellees,

v.

REYNOLDS MINING CORPORATION and Michael D. Reynolds, Defendants–Appellants.

No. 19879.

Supreme Court of New Mexico.

Feb. 20, 1992.

Penni Adrian, Albuquerque, Don Klein, Jr., Socorro, for defendants-appellants.

The Payne Law Firm, Wallace P. Harman, Diane P. Donaghy, Albuquerque, for plaintiffs-appellees.

OPINION

FROST, Justice.

Reynolds Mining Corporation and Michael D. Reynolds (Reynolds), appellants, and William Bixby, et al. (Bixby), appellees, dispute the possession of certain placer mineral claims located in Santa Fe County on federal public lands. The trial court found that Bixby rightfully possessed the placer claims and granted Bixby's motion for summary judgment on three separate

grounds. First, the trial court found that Reynolds' default on the mining lease between he and Bixby barred him from asserting any mining rights to the property in question. Second, the trial court found that Bixby's rights as landlord with respect to the mineral interests were superior to Reynolds' rights as tenant. Third, the trial court found that Bixby's mining claims were made prior to Reynolds' mining claims, and therefore were superior. We agree with the trial court on the third ground for summary judgment and therefore need not address the first two. We affirm.

FACTS

On August 24, 1987, Reynolds leased patented and unpatented lode claims from Bixby. Reynolds made the first month's payment of $20,000 due under the lease but subsequently defaulted. Bixby terminated the lease and gave written notice of its termination on December 24, 1987.

On March 31, 1989 Reynolds entered into a second lease/purchase agreement with Bixby. Reynolds leased the placer mineral rights located over the lode claims and obtained an option to purchase all patented and unpatented lode and placer claims. Reynolds made eleven monthly payments totalling $55,000 and then defaulted on this second lease as well. Bixby once again terminated the lease and gave Reynolds written notice of the termination on March 20, 1990.

Between the effective dates of these two leases, Reynolds contends that he located placer mining claims, which he named the Redco 1–7 claims, over the underlying lode claims undisputedly owned by Bixby. Reynolds, in fact, entered into a stipulation conceding possession of the underlying lode claims to Bixby. Although Reynolds was not working on the land under the authority of any lease at the time of the locations of the Redco 1–7 claims, Reynolds alleges that Bixby knew he was still on the land and that the Redco placer discoveries were thereby peaceably made. Reynolds also contends that a November 17, 1987 location notice, filed by Bixby for the Upper SL placer claims, covering the same land as the Redco claims, was backdated and was really located on February 12, 1988, ten days after Reynolds' location. These disputed facts, however, were not the basis of the trial court's decision to grant summary judgment. The trial court's decision was properly based on Bixby's undisputed ownership of the underlying lode claims, and the rights that attached therewith.

DISCUSSION

Most mineral substances found on federal public lands open to exploration may be located under the federal mining law. 30 U.S.C. § 22 (1988). A valid mining claim on federal public land must be located and patented either as a lode claim or a placer claim. 30 U.S.C. §§ 23, 28, 29, 35, 37 (1988). Title 30 U.S.C. §§ 23 and 35 distinguish lode and placer claims. In general, a well-defined vein embedded in rock is located as a lode claim, and a loose valuable mineral in sand or gravel is located as a placer claim.

Federal mining law, as evidenced by 30 U.S.C. § 26, gives the lode locator exclusive possession of the surface:

> § 26. **Locators' rights of possession and enjoyment** The locators of all mining locations heretofore made or which shall hereafter be made * * * on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns * * * so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, *shall have the exclusive right of possession and enjoyment of all the surface* included within the lines of their locations * * * *

30 U.S.C. § 26 (1988) (emphasis added).

Under 30 U.S.C. § 26, the lode locator possesses the surface of his claim, so that any prospecting done on his land without his consent would be a trespass. Consistent with this analysis, both New Mexico and federal cases hold that an attempted claim made on the valid claim of another is void if initiated by trespass. In 1907, this court in *Upton v. Santa Rita*

Mining Co., 14 N.M. 96, 89 P. 275 (1907) decided the validity of a claim wherein the location notice itself had been staked on the claim of another. The court held that under the circumstances of that case the location notice was effective, but only as to the land not already covered by a claim. *Id.* at 126, 89 P. at 285. The court cautioned against too broad a reading of this holding:

> Nor do the views here announced overlook the settled principle *that a location held by patent or by prior location is property in the highest sense and that no rights upon it can be initiated by trespass.* We hold, however, not that a conflict with an adjoining claim by a subsequent locator confers any right as against such prior claim, but that as to the portion of the mining claim lying without such claim the location is not rendered void by the mere fact that the notice may be upon such patented or previously located ground.

Id. at 128, 89 P. at 285–86 (emphasis added).

Federal case law also supports the view that an attempted location on land covered by a prior location is a trespass and therefore invalid. In *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220, 24 S.Ct. 632, 48 L.Ed. 944 (1904), an attempted lode location was made on land held by a valid placer locator.[1] The court held the attempted lode location invalid explaining that 30 U.S.C. § 26 together with § 35 granted exclusive right of possession of the surface to the placer locator and that subsequent prospecting on the land of the placer locator was a trespass. *Clipper*, 194 U.S. at 226, 24 S.Ct. at 634. The court noted that the lode locator could not acquire a right by way of a trespass. *Id.* at 230, 24 S.Ct. at 636. In *Ranchers Exploration & Development Co. v. Anaconda Co.*, 248 F.Supp. 708 (D.Utah 1965), the court explained what constitutes a trespass in this context: "If a mineral discovery has been made, the locator doing the requisite work on his claim is *protected from even the peaceable entry* of another, which would be, as to him, an unauthorized trespass nonetheless." *Id.* at 727 (emphasis added) (citing *Belk v. Meagher*, 104 U.S. 279, 284, 26 L.Ed. 735 (1881)).

A grant of summary judgment is proper if the pleadings together with any affidavits show that there are no genuine issues as to the material facts and the movant is entitled to judgment as a matter of law. SCRA 1986, 1–056(C); *Westgate Families v. County Clerk of Los Alamos*, 100 N.M. 146, 667 P.2d 453 (1983). Where a movant for summary judgment has established a prima facie case, the opposing party must put forth specific facts admissible into evidence to establish a disputed material fact. *Storey v. University of New Mexico Hosp.*, 105 N.M. 205, 730 P.2d 1187 (1986). Conclusions that are stated in an affidavit, unsupported by any factual basis, or matters contained in affidavits that are not properly admissible in evidence, are not sufficient to raise issues of material fact. *Portales Nat'l Bank v. Bellin*, 98 N.M. 113, 645 P.2d 986 (Ct.App.1982). The opposing party must set forth more than mere argument. *Oschwald v. Christie*, 95 N.M. 251, 620 P.2d 1276 (1980). In addition, summary judgment may be proper even though some disputed facts remain, if the disputed facts relate to immaterial issues. *Id.*

Bixby met his burden of establishing a prima facie case. The pleadings, motions and affidavits establish that Reynolds was on the land without a lease at the time he purportedly discovered the placer minerals. Furthermore, Reynolds by signed stipulation, conceded possession of the underlying lode claims to Bixby. The lode claims gave Bixby exclusive possession of the surface within the location

1. In the case at hand, the situation is exactly the opposite. An attempted placer location by Reynolds was made on land held by Bixby, a valid lode locator. In *Clipper*, the court analyzed 30 U.S.C. § 26, which gives the lode locator the exclusive right of possession, and 30 U.S.C. § 35, and interpreted § 35 as giving the locator of placer claims the same rights of exclusive possession as those conferred upon the lode locator. (When *Clipper* was decided the present Sections 26 and 35 were codified as Sections 2322 and 2329 of Chapter 6, Title 32, revised statutes.)

boundaries of his claim. *See* 30 U.S.C. § 26. Under this set of facts, Reynolds was trespassing and could not have established valid placer claims.

Reynolds, on the other hand, did not meet his burden of showing disputed material facts. In a verified pleading, Reynolds alleges that he was on Bixby's land peaceably; however, this fact is not determinative. *Anaconda* and *Belk* clearly hold that an attempted location even by peaceable entry cannot usurp the rights of a locator holding exclusive possession of his land under 30 U.S.C. § 26. *Anaconda,* 248 F.Supp. at 727; *Belk,* 104 U.S. at 284. Reynolds further asserts that he was on the land with Bixby's "full knowledge," and argues that Bixby thereby waived his exclusive right to possession. *Clipper* does indicate that the locator may waive his exclusive right to possession of the surface. *Clipper,* 194 U.S. at 224, 230, 24 S.Ct. at 633, 636. The court in *Clipper* also observed, however, that in order for a locator to waive the trespass he must have "knowledge of what the prospectors are doing." *Id.* at 230, 24 S.Ct. at 636. Reynolds merely asserts his conclusion that Bixby had "full knowledge" that he was on the land. Besides the deficiency of "specific fact" necessary to rebut a prima facie showing, Reynolds' assertion does not go toward any conclusive fact. Whether or not Bixby knew Reynolds was on the land is not important unless Bixby also knew that Reynolds was actually prospecting for placer minerals. Nowhere does Reynolds properly allege specific facts that would indicate Bixby's knowledge of Reynolds' prospecting for placer minerals or Bixby's knowledge of any other actions taken by Reynolds inconsistent with Bixby's interests.

In conclusion, the critical facts in this case are reflected in a stipulation between the parties in which Reynolds conceded the possession of the lode claims to Bixby. The lode claims gave Bixby the exclusive right to the possession of the land under 30 U.S.C. § 26. Reynolds' prospecting on that land was therefore a trespass, and no right can be acquired through a trespass. Thus, there was no need for the trial court to analyze the evidence of conflicting location dates and markers of the placer claims; Reynolds' attempted placer claim was clearly invalid based on the priority of Bixby's underlying lode claims. For this reason, we affirm the summary judgment.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

826 P.2d 971

Art SANCHEZ, Claimant–Appellant,

v.

MOLYCORP, INC., and Unocal, a self-insured employer, Respondents–Appellees.

No. 12808.

Court of Appeals of New Mexico.

Jan. 17, 1992.

Anthony G. Lopez, Taos, for claimant-appellant.

William P. Slattery, Campbell & Black, P.A., Santa Fe, for respondents-appellees.

OPINION

MINZNER, Judge.

Claimant appeals from the decision of the workers' compensation judge (WCJ) denying his claim for temporary total disability and awarding attorney's fees based on an award for permanent partial disability. Claimant raises the following issues on appeal: (1) whether he was entitled to temporary total disability because Molycorp refused to allow him to return to work until he obtained a full work release; (2) whether certain findings of fact are supported by substantial evidence on the whole record; (3) whether the award of attorney's fees, which equals $28.32 per hour, was an abuse of discretion; and (4) whether the WCJ

erred by terminating Claimant's right to future reasonable medical expenses. Respondents (Employer) concede that the claim for future medical care should have been dismissed without prejudice. Therefore, only the denial of the temporary total disability claim and the amount of attorney's fees are still disputed. We address the first and second issues under one heading. We reverse and remand for a hearing on the issue of temporary total disability. We direct the WCJ on remand to reconsider the amount of attorney's fees awarded and to amend the compensation order previously entered to indicate that the claim for future medical benefits is dismissed without prejudice.

I.

BACKGROUND.

Claimant worked as a "mucker/laborer" at Molycorp, a job described as requiring heavy work. On February 14, 1990, he was assigned to break boulders with a twenty-pound sledgehammer. Some time after he began the task, his sledgehammer bounced off a boulder and twisted out of his hands; the handle struck the tip of his right index finger, injuring it.

Claimant was taken to the Questa Health Center where a physician took x-rays and applied a splint. The treating doctor signed an injury report that released Claimant to "light duty" work. Later, the doctor gave deposition testimony in which he stated that by releasing Claimant to light duty, he meant that Claimant could do any work that was not affected by the presence of the splint. He also testified that he believed some of Claimant's responsibilities, specifically using a sledgehammer, would be adversely affected by the splint's presence.

Claimant went back to work that day and was told to finish his shift by sweeping around the offices. The next day, he returned to work with a written statement he had prepared. The statement provided:

> To whom it may concern:
>
> I the undersigned was injured on 2/14/90, while performing work assignment on grizzly level. Was taken to Questa Health Center by company safety representative Miguel Sanchez, where I was diagnoised [sic] and treated for a broken right hand index finger (pointer finger). Doctor at Questa Health Center suggested light duty for six weeks. Will attempt to perform job assigned by company under protest. Any further injury to injured finger due to company job assignment or disfigurement of injured finger due to first injury (Molycorp) will be subject to legal action.

Claimant's Exhibit 6.

Claimant was sent to several different foremen that day. He finally was given work driving a vehicle to pick up tools. At the end of the day, he testified that Molycorp's production superintendent, Ron Allum, instructed him not to return to work until he obtained a second medical opinion and a full work release. Employer objected to Claimant's testimony as hearsay. To buttress his claim that Molycorp refused to make light duty work available, Claimant also was prepared to testify that after he returned to work on the day he was injured, a Molycorp official, Dave Shoemaker, stated: "There is nothing wrong with Art. He is stronger with his left arm than most people are with both arms. Send him underground." The WCJ rejected his proffered testimony, ruling that both statements were hearsay and inadmissible. Employer did not call either Allum or Shoemaker to testify.

Claimant saw an orthopedic surgeon, Dr. Herbert Rachelson, on February 27. Dr. Rachelson diagnosed a small fracture at the tip of his finger, with an accompanying mallet deformity. He did not release Claimant to full duties until May 9. He considered Claimant "disabled" because Claimant needed full use of his right hand to perform his duties, with which the injury interfered.

Claimant did not work at the mine again until May 30, 1990. He delivered Dr. Rachelson's full release to Molycorp on May 9 but was required to undergo a physical and obtain a release from the company physician before he could return to work.

Claimant filed his claim against Molycorp on April 3, 1990. He sought temporary total disability benefits from February 15, 1990, until he returned to work, compensation for the permanent partial loss of use of his finger, past and future medical treatment, and mileage reimbursement. Employer contended that Claimant was not injured in the course and scope of his employment and that he was not entitled to any compensation, either for the partial loss of the use of his finger or for temporary total disability. Employer claimed that Claimant actually injured his finger prior to February 14 in a nonwork-related incident, and if the accident did occur within the course and scope of his employment, he was not entitled to any temporary total disability benefits because he failed to perform light duty work which was available.

The WCJ concluded that Claimant's injury was work-related and awarded him compensation for a four-percent permanent partial loss of use of his finger, plus past medical expenses and attorney's fees. The WCJ found that Claimant was released to work on February 14 and offered light duty "immediately" after Molycorp learned of the injury. The WCJ also found that Claimant told Molycorp that it would be liable for any damages to his finger while working light duty and that Molycorp advised Claimant "to get a second opinion as to whether [he] could return to work on either a light duty or full duty basis." Finally, she found that he did not make an appointment with Dr. Rachelson for two weeks and failed to inquire about the availability of light duty or full duty work until May 20.

She concluded that: "Claimant was able to perform his job duties either full duty or light duty from February 14, 1990, until May 30, 1990, and was therefore, not entitled to temporary total disability benefits pursuant to Section 52–1–25, N.M.S.A. (1978) (1987 repl. [sic] Pamp.)." Conclusion of Law 5. The WCJ disallowed his claim for temporary total disability from February 15, 1990 to May 30, 1990. There was evidence that Claimant's attorney had spent 60.2 hours in preparation, an amount of time that Employer's attorney had admitted was reasonable. The WCJ awarded $1,705.00 in attorney's fees.

II.

DENIAL OF THE TEMPORARY TOTAL DISABILITY CLAIM.

To establish that he was temporarily totally disabled, Claimant was required to prove that he was completely unable to perform the tasks comprising the work he did at the time he was injured, and that he was unable to perform any work for which he was able, based upon his age, education, and experience. *Amos v. Gilbert W. Corp.*, 103 N.M. 631, 635, 711 P.2d 908, 912 (Ct.App.1985). Once he met his burden by presenting proof establishing his disability, however, "the burden of coming forward with the evidence [shifts] to the employer to demonstrate the [claimant's] employability ... for a particular job for which he is reasonably fitted." *Id.* (citing *Brown v. Safeway Stores, Inc.*, 82 N.M. 424, 483 P.2d 305 (Ct.App.1970)).

Claimant argues that the WCJ denied him benefits for temporary total disability on two grounds, neither of which was sufficient. First, he argues that the WCJ apparently found he was released to full duty, and there was insufficient evidence to support that determination. Second, he argues that the WCJ apparently found light duty was offered, but in fact the evidence showed Molycorp refused to allow him to return to light duty work, even though he was physically capable during this period, and required him to obtain a full duty release from a physician. While he concedes that light duty work was available and that he was capable of performing it, he argues that there was insufficient evidence in the record as a whole to support a finding that Molycorp would have allowed him to work light duty. He contends that the availability of light duty work and his capacity to perform it cannot preclude his receipt of benefits for temporary total disability if there is sufficient evidence to support a finding that he was only capable of light duty and Molycorp refused to assign it to him.

Employer argues that Claimant offered only inadmissible hearsay to prove light duty work was not available to him. Employer also argues that the written statement brought to work the day after the accident was evidence that he was unwilling to do light work. It contends that the actual issue raised on appeal is whether there is substantial evidence to support the WCJ's denial of benefits for temporary total disability.

We agree with Employer that the threshold question is whether there is sufficient evidence to support the findings underlying the WCJ's denial of benefits. However, we agree with Claimant that if those findings are not supported by substantial evidence, then the remaining question is one of law. That question is whether the unchallenged findings support the conclusion that "Claimant was able to perform his job duties either full duty or light duty from February 14, 1990, until May 30, 1990, and was therefore, not entitled to temporary total disability benefits[.]" We think they do not.

If there is sufficient evidence to support the WCJ's finding that Claimant was capable of returning to full duty on February 14, then it would not have been inappropriate for Molycorp to refuse to allow Claimant to work light duty on that day. Under those circumstances, even if Molycorp refused to allow Claimant to work without a full release, we would affirm the compensation order on the basis that any error raised on appeal was harmless.

If, however, the evidence shows that Claimant was not capable of other than light duty, Claimant met his burden under *Amos* of coming forward with evidence of the availability of light duty. If Molycorp refused to assign Claimant light duty when that was all he was capable of doing, Employer did not carry its burden of production under *Amos.*

We must review the entire record to determine whether the WCJ's findings of fact are supported by substantial evidence. *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct. App.1988). The WCJ's findings will not be disturbed if they are supported by substantial evidence, *id.,* and they are to be liberally construed to support the judgment. *H.T. Coker Constr. Co. v. Whitfield Transp., Inc.,* 85 N.M. 802, 518 P.2d 782 (Ct.App.1974). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support the conclusion. *Tapia v. Panhandle Steel Erectors Co.,* 78 N.M. 86, 428 P.2d 625 (1967).

We agree with Claimant that Conclusion No. 5 indicates "disability benefits were denied because the Hearing Officer concluded that Claimant was able to perform his full duties during this period of time." We also agree with Claimant that there is not substantial evidence in the record as a whole to support a finding that he was able to return to full duty assignments. The medical evidence only supports a determination that Claimant could have returned to light duty work. Both physicians so testified. Consequently, we cannot affirm the denial of benefits on the ground Claimant was capable of full duty.

We also agree with Claimant that there is not substantial evidence in the record as a whole to support a conclusion that on or about February 14 Claimant was told to obtain a second medical opinion on his ability to return to light duty or full duty work. Employer did not call Allum to testify, and Claimant testified that he was required to obtain a full release. Consequently, there is no evidence that light duty was available to Claimant on terms with which he was able to comply.

We agree with Employer that if Claimant refused to accept duties he was capable of performing, he was not entitled to benefits for temporary total disability, but no finding was made that Claimant was unwilling to do light work. Thus, we do not address the inference Employer argues the WCJ might have drawn from the written statement. As we understand the written statement Claimant prepared, he indicated only that if he was assigned work other than light duty, he would perform the assigned job under protest and hold Molycorp liable for further injury. We are

not prepared to say that this statement establishes as a matter of law that Claimant was unwilling to perform light duty of which he was capable.

The WCJ may have believed that Claimant was not entitled to benefits for temporary total disability when he failed to inquire about the availability of light duty until May. Her findings do not make that belief explicit, however, and under *Amos* we do not believe Claimant's lack of inquiry precludes his right to recover benefits for temporary total disability. Thus, we need not address Claimant's argument that there is insufficient evidence to support the finding regarding lack of inquiry.

We conclude that the findings made in support of the determination to deny benefits for temporary total disability are not supported by substantial evidence in the record as a whole and that the remaining findings do not permit us to conclude that the WCJ rejected Claimant's evidence in support of his claim as not credible. Further, we are persuaded that relevant evidence was excluded. Had all of the evidence Claimant offered been admitted and found credible, the WCJ should have concluded that Claimant made a prima facie case of entitlement to benefits for temporary total disability and required Employer to produce evidence that light duty work was offered Claimant without requiring a full release.

Claimant was prepared to offer testimony that would tend to support his contention that Molycorp did not intend to honor his physicians' restrictions on his ability to perform heavy tasks. He was also prepared to testify regarding a specific directive given to him by Molycorp, which was not to return to work until he had a second opinion and a full release from a physician. This testimony was relevant in determining whether Claimant had refused to work light duty or been told not to return to work unless he obtained a full release.

We agree with Claimant that the testimony was not offered for the truth of the out-of-court statements, but rather to prove that they were made. Under these circumstances, the out-of-court statements were not hearsay. *See Jim v. Budd,* 107 N.M. 489, 491–92, 760 P.2d 782, 784–85 (Ct.App.1987). If, on remand, Employer offers evidence that Allum and Shoemaker did not make the statements Claimant attributed to them, Claimant's testimony would be admissible as proof of prior inconsistent statements. *See* SCRA 1986, 11–801(D)(1)(a). Finally, even if Claimant's testimony contained hearsay, the record indicates it could have been admitted as proof of admissions made by agents or servants of a party-opponent made in the course and scope of employment. *See* R. 11–801(D)(2)(d); *Segura v. Molycorp, Inc.,* 97 N.M. 13, 18, 636 P.2d 284, 289 (1981) (trial court properly allowed employee to testify about statements made by employer's agent; statements were admissions by an agent of a party-opponent and thus *not* hearsay); 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 801(d)(2)[01], at 801–236 (1991) (rule reflects "common sense view that statements of a principal actor should generally be received rather than excluded from evidentiary consideration").

We remand for a hearing to allow Claimant an opportunity to introduce statements made by Molycorp's agents concerning light duty work and the terms on which it was available. Molycorp will then have an opportunity to respond to the testimony Claimant offered. Thereafter, the WCJ will be in a position to determine whether Claimant should be awarded benefits for temporary total disability.

III.

ATTORNEY'S FEES.

The issue of adequate attorney's fees in this case is a difficult one. At first glance, one might think that an award of fees equal to 179 percent of Claimant's compensation would be more than adequate to compensate the attorney. However, it is inappropriate to rely on the percentage of recovery method to determine whether a particular award is adequate. *Sanchez v. Siemens Transmission Sys.,* 112 N.M. 533,

817 P.2d 726, 728 (1991) (quoting *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 338, 695 P.2d 483, 488 (1985)). The facts of this case illustrate why the percentage of recovery approach is inadequate. Here the injury was relatively slight, and the award reflected the nature of the injury. Nevertheless, in spite of the relatively small award of benefits, it is clear that other relevant factors would support a much greater award of attorney's fees. The nature of the injury, whether it was work-related, and the extent and duration of Claimant's disability were all hotly disputed issues. There was evidence that the attorney's normal hourly fee was $125 per hour and that the fee range for work of this kind in Taos County was $90 to $125 per hour. It is undisputed that the time spent was reasonable. From the record, then, it appears that the attorney's fees awarded, which equal only about $28 per hour, were inadequate.

On remand, the WCJ is directed to reconsider the award. She may consider the effort expended on this appeal coupled with the new trial, along with all the other relevant factors, to determine an adequate award. *Id.* 112 N.M. at 535–36, 817 P.2d at 728–29; *see also Fuyat v. Los Alamos Nat'l Lab.*, 112 N.M. 102, 108, 811 P.2d 1313, 1319 (Ct.App.1991) (the percentage of the award is not singularly determinative; court considered the case's medical complexity, the fact that all issues were hotly contested, the present value of the award, the hours expended by the attorney and his usual hourly fee, and the employer's failure to make any written settlement offer to uphold the award).

IV.

CONCLUSION.

The compensation order is reversed, and the cause is remanded for a hearing on Claimant's claim for temporary total disability and attorney fees and for entry of an amended compensation order that reflects findings and conclusions consistent with this court's opinion made after the hearing on remand. The amended compensation order shall indicate that Claimant's claim for future medical expenses is dismissed without prejudice.

IT IS SO ORDERED.

DONNELLY and APODACA, JJ., concur.

827 P.2d 97

Garrett QUINTANA, Petitioner,

v.

Kim KNOWLES, Jane Knowles, James T. Jackson and Sheila Cooper, Respondents.

No. 19970.

Supreme Court of New Mexico.

Feb. 10, 1992.

Roth, Van Amberg, Gross, Rogers & Ortiz, F. Joel Roth, Santa Fe, for petitioner.

Catron, Catron & Sawtell, John S. Catron, Santa Fe, for respondents.

OPINION

RANSOM, Chief Justice.

Garrett Quintana filed suit to quiet title in a road that provides access to his property. The road traverses property owned and possessed by defendants. The trial court entered a decree in favor of Quintana declaring the road to be a New Mexico public highway established under federal law. Defendants filed notice of appeal, but did not move to stay the trial court's decree. Relying upon NMSA 1978, Section 39-3-9 (Repl.Pamp.1991) (supersedeas bond requirements in actions involving real or personal property), Quintana filed a motion in the trial court to compel defendants to post a supersedeas bond to assure payment of any damages occasioned by the appeal. Quintana attached an affidavit to the motion detailing the prejudice he would suffer as a consequence of the appeal. The trial court denied the motion, and the court of appeals affirmed.

Citing *Salas v. Bolagh,* 106 N.M. 613, 616, 747 P.2d 259, 262 (Ct.App.1987), the court of appeals stated that Section 39-3-9 does not require posting of a supersedeas bond when there exists no judgment to stay, no change in the ownership or possession of the property, and such bond would serve no purpose. The court of appeals reasoned that since the appellant did not seek to stay the judgment of the trial court, there is nothing upon which a supersedeas bond could operate. We granted certiorari to clarify the operation of the statutory supersedeas bond requirements and, although in sympathy with a prevailing party left in possession of real estate whose development is harmed by reason of appellate delay, we are compelled to affirm the court of appeals.

The term supersedeas, as it is understood in this state, is synonymous with a stay of proceedings, stay of execution, or simply stay. *Sena v. District Court,* 30 N.M. 505, 511, 240 P. 202, 204 (1925); *see also Black's Law Dictionary* 1437-38 (6th ed. 1990) (noting that in modern times, term has become synonymous with stay of proceedings).[1] During the pendency of the appeal, supersedeas restores the parties to

1. The United States Supreme Court defined supersedeas in its original narrow context as a special writ emanating from an appellate court that effects "a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ." *Hovey v. McDonald,* 109 U.S. 150, 159, 3 S.Ct. 136, 141, 27 L.Ed. 888 (1883).

and maintains them in the status they enjoyed prior to the judgment or decree in the trial court. In New Mexico, the legislature has made the availability of supersedeas in all civil actions dependent on certain bonding requirements. *See* NMSA 1978, §§ 39-3-9, -22 (Repl.Pamp.1991).[2] The bond provides a means of compensating an appellee, upon an affirmance, for damages suffered between the entry of judgment and its affirmance that would not have been suffered but for the appeal. In addition, the bond enables the appellee to recover the amount to which the appellee is entitled without filing another lawsuit. *Cf. Salas*, 106 N.M. at 615-16, 747 P.2d at 261-62 (purpose of bond is to guarantee appellee collection of judgment should the judgment be affirmed on appeal).

The general supersedeas bond statute, Section 39-3-22, enacted in 1907, describes the requirements a supersedeas bond must satisfy in all civil actions. Subsection (A) conditions supersedeas of money judgments upon the filing of an appropriate supersedeas bond:

> There shall be no supersedeas or stay of execution upon any final judgment or decision of the district court in any civil action in which an appeal has been taken or a writ of error sued out unless the appellant or plaintiff in error * * * within sixty days from the entry of the judgment or decision, executes a bond to the adverse party in double the amount of the judgment complained of, with sufficient sureties, and approved by the clerk of the district court in case of appeals or by the clerk of the supreme court in case of writ of error.

NMSA 1978, § 39-3-22(A). Where the recovery is for other than a fixed amount of money the bond, if required, must indemnify the appellee for certain damages:

> If the decision appealed from, or from which a writ of error is sued out, is for a recovery other than a fixed amount of money, the amount of the bond, if any, shall be fixed by the district court if an appeal is taken, or, in case of a writ of error, by the chief justice or any justice of the supreme court, conditioned that the appellant or plaintiff in error shall prosecute the appeal or writ of error with diligence, and that, if the decision of the district court is affirmed or the appeal or writ of error is dismissed, he will comply with the judgment of the district court and pay all damages and costs finally adjudged against him in the district court and in the supreme court or court of appeals on the appeal or writ of error, including any legal damages caused by taking the appeal, whether the damages are assessed upon motion in the cause or in a civil action on the bond.

NMSA 1978, § 39-3-22(B). Only after the bond, if required, has been approved and filed, are the proceedings stayed. NMSA 1978, § 39-3-22(C).

In 1933, the legislature enacted Section 39-3-9, the property supersedeas bond statute, that establishes the bonding requirements for supersedeas in actions involving title to or possession of real or personal property:

> Where an appeal is taken or a writ of error sued out, from a judgment or decree of any district court involving the title to or possession of real or personal property, the trial court shall fix the amount of the supersedeas bond, if supersedeas is granted, for such sum as will indemnify the appellee for all damages that may result from such supersedeas, or from such appeal or writ of error. Said bond shall be conditioned to prosecute the appeal with effect and pay all damages and costs that may result to the appellee, if said appeal or writ of error be dismissed or the judgment or decree appealed from shall be affirmed. In case the title to or possession of real estate is involved in such action, the rental value and all damages to improvements and waste, shall be considered elements of damages.

NMSA 1978, § 39-3-9.

Quintana asserts that Section 39-3-9 makes the posting of a bond a prerequisite to the right to appeal from any judg-

2. The procedures for obtaining supersedeas relief are set out in SCRA 1986, 1-062, 12-207.

ment involving title to or possession of real or personal property, whether the appellant has sought supersedeas or not, if the appellee establishes that the appeal will prejudice the appellee. We are not so persuaded.

Our touchstone in interpreting Section 39-3-9 is the language of the Statute. *See State v. Elliott,* 89 N.M. 756, 757, 557 P.2d 1105, 1106 (1977) ("Statutes are to be given effect as written and, where free from ambiguity, there is no room for construction."). Section 39-3-9 expressly provides that "the trial court shall fix the amount of supersedeas bond, if supersedeas is granted." Thus, as a precondition to operation of that Section, the appellant must have moved for supersedeas, and the trial court must have granted the motion.[3] Nothing in the plain language of the Statute requires the appellant to post a supersedeas bond when supersedeas has not been sought and granted. *See Gregg v. Gardner,* 73 N.M. 347, 362, 388 P.2d 68, 79 (1963) (noting in dictum that general supersedeas bond statute is not mandatory, bond is required only if status quo is to be maintained). Only if supersedeas is sought does Section 39-3-9 come in to play first by mandating that the trial court shall set the amount of the bond[4] and then by describing the nature of the bond required to stay a judgment or decree involving the title to or possession of real or personal property. Properly understood, Section 39-3-9 conditions the availability of supersedeas, in part, on the posting of a statutorily sufficient bond; it does not, as Quintana would have it, condition the right to appeal on the posting of a bond.

Quintana offers three arguments in favor of his construction of Section 39-3-9. First, he contends that by stating that the bond shall indemnify the appellee for damages resulting from the "supersedeas, or from such appeal or writ of error," Section 39-3-9 evinces the legislature's intention to require a bond for damages arising from all appeals within the purview of Section 39-3-9. While we confess that the purpose of that language is less than clear, the inference Quintana asks us to draw is at best tenuous. In construing Section 39-3-9, we must bear in mind that in New Mexico every aggrieved party enjoys the constitutional right to one appeal. N.M. Const. art. VI, § 2. Accordingly, we are hesitant to draw inferences from Section 39-3-9 that condition or hamper that right when the plain language of the statute is clear, and the legislative history does not suggest otherwise. The bond required by Section 39-3-9 is a supersedeas bond. Section 39-3-9 is entitled "Title or possession of property involved; supersedeas bond." Such device is universally understood to mean a bond posted as a condition to securing supersedeas. The interpretation Quintana would have us adopt would fundamentally alter the accepted meaning of that term—supersedeas bond under Section 39-3-9 would become a general appeal bond to be posted by every appellant upon the filing of an appeal.[5] Nothing in the language of

3. Section 39-3-9 is not artfully drafted. Section 39-3-10 provides that Section 39-3-9 is to supplement any existing statute or court rule concerning supersedeas. When Section 39-3-9 and Subsection 39-3-22(C) are read together, it is clear that while the trial court may grant the motion for supersedeas, the stay shall not become effective until the appropriate bond has been posted by the party seeking the stay.

4. In this respect, Section 39-3-9 differs from Section 39-3-22. The latter requires a justice of this Court to approve the bond when relief from the decision below is sought by writ of error, while the former does not.

5. Our interpretation of the plain meaning of the term supersedeas is consistent with the views expressed by the high courts of our neighboring states that have enacted statutory supersedeas bond requirements. *See Burke v. Dendinger,* 120 Neb. 594, 234 N.W. 405, 405 (1931) (holding that compliance with supersedeas bond statute is not prerequisite to appellate review); *Armstrong v. Trustees of Hamilton Inv. Trust,* 667 P.2d 985, 988 (Okla.1983) (holding that supersedeas is not jurisdictional requirement for appellate review; appeal may be prosecuted without posting bond); *Hutchings v. Winsor,* 92 Okl. 37, 217 P. 1044, 1045 (1923) (holding that only purpose and effect of supersedeas bond is to stay execution upon the judgment appealed from; right of appeal does not depend upon the giving of such bond), *overruled on other grounds by Pancoast v. Eldridge,* 157 Okl. 195, 11 P.2d 918, 920 (1932).

Section 39-3-9 reveals the legislature's intention to condition the constitutional right to one appeal or to alter the accepted meaning of the term supersedeas bond. Absent any such intention, we will not so condition the right.

Nor are we persuaded by Quintana's argument that our construction of Section 39-3-9 renders that Statute "at best fluff which simply reconfirms some of the rights of appellees which have been created by statute fifteen years earlier." Quintana contends that Subsection 39-3-22(B), enacted prior to Section 39-3-9, fully described the bonding requirements for appeals from judgments awarding recovery for "other than a fixed amount of money," which would include all cases falling under Section 39-3-9. He urges that our interpretation of Section 39-3-9 would conflict with the rule of construction that presumes the legislature, when enacting new legislation, intends to change the existing law.

At the outset, we note that rules of construction cannot supplant the plain command of the language of a statute. *See Bradbury & Stamm Const. Co. v. Bureau of Revenue,* 70 N.M. 226, 231, 372 P.2d 808, 812 (1962) (rules of statutory construction are but aids in arriving at legislative intent and should never be used to override same where it otherwise plainly appears). Here, as noted above, the statutory command of Section 39-3-9 is clear. While we need go no further, we nonetheless address Quintana's argument.

True, Subsection 39-3-22(B) is sufficiently broad to include cases falling under Section 39-3-9. However, when Section 39-3-9 was enacted, the general supersedeas bond statute did not require the bond to indemnify for "legal damages caused by taking the appeal." [6] The question whether the general supersedeas bond statute would make the surety liable under the bond for rents and profits lost during the pendency of an appeal from a judgment or decree concerning real property, had not been resolved at the time the property supersedeas bond statute was enacted. *See Hart v. Employers Liab. Ass'n Corp.,* 38 N.M. 83, 28 P.2d 517 (1933) (noting considerable confusion "in the profession" concerning the issue).[7] Against that backdrop of uncertainty, Section 39-3-9 made clear that at least with respect to actions involving title to or possession of real estate, the bond must indemnify the appellee for certain legal damages occasioned by the operation of the stay: "[R]ental value, and all damages to improvements and waste, shall be considered elements of damages." NMSA 1978, § 39-3-9. We are aware of no doctrine that would preclude the coexistence of a general statute and a more specific statute.

Finally, citing *Burroughs v. United States Fidelity & Guaranty Co.,* 74 N.M. 618, 397 P.2d 10 (1964), Quintana contends our construction of Section 39-3-9 is at odds with our case law. Because our case law interpreting Section 39-3-9 is consistent with our holding today and because *Burroughs* is inapposite, we disagree.

In *Higgins v. Fuller,* 48 N.M. 215, 148 P.2d 573 (1943), this Court first construed

6. As enacted in 1907, the pertinent part of the general supersedeas statute provided that the amount of the bond "be fixed by the district court or the judge thereof, and in case of a writ of error, by the chief justice or any associate justice of the supreme court." N.M. Laws 1907, ch. 57, § 16. Like the current version, the original enactment also provided that the bond be conditioned so that "if the decision of the court below be affirmed or the appeal or writ of error be dismissed [the appellant] will comply with the decree of the district court and pay all damages and costs adjudged against him in the district court and in the supreme court on such appeal or writ of error." *Id.* Not until 1966 did the general supersedeas statute require indemnification for "legal damages caused by taking the appeal." N.M. Laws 1966, ch. 28, § 50. We fail to see any conflict with the rule of construction cited by Quintana. The property supersedeas bond statute, when it was enacted, resolved considerable uncertainty in the existing law. The 1966 amendment did no more than to require similar bonding requirements in cases not within the purview of Section 39-3-9.

7. Section 39-3-9 was approved by the legislature on February 10, 1933. *Hart* was decided on November 29, 1933. The supersedeas bond in that case, was filed to stay enforcement of the judgment well before Section 39-3-9 became effective. *See Hart v. Walker,* 35 N.M. 465, 2 P.2d 1074 (1931) (affirming the stayed judgment on July 3, 1931).

the operation of the property supersedeas bond statute. At issue in *Higgins* was whether the appellant's failure to post the supersedeas bond ordered by the trial court was fatal to the appeal. The appellant had lost her action to obtain title to certain real property in the possession of the appellee. The appellant filed notice of appeal, and the trial court ordered her to post a supersedeas bond. When the appellant did not post the bond, the appellee filed a motion to dismiss the appeal. This Court held that the trial court erred in requiring the supersedeas bond and, thus, denied the motion to dismiss the appeal. In so doing, the Court construed the property supersedeas bond statute to require a bond only if the party in possession appealing from an adverse judgment seeks to preserve the status quo:

> We construe the statute to mean that should judgment go against a litigant by decreeing ownership to realty in his adversary out of possession, then, in connection with his appeal, *such litigant must execute and file a supersedeas bond as required by the court and as provided by this statute, in order to maintain the status quo.*
>
> * * * * * *
>
> The only purpose of supersedeas bond is to stay the judgment, and if there be nothing to stay there is nothing upon which a supersedeas could operate.

Id. at 217, 148 P.2d at 574 (emphasis added); *accord Salas,* 106 N.M. 616, 747 P.2d at 262. This is the substance of our holding today.

The crux of the *Higgins* holding is no more than the observation that where no stay has been sought, a trial court, under Section 39-3-9 cannot order the appellant to post a bond. Nothing more need have been said. The trial court ordered the appellant to post a supersedeas bond when supersedeas had not been sought. Accordingly, such order was a nullity and noncompliance with it was not fatal to the appeal.[8]

In dictum, the Court articulated independent grounds for denying the motion to dismiss. The Court observed that, under prior statute, a motion to dismiss will not succeed in the absence of a showing of prejudice. *Id.* 48 N.M. at 218, 148 P.2d at 574 (citing NMSA 1941, § 19-201(16)(4)) (no motion to dismiss an appeal for other than jurisdictional grounds will succeed in the absence of a showing of prejudice) (superseded by NMSA 1953, § 21-2-1 (Supp. 1974)). Since the appellee in *Higgins* made no showing of prejudice, the motion was not well taken. The prejudice discussed in *Higgins,* contrary to Quintana's suggestion, has nothing to do with whether a supersedeas bond is required; prejudice was a component of a motion to dismiss an appeal for other than jurisdictional grounds under the prior statute.

This Court revisited Section 39-3-9 in *Burroughs.* There, in the first action, Burroughs brought suit in replevin to recover possession of a tractor and trailer. He filed a replevin bond, and the tractor and trailer were delivered to him. Burroughs won at a trial on the merits, and the defendants appealed. The defendants executed and filed a supersedeas bond, and Burroughs returned the tractor to them. We affirmed the judgment and ordered the district court to enter judgment against both the defendant and the surety on the supersedeas bond. *Burroughs,* 74 N.M. at 619, 397 P.2d at 11.

Burroughs brought a new action against the surety on the bond, and recovered a judgment for $9,000, representing the value of the tractor and trailer. The surety appealed asserting that the bond did not

8. There is much surplusage in *Higgins* upon which Quintana and later opinions have affixed significance. For example, the above-quoted passage makes reference to a litigant out of possession. *Higgins,* 48 N.M. at 217, 148 P.2d at 574. Surely, if a party not in possession loses at trial, then supersedeas of the adverse judgment would have no effect on the rights of either party—the rights of the parties inter se are the same after the judgment as they were before. This is what the Court suggests when it later mentions that the case before it involved "no change in the status of the parties" and that there was "no judgment to stay." *Id.* In fairness, these statements probably clarify the procedural context in which a party would seek supersedeas. We emphasize, however, that such statements cannot be read to describe when a supersedeas bond will be required under Section 39-3-9.

authorize delivery of possession, and that the bond secured only costs on appeal, not the value of the tractor and trailer. The issues before this Court concerned whether the supersedeas bond authorized re-delivery of the tractor and trailer to Burroughs, and whether the bond secured the value of the tractor and trailer in addition to costs and interest accrued from the date of judgment. *Id.* at 621–22, 397 P.2d at 12. The Court held that the bond secured the value of tractor and trailer and that the surety was estopped from complaining about the transfer of possession. *Id.* at 625, 397 P.2d at 14–15. *Burroughs* did not address the question whether Section 39–3–9 requires a bond in the absence of supersedeas.

Quintana cites to dictum in *Burroughs* in support of his interpretation of the statute. There the Court interpreted *Higgins* to have held that the property supersedeas bond statute may require an appellant, who has not sought to stay execution on the judgment, to execute a supersedeas bond if the appellee can demonstrate that the appeal will work to the appellee's prejudice. *Burroughs,* 74 N.M. at 624, 397 P.2d at 14. As we discussed above, that interpretation of *Higgins* or Section 39–3–9 is unwarranted. We expressly overrule any such inferences drawn from *Burroughs* to the extent they conflict with our holding today.

For all of the foregoing reasons, the judgment of the court of appeals is affirmed.

IT IS SO ORDERED.

MONTGOMERY and FRANCHINI, JJ., concur.

827 P.2d 102

Lorenzo SAIZ, as Personal Representative of the Estate of Jerry Saiz, Deceased, Petitioner,

v.

BELEN SCHOOL DISTRICT, a governmental entity, Respondent.

No. 19124.

Supreme Court of New Mexico.

Feb. 21, 1992.

James A. Thompson, Alameda, for petitioner.

William H. Carpenter, Michael B. Browde, Albuquerque, for amicus curiae, NM Trial Lawyers Ass'n.

Kevin M. Brown, Albuquerque, for respondent.

Paul M. Schneider, Albuquerque, for amicus curiae Risk Management Div. of the General Services Dept. of State of N.M.

OPINION

RANSOM, Chief Justice.

This is a wrongful death action brought against the Belen School District by the personal representative of a young boy who was electrocuted by a high-voltage lighting system at a high school football game. The accident occurred about twenty-five years after the system was installed. Plaintiff was awarded only a judgment against the school district for its proportionate fault in negligent maintenance subsequent to the installation of the system. That judgment is not at issue and remains undisturbed.

We issued a writ of certiorari to the court of appeals to decide whether, additionally, the school district can be held responsible for the faulty lighting system as initially installed and inspected by independent contractors.[1] The court of appeals had affirmed the trial court's ruling against the vesting of such responsibility in the school district. We conclude, to the contrary, that the school district is directly responsible for injuries that were caused by the absence of precautions required in the face of peculiar risks of harm created by locating a high-voltage electrical supply line in an area of public accommodation. However, responsibility is based not upon vicarious liability, but on strict liability for which the school district is granted immunity under the Tort Claims Act, NMSA 1978, Sections 41–4–1 to –27 (Repl.Pamp.1989).[2]

1. Leave to file amicus briefs was granted to the New Mexico Trial Lawyers Association, aligned with Saiz, and to the Risk Management Division of the General Services Department of the State of New Mexico, aligned with the school district.

2. We also note in the course of our analysis that there is no time bar to the action brought against the school district and that the personal representative preserved the principal claim of error addressed by us. We reach the dispositive question of immunity raised under the Tort Claims Act only because of the manner in which we first find that liability is otherwise precluded by neither the interposition of independent con-

Therefore, we affirm on a rationale different than was employed by the trial court or the court of appeals.

Facts. This case has its origin in a series of contracts made in 1964. At that time the Belen School District contracted with its chief architect, Kruger, Lake & Henderson, to provide outdoor lighting for its high school football field. Dean Powell, an electrical engineer, was engaged to design the system, and the school district contracted with Yearout Electric Company to build it. As installed, the 250–ampere, 480–volt system consisted of a series of wooden light poles serviced by underground electrical cable. Some of the poles were installed directly in front of bleachers. In about 1973, in order to keep spectators off the playing field, the school district built a metal cyclone fence in front of the bleachers and close to some of the light poles.

On September 2, 1988, thirteen-year-old Jerry Saiz attended a night football game at the high school field. While standing by one of the light poles at halftime, he touched both the metal electrical conduit running up one of the poles and the metal cyclone fence. He was electrocuted and died a few minutes later. The insulation around the buried cable had been damaged by the sharp metal edge of the conduit, and the metal conduit running up the pole was electrified by the high-voltage current. The failure to install a smooth plastic bushing, required under the state electrical code, where the buried insulated cable entered the metal conduit, had caused an electrical short and the electrocution of Jerry Saiz.

Proceedings. Lorenzo Saiz, as personal representative of the estate of Jerry Saiz, brought suit against the school district under the Tort Claims Act, alleging the school district was negligent in the installation and maintenance of the electrical system. Saiz did not sue the architect, the design engineer, or the electrical contractor. His action against these parties was precluded by NMSA 1978, Section 37–1–27 (Repl.Pamp.1990) (suits against builders and other parties furnishing construction services are barred after ten years from date of project's completion).

In its answer to the complaint, the school district raised as an affirmative defense the fault of others. Who was at fault, or how, was not specified. At trial the school district sought to lay off damages against various nonparties, among whom were both the electrical contractor who had failed to install the plastic bushing and the architect for his negligent supervision and inspection of the system. Saiz focused his attention on evidence suggesting the school district was negligent in the installation of the cyclone fence, as well as on evidence indicating the school district should have been aware the lighting system was faulty. For a number of years the school district had experienced serious problems with the lighting system and had made various attempts to correct those problems. Saiz claimed at trial that the school district was negligent in failing to test the system properly and in failing to detect the short circuit that caused the electrocution.

Upon close of the evidence, Saiz tendered a uniform jury instruction on agency, SCRA 1986, 13–405, alleging that the school district, as the employer, was liable for the wrongful acts of various individuals including the electrical contractor. The school district tendered SCRA 1986, 13–404, an instruction that ultimately was given, reciting the general principle of law that an employer is not responsible for the acts of an independent contractor. In response, Saiz tendered an instruction on a common-law exception to nonliability. Citing *Montanez v. Cass,* 89 N.M. 32, 546 P.2d 1189 (Ct.App.1975), *aff'd in part and rev'd in part on other grounds sub nom. New Mexico Electric Service Co. v. Montanez,* 89 N.M. 278, 551 P.2d 634 (1976), Saiz claimed that an employer is responsible to third persons for harm caused by the negligence of an independent contractor engaged in an inherently dangerous activity. The trial court refused the latter instruction for the reason that the exception did

tractors nor the other issues preserved, briefed, and argued.

not apply in this case.[3] The jury was instructed that, should it find the electrical contractor violated the state electrical code in omitting the plastic bushing, it was to find him negligent as a matter of law.

Thus instructed, the jury returned a verdict for the plaintiff and allocated fault as follows: to the electrical contractor, sixty percent; to the architect, twenty-five percent; to the school district, fifteen percent; to the design engineer and the deceased, zero percent each. The judgment entered against the school district, $169,902.73, represented fifteen percent of the total damages ($1,250,000.00), less a voluntary payment for hospital and burial expenses previously paid by the school district's insurance carrier.

Disposition below. Saiz filed a posttrial motion under SCRA 1986, 1–059(E), to amend the judgment and to impose joint and several liability against the school district under two theories: (1) for vicarious liability pursuant to NMSA 1978, Section 41–3A–1(C)(2) (Repl.Pamp.1989), for the acts of its independent contractors; and (2) under the "public policy" exception to several liability provided in Section 41–3A–1(C)(4).[4] The trial court scheduled the hearing for posttrial motions beyond the thirty-day time limit to appeal the judgment, *see* SCRA 1986, 12–201(A) and (D), and Saiz timely filed a notice of appeal. The motions were not ruled upon. Saiz pursued in the court of appeals his argument that the independent contractors were engaged in inherently dangerous work and that the school district consequently was jointly and severally liable for the negligence of the contractor and architect. The court of appeals affirmed the judgment by an unpublished opinion, stating that the school district cannot be held vicariously liable for acts of an independent contractor performed twenty-five years earlier. The court also stated that because joint and several liability applies only in certain limited situations, the claim must be raised in the plaintiff's pleadings.

Inherently dangerous activities and nondelegable duties. As a general rule, an employer of an independent contractor is not responsible for the negligence of the contractor or his employees. *Scott v. Murphy Corp.*, 79 N.M. 697, 448 P.2d 803 (1968); *Restatement (Second) of Torts* § 409 (1964) [hereinafter *Restatement*]. The absence of a right of control over the manner in which the work is to be done is the most commonly accepted criterion for distinguishing independent contractors from employees for whose negligence the employer is vicariously liable. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71, at 509 (5th ed. 1984) [hereinafter *Prosser & Keeton*]; *see also* SCRA 1986, 13–403 (Uniform Jury Instruction: definition of employee-employer); SCRA 1986, 13–404 (definition of independent contractor). The general rule has no application where the employer has nondelegable duties (1) arising out of some relation toward the public or the particular plaintiff (*e.g.*, duty of lessor to lessee), or (2) because of work that is specially, peculiarly, or inherently dangerous.[5] *See Restatement* ch. 15, Topic 2, at 394–423.

3. We recognize that, in any event, the exception did not give rise to a fact issue for the jury, but we later discuss the effect of the tender in raising an issue of law.

4. In 1987 the New Mexico Legislature adopted the doctrine of several liability. Nonetheless, liability remained joint and several for certain enumerated exceptions:

(1) to any person or persons who acted with the intention of inflicting injury or damage;

(2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;

(3) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or

(4) to situations not covered by any of the foregoing and having a sound basis in public policy.

NMSA 1978, § 41–3A–1(C) (Repl.Pamp.1989).

5. We do not reach the question whether liability under either of these theories falls within the immunity afforded governmental entities by the exclusion of independent contractors from the definition of public employees for whose torts the entity's immunity is waived. *See* footnote 14, *infra*.

Only the latter type of duty has been raised for consideration here.

The *Restatement* acknowledges that rules regarding liability of the employer under nondelegable duties tend to overlap and that it may be premature to enunciate any general principles. *See id.* at 394–95. Understandably, confusion and uncertainty exist, for there has been a tendency for courts (this one included) to rely on several distinctive theories to justify their decisions, to characterize the employer's nondelegable duties as exceptions to the general rule, and to use language from these "exceptions" more or less indiscriminately. In this opinion we focus on the nature of nondelegable duties and of liability for inherently dangerous activities. In relation to independent contractors, in prior opinions we have addressed "peculiar risks" and "inherently dangerous activities" in only a small number of cases as discussed below, and then not in detail and not in a situation where it made any difference to analyze the nature of a nondelegable duty. Today we address whether a nondelegable duty gives rise to direct strict liability for the absence of required precautions or whether it gives rise to vicarious liability for the negligence of the independent contractor. The question is whether liability is dependent upon an *employer's breach of duty* to ensure the taking of precautions made reasonably necessary as a matter of law, or whether liability is imputed to the employer by reason of *another's breach of duty* to exercise ordinary care.

-Nondelegable duty. In *Pendergrass v. Lovelace,* 57 N.M. 661, 262 P.2d 231 (1953), a cropdusting case involving liability for the negligent spraying of an herbicide, this Court stated that "[w]ork that is intrinisically and inherently dangerous in performance is not delegable so as to escape liability." *Id.* at 663, 262 P.2d at 232. The Court next addressed these concepts in *Budagher v. Amrep Corp.,* 97 N.M. 116, 637 P.2d 547 (1981), a case involving the collection and discharge of surface waters. The Court referred to several exceptions to the general rule of nonliability, including both the "peculiar risk" (§ 416) and the "special danger" (§ 427) exceptions of the *Restatement.*[6] *Budagher,* 97 N.M. at 119–20, 637 P.2d at 550–51. In deciding that the defendant landowner owed a nondelegable duty to adjoining property owners to ensure that the volume and rate of the natural flow of surface water remained unchanged, the Court recognized the applicability both of Section 416 and Section 427 of the *Restatement,* but explained only the former in relation to the facts of the case. The Court stated that the construction of certain dams and the location of drainage culverts "created a peculiar risk of harm (*i.e.,* flooding) to Budaghers' property which might have been anticipated [by defendant] as a direct or probable consequence of the construction of the dams, had reasonable care been omitted." *Id.* at 120, 637 P.2d at 551.

Section 416 of the *Restatement* pertains to one who employs an independent contractor to do work that the employer should recognize as likely to create a peculiar risk of physical harm to others unless special precautions are taken. The employer is subject to liability for physical harm caused by the failure of the independent contractor to exercise reasonable care to take the necessary precautions, even though the employer has provided, in the contract or otherwise, that such precautions be taken. Section 427 of the *Restatement* pertains to one who employs an independent contractor to do work involving a special danger to others, that the employer knows or has reason to know to be inherent in or normal to the work, or that the employer contemplates or has reason to contemplate when making the contract. The employer is subject to liability for physical harm caused by the independent contractor's failure to take reasonable precautions against the danger.[7]

As the *Restatement* recognizes, these two rules represent different formulations

6. The activity is inherently dangerous because it involves a "peculiar risk" in the absence of special precautions, or because it involves a "special danger" inherent in the work. We note that the *Restatement* uses the two phrases "peculiar risk" and "special danger" almost interchangeably. *See Restatement* §§ 413 cmt. b, 427 cmt. a. We will treat them as being equivalent.

7. We treat as equivalent the concepts of "reasonable care to take special precautions" and "rea-

of the same principle: the employer remains liable for injuries resulting from dangers the employer should have anticipated at the time the employer entered into the contract. *Id.* § 416 cmt. a. Both of these rules can be traced to the leading English case of *Bower v. Peate,* [1876] 1 Q.B. 321, in which the walls and foundation of the plaintiff's house were undermined by excavation on the adjoining property. The explanation given by the court, in holding the adjacent landowner responsible for harm caused by the absence of adequate preventative measures, is as informative as any we have read:

> [A] man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else * * * to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

Id. at 326. We think it important that in *Bower* the employer was directly responsible to do what was necessary to prevent injurious consequences. Vicarious liability for the negligence of an independent contractor, as for an employee, was not the rationale:

> [T]here is * * * good ground for holding [the employer] liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, *no matter through whose default* the omission to take the necessary measures for such prevention may arise.
>
> * * * * * *
>
> * * * The agent may no doubt be responsible, but the responsibility of the principal is none the less.

Id. at 327 (emphasis added).

We hold that one who employs an independent contractor to do work that the employer as a matter of law should recognize as likely to create a peculiar risk of physical harm to others unless reasonable precautions are taken is liable for physical harm to others caused by an absence of those precautions. The employer cannot delegate the responsibility for taking the precautions. As our previous cases have indicated, the employer has a nondelegable duty to ensure the precautions are taken. *See Pendergrass,* 57 N.M. at 663, 262 P.2d at 232; *Budagher,* 97 N.M. at 121, 637 P.2d at 551 (landowner has nondelegable duty with reference to surface waters and "[landowner's] negligence is established" once it is proved surface water was collected and then discharged in a greater volume or rate than normal). Thus, when an employer hires an independent contractor to do work that the law recognizes as likely to create a peculiar risk of harm, the employer is directly responsible if reasonable precautions are not taken against the risk. This liability is direct, not vicarious. Proof of liability or even negligence of the independent contractor is not an essential element of the employer's liability.

As we explain in our conclusion to this opinion, we reject any requirement apparent from Section 416 of the *Restatement* that liability of the employer is dependent upon failure of the independent contractor to exercise reasonable care. The *focus* is on the presence or absence of a necessary precaution, not on whether an independent contractor's failure to take the precaution may be excused or justified under a reasonably prudent person standard. The test of liability is the presence or absence of precautions that would be deemed reasonably necessary by one to whom knowledge of all the circumstances is attributed; and liability is dependent on neither the lack of care taken by the contractor nor the lack of care taken by the employer to ensure that the contractor takes necessary precautions.

We also believe that whether work is inherently dangerous is a question

sonable precautions against special dangers." These phrases both refer to precautions made reasonably necessary by a peculiar risk or a special danger.

of law, even though we recognize there may be gray areas requiring fact-finding. As discussed below, the court decides whether the established facts gives rise to an inherently dangerous activity. If so, the jury decides under the evidence and by expert and lay testimony: (1) what precautions would be deemed reasonably necessary by one to whom knowledge of all the circumstances is attributed, and (2) whether the absence of a necessary precaution was a proximate cause of injury. Because the precaution must be reasonable, liability for inherently dangerous activities is distinguished from absolute liability for abnormally dangerous or ultrahazardous activities as discussed below. There may be reasons for the jury also to decide and apportion fault among independent contractors and others, but if the only question is the liability of an employer for injury proximately caused by the absence of a necessary precaution against the peculiar risks of an inherently dangerous activity, fixing fault of the independent contractor is not required. The employer's liability for breach of a nondelegable duty is direct, not vicarious.

-Peculiar risks. By "peculiar risk" we mean a risk that is unusual or "not a normal, routine matter of customary human activity," *Restatement* § 413 cmt. b, and that is different from one to which persons commonly are subjected by ordinary forms of negligence. *Id.* § 416 cmt. d. This is not to suggest that the risk is one not to be expected from the type of work the contractor has been hired to perform. Quite to the contrary, the concept is concerned with "special risks" arising out of the work itself, its character, or manner of performance, against which a reasonable person would recognize the necessity of taking "special precautions." *Id.* § 413 cmt. b.

To recover for injury from a peculiar risk or special danger, a plaintiff need not show that some hazard was the inevitable consequence of performing the work, or that the hazard could not be eliminated by the exercise of reasonable care. *See id.* §§ 416 cmt. e, 427 cmt. b. Rather, work is inherently or intrinsically dangerous because the commission of the work, either the work activity itself or the object sought to be attained, is very likely to cause harm if a reasonable precaution against the peculiar risk or special danger is not taken. *See Deitz v. Jackson,* 57 N.C.App. 275, 291 S.E.2d 282, 286 (1982). We emphasize that more than mere foreseeability of injury is required. The hazard must be substantial. That is, there must exist a strong probability that harm will result in the absence of reasonable precautions. *Cf. Florida Power & Light Co. v. Price,* 170 So.2d 293, 295 (Fla.1964) (holding that work is inherently dangerous if "of such a nature that in the ordinary course of events its performance would probably, and not merely possibly, cause injury if proper precautions were not taken").

Activities that are "inherently dangerous" represent an intermediate category of hazardous activity between those that are nonhazardous (or only slightly so), in which harm is merely a foreseeable consequence of negligence, and activities that are ultrahazardous, in which the potential for harm cannot be eliminated by the highest degree of care. We believe the high probability or relative certainty that harm will arise in the absence of reasonable precautions distinguishes this intermediate category.

It has been suggested that some courts have expanded the inherently dangerous activity doctrine so far as to leave little room for operation of the general rule that an employer is not liable for negligence of an independent contractor. *Prosser & Keeton* § 71, at 514 n. 60. For instance, the Supreme Court of Colorado has defined an inherently dangerous activity simply as an activity that "present[s] a foreseeable and significant risk of harm to others if not carefully carried out." *Western Stock Ctr., Inc. v. Sevit, Inc.,* 195 Colo. 372, 578 P.2d 1045, 1050 (1978) (en banc). As we have defined it, however, we do not think a nondelegable duty for inherently dangerous activities will swallow the general rule. The doctrine of nondelegable duty applies

only in cases in which, in the absence of reasonable precautions, a strong probability exists that harm will result from an unusual type of risk.

-Abnormally dangerous activity distinguished. Additionally, there is an important distinction to be drawn between the peculiar risk or inherently dangerous activity exception and other doctrines such as work that is "ultrahazardous" or "abnormally dangerous." Some confusion of terminology is readily apparent in the proceedings of this case. The doctrine of ultrahazardous activities (now "abnormally dangerous activities" under the *Restatement*[8]) imposes responsibility upon persons engaged in such activities for any resulting harm even though all reasonable precautions have been taken against the risk of harm the activity creates. *See Thigpen v. Skousen & Hise,* 64 N.M. 290, 292–94, 327 P.2d 802, 804–05 (1958). The doctrine applies to those situations where the risks involved cannot be eliminated by the exercise of reasonable care, or even the utmost care. *See id.* at 294, 327 P.2d at 805. Application of the ultrahazardous activity doctrine has been restricted in our decisions to the use of explosives in blasting. *E.g., Thigpen.*

-Collateral negligence. A corollary to the nondelegable duty doctrine in relation to peculiar risk or special danger is that an employer is not responsible for the "collateral" negligence of the independent contractor, meaning negligence collateral to the contemplated risk. *See Restatement* § 426.[9] This defense has been described as negligence in the operative detail of the work as distinguished from the general plan or result to be accomplished. *See id.* cmt. a. While this distinction sometimes can be drawn, it should not be regarded as a definitive test. Rather, the distinction is between negligence that is foreign to the contemplated risk of doing the work and negligence in failing to take precautions necessary to avoid the contemplated risk. *See id.* The employer's nondelegable duty runs only to a hazard associated with a peculiar risk or special danger the employer as a matter of law had reason to anticipate. It requires the employer to see that the contractor takes reasonable precautions to eliminate that risk. The employer definitely has the authority to control the manner in which the work is performed with reference to this danger or risk. In fact, the employer has the duty to control this aspect of the work, even the operative details if necessary, to ensure that reasonable precautions are taken. Similarly, to the extent a manufacturer is the ultimate party strictly liable for supply of a defective product, it is often stated that this is because the manufacturer is in a position to avoid defective products.

-Existence of nondelegable duty is a question of law. There is no clear con-

8. The *Restatement* has substituted "abnormally dangerous" for the term "ultrahazardous" used in the first edition. In some respects the definition of the new term is significantly different. *Compare Restatement (Second) of Torts* §§ 519–520 (1976) *with Restatement of Torts* §§ 519–520 (1938). For our purposes, however, it is important only to note that either concept involves a serious risk of harm that cannot be eliminated by adequate precautions—either the exercise of "reasonable care" or "utmost care" depending upon the present or earlier formulation of the rule. The principles expressed in the first and second editions of the *Restatement of Torts* are based upon the classic English case of *Rylands v. Fletcher,* [1861–73] All E.R. Rep. 1 (H.L.1868) (appeal taken from England), which itself involved the work of an independent contractor. This important case, and the incorporation of its principles into the *Restatement of Torts,* is discussed at some length in *Prosser & Keeton* Section 78. The ultrahazardous activity doctrine is, of course, another exception to the independent contractor rule. *See Restatement* § 427A.

9. That Section of the *Restatement* is as follows:

§ 426. Negligence Collateral to Risk of Doing the Work.

Except as stated in §§ 428 and 429, an employer of an independent contractor, unless he is himself negligent, is not liable for physical harm caused by any negligence of the contractor if

(a) the contractor's negligence consists solely in the improper manner in which he does the work, and

(b) it creates a risk of such harm which is not inherent in or normal to the work, and

(c) the employer had no reason to contemplate the contractor's negligence when the contract was made.

sensus on whether the applicability of the inherently dangerous activity doctrine is a question of law or fact. *See* James Lockhart, *Cause of Action Against Employer for Negligence of Independent Contractor Engaged in "Inherently Dangerous" Activity,* 11 Causes of Action 393, 415 (1986). In many cases the determination will be influenced by the particular circumstances under which work is performed as well as the nature of the work itself. For instance, in this case it is significant that the light pole and conduit were located in an area for spectators.

Judge Sutin, writing for the court of appeals in *Montanez v. Cass,* 89 N.M. 32, 546 P.2d 1189 (Ct.App.1975), *rev'd in part on other grounds sub nom. New Mexico Electric Service Co. v. Montanez,* 89 N.M. 278, 551 P.2d 634 (1976), stated that whether a nondelegable duty exists, because a contractor is engaged in an inherently dangerous activity, is a pure question of law. *Id.* at 36, 546 P.2d at 1193. Also, like a number of other courts, he explained the basis for the doctrine as the idea that third persons placed in an area of inherent danger should be protected as a matter of public policy. *Id.* at 37, 546 P.2d at 1194. We agree with these conclusions.

It is a well-recognized principle of tort law that whether a duty exists is a question of law for the court, involving legal precedent, statutes, and the recognition of society's interest in general security. The court's statement of duty is a policy determination that the obligation of the defendant is one to which the law will give recognition and effect. *See Ramirez v. Armstrong,* 100 N.M. 538, 541, 673 P.2d 822, 825 (1983). In this regard it should be remembered that the policy behind the law of torts does more than compensate victims—it encourages reasonable safeguards against the risk of harm. The determination by the court that an employer is under a nondelegable duty to ensure that reasonable precautions are taken against a peculiar risk is a decision that, in a situation with a strong probability of injury, the public interest in safety demands an increased regard for precautions.

-High-voltage in an area of public accommodation. Locating a high-voltage electrical supply line in an area of public accommodation creates a peculiar risk of physical harm. *Cf. Nationwide Mut. Ins. Co. v. Philadelphia Elec. Co.,* 443 F.Supp. 1140 (E.D.Pa.1977) (independent contractor's failure to insulate overhead power line at construction site creates peculiar risk of harm). It would seem beyond dispute that electricity has certain well-known inherent dangers. It gives no warning of its presence, and if amperage and voltage are sufficiently high its discovery can be attended by fatal consequences. This case involves high-voltage electricity. We do not regard possible exposure to electrical currents of this level a matter of routine human activity. The hazard is distinctly different from hazards to which persons commonly are subjected to—it represents a very special danger or peculiar risk. Whatever may be said regarding a "household" level of current is not applicable here, and on household current we offer no opinion.

It is reasonably necessary to reduce the hazard associated with a high-voltage supply line by placing bare electrical conductors where they remain inaccessible, or by insulating them adequately, or both. *See, e.g., Cantu v. Utility Dynamics Corp.,* 70 Ill.App.3d 260, 26 Ill.Dec. 160, 387 N.E.2d 990 (1979) (finding that installation of electrical lines is an inherently dangerous activity, and holding that persons handling electricity must protect the public against the danger by proper insulation of its wires where the public is likely to come into contact with them); *Lancaster v. Potomac Edison Co.,* 156 W.Va. 218, 192 S.E.2d 234 (1972) (holding that power company which maintains electric lines of high or dangerous voltage in a place it knows or should anticipate others may lawfully be for any reason, and in such a manner as exposes them to danger of contact, is bound to take precautions for their safety by insulation or other adequate means).[10]

10. The inherent dangers of high-voltage electricity have been recognized in *Montanez v. Cass,* 89

When insulated cable is placed in an accessible area, reasonable measures also must be taken to protect that insulation. Each situation calls for its own precautions, and the specifications of the state electrical code were intended to address the potential hazards involved in particular installations and situations. When these standards are not followed, we believe it to be highly probable that harm will occur. To one hiring an independent contractor to install high-voltage supply lines in an area accessible to the public, there is imputed in law the knowledge that members of the public will be exposed to a peculiar risk of harm if these standards are not met. In this case the supply line was not located in an area merely accessible to the public, but in an area where the public could be expected to be crowded closely together and where extensive physical contact with the electrical conduit running up the light pole was a certainty.

Additionally, we cannot view the inclusion of the plastic bushing as merely an operative detail of the work, so that its omission was merely "collateral" negligence for which the school district bore no responsibility. The electrical code specified its inclusion to guard against the danger inherent in, or peculiar to, the transmission of electricity. The negligence of the contractor created the very risk the requirement was intended to prevent—the escape of the current into the metal conduit and the electrocution of a member of the public.

Nature of the school district's liability. As we have stated above, the establishment of liability under a nondelegable duty does not give rise to vicarious liability. Under vicarious liability, one person, although entirely innocent of any wrongdoing and *without regard to duty,* is nonetheless held responsible for harm caused by the wrongful act of another. We acknowledge that commentators and cases speak of vicarious liability under the doctrine of a nondelegable duty. *See, e.g., Prosser & Keeton* § 71, at 511; 5 Fowler V. Harper et al., *The Law of Torts* § 26.11, at 84–93 (2d ed. 1986). "Vicarious liability" and "negligence of the contractor" are terms common to many of the authorities we have discussed. We reject any coupling of the concept of vicarious liability and nondelegable duty.

The common law develops by steps manifesting the imprint of established doctrines. Courts that lengthen the stride of the common law are wont to do so in well-worn and familiar doctrines. So we believe is the character of the imprint on nondelegable duty left by the rationale encompassing "vicarious liability to the same extent as the independent contractor." It should not be required that the contractor be liable. That is not the point. The court determines the presence of a peculiar risk and the need for precautions. The factfinder defines what reasonable precautions were necessary. Liability is based upon a showing of injury proximately caused by the absence of the necessary precautions. What the independent contractor knew or should have known is not at issue.

The doctrine with the proper fit is that of strict liability as developed in products liability cases. The liability of the owner or occupier of land rests upon injury proximately caused by defective work thereon as defined by the absence of a precaution made reasonably necessary in the face of peculiar risks inherent in the work. Once the court has found the need for precautions, it serves the policy underlying nondelegable duties to impose liability on the owner or occupier of land for injury proxi-

N.M. 32, 546 P.2d 1189 (Ct.App.1975), *rev'd in part on other grounds sub nom. New Mexico Elec. Serv. Co. v. Montanez,* 89 N.M. 278, 551 P.2d 634 (1976). That case involved the liability of an employer for injuries caused by the negligent installation of an electrical transformer and a secondary electrical system by an independent contractor. Later, a second independent contractor was hired to remove the system and an employee of that contractor was injured. The court of appeals determined that the employer was responsible for the injuries under the inherently dangerous activity doctrine. 89 N.M. at 37–39, 546 P.2d at 1194–96. This Court reviewed that decision, and while it agreed that the installation was imminently dangerous to others, the Court declined to expand the duty of the employer to encompass the employees of independent contractors. *New Mexico Elec. Serv. Co.,* 89 N.M. at 281–82, 551 P.2d at 637–38.

mately caused by any failure to take reasonable precautions.

-Joint and several liability. Under our system of pure comparative fault, concurrent tortfeasors, generally, are severally liable for damages apportioned on the basis of the percentage of each tortfeasor's fault to the total fault attributed to all persons. *See* NMSA 1978, § 41–3A–1. Exceptions are made for intentional torts, vicarious liability, products liability cases, and other situations "having a sound basis in public policy." Section 41–3A–1(C). To these exceptions, joint and several liability applies. *Id.* This Court has not had occasion to add to the express exceptions of the Statute under the public policy grounds of Subsection (C)(4). We do so today.

The liability for a nondelegable duty that we impose directly upon the employer of an independent contractor is grounded in a special public policy to protect third persons in an area of inherent danger and to encourage conscientious adherence to standards of safety where injury likely will result in the absence of precautions. The test of liability is the presence or absence of reasonable precautions; and direct liability is not dependent upon any apportionment to an employer of his or her concurrent negligence in failure to ensure that an independent contractor takes necessary precautions.

Therefore, we hold that when precautions are not taken against inherent danger, the employer is jointly and severally liable for harm apportioned to any independent contractor for failure to take precautions reasonably necessary to prevent injury to third parties arising from the peculiar risk. Unless immune pursuant to the Tort Claims Act, the school district in this case is jointly and severally liable for that portion of the damages attributed to both the electrical contractor, whose installation violated minimum state standards, and the architect, who failed properly to supervise the project and inspect the system. In this case, that is the proportion of fault attributable to the failure to take the necessary precaution. This liability would be in addition to any fault apportioned by the jury to the school district for negligent maintenance.

Jury instructions not necessary. The question of whether an employer has a nondelegable duty is one for the trial judge after hearing all of the evidence. The finding of a nondelegable duty dictates the imposition of joint and several liability. While it would not be improper for the court to instruct the jury on the presence and effect of a nondelegable duty, there is no error in failing to do so. In this case Saiz tendered SCRA 1986, 13–405 (employer sued; no issue of employment, scope of employment, or agency), a general Uniform Jury Instruction on agency. Although UJI 13–405 was not intended for cases involving independent contractors generally, it is a correct abstract statement of the law concerning the legal effect of a nondelegable duty. That is, the employer is to be held responsible for the wrongful act of the employer's employee or agent. The reverse is true of UJI 13–404 (independent contractor). The trial court refused to give UJI 13–405, but gave UJI 13–404. We do not believe, however, that the latter statement of abstract law prejudiced the jury in its instructed duty to find and apportion fault.[11]

Error preserved. Further, the instruction requested by Saiz in this case concerning inherently dangerous activities, though not drafted so as to fully inform the court of the import of its terms, was another fairly accurate abstract statement of the law of nondelegable duty and was sufficient to call to the attention of the trial judge the applicability of that exception to the independent contractor rule. *See Bu-*

11. As we have stated, it is not necessary for the establishment of the liability of the owner or occupier of land, based upon the absence of required precautions in the face of a peculiar risk, that the proportionate fault of independent contractors be established. Parties may nonetheless establish such proportionate fault for purposes of the several liability of independent contractors to the plaintiff or for claims of contribution or indemnity among the employer and the independent contractors.

dagher, 97 N.M. at 118–21, 637 P.2d at 549–52 ("Once the judge accepted Amrep's defense of independent contractor, he should have realized that the exceptions to the general rule of independent contractors [were] applicable."). The trial judge ruled as a matter of law that the exception was inapplicable. This was incorrect.

Moreover, we cannot agree that, under the facts of this case, Saiz was required to raise the issue of joint and several liability in his pleadings as stated by the court of appeals. This is because the thrust of Saiz's theory of recovery, as presented at trial, was that the school district was completely responsible for the decedent's injuries based upon its own maintenance of the lighting system since the time it was installed.

A plaintiff is entitled to pursue at trial the plaintiff's theory of the case. This does not preclude the plaintiff from rebutting any other theory offered by way of defense. Where a defendant seeks to avoid liability through the apportionment of fault to other tortfeasors, the defendant should anticipate that, for any number of reasons, the defense may be subject to attack at trial. Rule 1–012(B) specifically provides a party may raise at trial any issue in law or fact raised by a pleading to which that party is not required to respond.

No time bar under Section 37–1–27. We briefly consider whether Saiz's recovery against the school district for breach of a nondelegable duty is subject to any time bar because the independent contractors in effect are immune from Saiz's direct suit under NMSA 1978, Section 37–1–27, a statute of repose.[12] We see no reason not to impose full responsibility on a joint tortfeasor subject to strict liability for breach of a nondelegable duty despite the fact that the plaintiff's direct suit against other tortfeasors is barred, and despite the fact that the joint tortfeasor upon whom full responsibility falls may lack a right of contribution from those granted the immunity. As we understand Section 37–1–27 and the circumstances surrounding its passage, the legislature intended to shift liability from builders to property owners (or other joint tortfeasors) for dangerous conditions arising out of improvements to real property ten years after the completion of a project. As explicitly stated in *Howell v. Burk,* 90 N.M. 688, 693, 568 P.2d 214, 219 (Ct.App.), *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977), this Statute was not intended to benefit the owner of real property. Rather than abrogate liability for all parties, the statutory immunity applies only to a select group—builders, architects, engineers, and other parties that furnish construction services.

Significantly, at the time this Statute was passed the liability of joint tortfeasors was joint and several. Thus, the effect of the Statute when passed was to make landowners potentially responsible for *all* damages.[13] When a landowner has responsibil-

12. The Statute provides, in pertinent part:

> No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, *shall be brought after ten years from the date of substantial completion of such improvements;* provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith. NMSA 1978, § 37–1–27 (emphasis added).

We refer to this provision as a statute of repose because, unlike a statute of limitations, this Statute begins to run from a specific date unrelated to the date of injury and thus may abrogate a cause of action before it accrues. In contrast, a statute of limitations begins to run when a plaintiff's cause of action accrues or is discovered. *See Terry v. New Mexico State Highway Comm'n,* 98 N.M. 119, 121–22, 645 P.2d 1375, 1377–78 (1982). The constitutionality of Section 37–1–27 was upheld in *Howell v. Burk,* 90 N.M. 688, 568 P.2d 214 (Ct.App.), *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977).

13. Nevertheless, the statute leaves open the possibility that a party can protect himself from the effect of the shift in liability by expressly contracting for a right of contribution not subject to the ten-year limitation. § 37–1–27 ("[T]his limitation shall not apply to any action based upon

ity as a joint tortfeasor based upon strict liability for breach of a nondelegable duty, we see no reason not to impose the same level of liability today. This would seem to have been exactly the level of responsibility the legislature had in mind when it passed Section 37-1-27 granting builders and other parties the immunity.

Immunity under Tort Claims Act. Waiver of immunity under the Tort Claims Act does not encompass strict liability, and liability is based solely on a reasonably prudent person standard of care in the performance of traditional tort concepts of duty. The Act specifically provides:

> Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty. The Tort Claims Act in no way imposes a strict liability for injuries upon governmental entities or public employees.

NMSA 1978, § 41-4-2(B). While a nondelegable duty is a traditional tort concept, our analysis demonstrates that it is based upon injury proximately caused by defective work and not upon the reasonably prudent person standard of care. It is strict liability. The feature of strict liability that distinguishes it from negligence is that the reasonableness of acts or omissions of the party to be charged (*e.g.*, the possessor of land or the supplier of a product) is not a consideration. Specifically, as in the case of strict products liability, the question is whether injury was proximately caused by a risk that a hypothetical reasonably prudent person having full knowledge of the risk would find unacceptable *even though the person to be charged in fact neither knew nor could have known of such risk at the time of the work. See, e.g.,* SCRA 1986, 13-1407 (Uniform Jury Instructions—Strict products liability; unreasonable risk of injury, and committee comment).

The distinctive test under the reasonably prudent person standard of care, on the other hand, is the foreseeability, *to one who has or should have knowledge,* that his or her act or failure to act will result in an unreasonable risk of injury. Traditionally, with the exception of certain fictions formerly attaching to the doctrine of contributory negligence, direct liability (as distinguished from vicarious liability) has depended on what the party to be charged knew or should have known.

Direct liability of the possessor of land under a nondelegable duty to ensure against an unreasonable risk of injury from a special danger is based not on what the possessor knew or should have known, but upon breach of duty imputed as a matter of law. This is strict liability for which we believe the legislature granted immunity under the Tort Claims Act. To hold that liability for a nondelegable duty is not within the immunity of the Tort Claims Act would require that we limit the legislature's use of "strict liability" to blasting cases, products liability, or to new doctrines unknown to traditional tort law. The legislature enunciated no such limitation, and it in fact declared that liability is to be based solely on a reasonably prudent person standard of care. Consequently, we hold the school district was immune from its joint and several liability for the acts of the independent contractors.[14] We affirm only the judgment for fifteen percent of total damages apportioned for the school district's fault in negligent maintenance

a contract, warranty or guarantee which contains express terms inconsistent herewith.").

14. Because it begs the issue of direct versus vicarious liability, as we have posed it, we do not rely on Section 41-4-4(D)(1) for our conclusion that the school district is immune from suit in this case. Section 41-4-4(D)(1) imposes liability on the governmental entity for "any tort which was committed by the public employee while acting within the scope of his duty." "Public employee," in turn, means "any officer, employee or servant of a governmental entity, *excluding independent contractors.*" Section 41-4-3(E) (emphasis added). Thus, by specifically excluding independent contractors from the definition of "public employee" (and thereby omitting from the financial responsibility assumed in Section 41-4-4(D)(1) liability for the torts of independent contractors), we can infer that the legislature retained immunity for the tortious acts of independent contractors committed within the scope of their duties.

subsequent to installation of the lighting system.

IT IS SO ORDERED.

BACA, MONTGOMERY, FRANCHINI and FROST, JJ., concur.

827 P.2d 118

JACKSON NATIONAL LIFE INSURANCE COMPANY, Plaintiff–Appellant and Cross–Appellee,

v.

Debrot RECECONI, Defendant–Appellee and Cross–Appellant,

and

Eugene W. Peirce, Jr., Defendant–Appellee.

No. 19498.

Supreme Court of New Mexico.

Feb. 24, 1992.

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Rodey, Dickason, Sloan, Akin & Robb, Michael J. Condon, Albuquerque, for appellant.

Jones, Snead, Wertheim, Rodriguez & Wentworth, Steven L. Tucker, Santa Fe, for appellee Receconi.

Daniel J. O'Friel, Santa Fe, for appellee Peirce.

OPINION

MONTGOMERY, Justice.

Decision of this appeal turns primarily on whether an express condition precedent in an application for a life insurance policy was waived by the insurance company through its soliciting agent. The condition required that the health of the insured remain as represented in the insured's application, which it did not; and the agent, with knowledge of the insured's deteriorated health, requested the first premium payment and forwarded it to the company, which thereafter retained it for several months. We hold that on these facts the conduct of the agent was attributable to the company and that the company waived compliance with the condition.

Other issues presented on appeal are: whether the application was void because not signed by the insured or consented to in writing; whether alleged misrepresentations in the application rendered the policy voidable at the company's election; whether, if the company was liable on the policy, the agent was liable to indemnify the company; whether punitive damages were properly assessed against the company; and whether the insured's beneficiary was entitled to attorney's fees for the company's refusal to pay the policy proceeds. The trial court, after a bench trial, held in favor of the agent and the beneficiary on all issues but the last, awarding the beneficiary judgment for the face amount of the policy, plus prejudgment interest and punitive damages, but declining to award attorney's fees. We affirm in part, reverse in part, and remand for further proceedings.

I.

Eugene W. Peirce, Jr. ("Peirce"), is an insurance agent licensed by the State of New Mexico. Debrot Receconi ("Mrs. Receconi") is the widow of Father Jon Simms Receconi ("Fr. Receconi"), an ordained minister who until his death on October 15, 1987, served as rector of an Episcopal church in Santa Fe. Peirce met the Receconis in the early 1970s and, between 1977 and 1987, sold life insurance to them on behalf of various life insurance companies. In early 1987, Peirce contacted the Receconis and recommended that they replace their life insurance policies with those of another company that could provide lower rates. Pursuant to this recommendation, the Receconis signed applications for life insurance on March 12, 1987, with Allied Insurance Company ("Allied").

Peirce submitted these applications to Allied; Allied in response requested that Fr. Receconi complete an alcohol questionnaire. Subsequently, on August 14, 1987, Peirce contacted the Receconis, told them he was dissatisfied with Allied, and recommended that they instead procure insurance with Jackson National Life Insurance Company ("Jackson").[1] The next day, Peirce went to the Receconis' home and completed a Jackson application for Mrs. Receconi, which she signed, but did not prepare one for Fr. Receconi, who had gone to work. Peirce then met with Fr. Receconi at the latter's office. Peirce discussed Jackson with Fr. Receconi and advised him to obtain life insurance coverage through Jackson. Although Fr. Receconi agreed to do so, Peirce did not have any blank application forms with him, so Fr. Receconi could not fill out or sign an application at that time. However, Fr. Receconi authorized Peirce to do whatever was necessary to procure life insurance coverage from Jackson.

Peirce met with Fr. Receconi on that occasion for approximately thirty minutes. He observed Fr. Receconi to be in excellent health and saw no evidence that he had resumed smoking.[2] Peirce asked Fr. Receconi only one health question at that time: whether he had experienced any major changes in his health since their March 12, 1987, meeting. Fr. Receconi answered that he had not.

Peirce did not fill out Fr. Receconi's application for life insurance with Jackson until September 15, 1987. On that date, Peirce directed his secretary to complete an application, using information from the Allied application and relying on Peirce's own observations of Fr. Receconi's health from the August 15 meeting. The application contained certain health-related questions, all of which were answered negatively, including questions as to whether the applicant had ever been treated for any respiratory or skin disorder and whether the applicant had smoked cigarettes within the past twelve months. The application also inquired about any existing life insurance and whether any application for such insurance had ever been canceled. The application also contained a "Declarations" section, which provided:

> I understand that my statements and answers in this application must continue to be true as of the date I receive the policy. I understand that if my health or any of my answers or statements change prior to delivery of the policy, I must so inform the Company in writing.

Additionally, the application contained the following provisions:

> It is agreed that * * * any policy issued on this application shall not take effect unless all of the following conditions are met: (a) the full first premium is paid, (b) the policy is delivered to the owner during the lifetime of the persons to be covered by such policy; (c) the health of all persons to be covered by the policy remains as represented in this application * * * * [N]o waiver or modification shall be binding upon the Company unless in writing and signed by its President or a Vice President.

After filling out Fr. Receconi's application, Peirce's secretary signed Fr. Receconi's name on it, at Peirce's direction. Peirce then submitted the application to Jackson and simultaneously canceled the Allied application. Before submitting the Jackson application, Peirce did not ask Fr. Receconi any of the questions it contained. In particular, Peirce did not ask Fr. Receconi whether his health had changed since August 15, 1987, did not review the requirements and conditions in the applica-

1. Peirce was not a Jackson agent at the time the Receconis submitted their applications for the Allied insurance. He became an agent for Jackson on June 4, 1987, authorized by his agency agreement to solicit applications for insurance but not to make contracts on behalf of Jackson or otherwise bind it by waiving performance of terms or conditions of any policy or other contract to which Jackson was a party.

2. Father Receconi at one time had been a cigarette smoker but had stopped smoking in 1984. When Peirce contacted the Receconis in 1987, he knew that Father Receconi had ceased smoking.

tion, and did not request Fr. Receconi to review the application before submitting it to Jackson.

The application, viewed as of September 15, 1987, contained certain misstatements and omissions. Specifically, it did not disclose Peirce's cancellation of the Allied application nor Fr. Receconi's then existing life insurance with another company. It did not disclose that Fr. Receconi had, according to the testimony of his wife, smoked "a few cigarettes" for two or three days before September 5. It made no mention of the viral pneumonia for which Fr. Receconi was treated beginning on September 6 and continuing on several occasions in early September. Finally, it did not disclose that he had been treated in June and July for skin disorders—a benign keratosis on his back and a slight rash around his mouth, for which he was given tetracycline, which in turn caused him to develop thrush.[3] As Jackson later admitted, these skin disorders were not material and the company would have accepted Fr. Receconi's application had the information been disclosed.

Jackson received the application on September 22, 1987. On October 5, Jackson sent Peirce the life insurance policy with instructions to deliver it to Fr. Receconi upon collection of the premium. Peirce received the policy sometime between October 8 and October 14. The policy stated that its effective date was October 6. On that day, Peirce telephoned Mrs. Receconi and advised her that Jackson had approved Fr. Receconi's application. During that conversation, Mrs. Receconi informed Peirce that Fr. Receconi had been hospitalized for several days with viral pneumonia and that he was in intensive care. Peirce nevertheless requested payment of the premiums on her and Fr. Receconi's policies. Mrs. Receconi obligingly sent the payments to Peirce on October 8, and Peirce promptly forwarded them to Jackson.

Meanwhile, Fr. Receconi's health worsened, and he remained in the hospital until his death on October 15.[4] Mrs. Receconi provided Peirce with updates on her husband's medical condition every other day from October 6 to October 15, but Peirce never informed Jackson of Fr. Receconi's change in health. Peirce never delivered the life insurance policy to Fr. Receconi.

Mrs. Receconi, as the beneficiary listed on Fr. Receconi's application, filed a claim for policy proceeds, which Jackson received on November 25, 1987. Jackson neither approved nor rejected the claim until March 18, 1988, when it sent Mrs. Receconi a letter denying coverage and returning the premium paid on October 6, 1987. Three days before sending this letter, Jackson brought the present action for declaratory relief against Mrs. Receconi and Peirce. Jackson sought a declaration that it was not liable under the policy on the following grounds: that no insurance contract was formed because of noncompliance with conditions precedent; that any insurance contract was rescinded because Fr. Receconi had materially misrepresented his health on the application; that Peirce had defrauded Jackson by accepting the premium without informing Jackson of Fr. Receconi's change in health; and that Peirce and the Receconis had conspired to defraud Jackson.[5]

Mrs. Receconi filed an answer generally denying Jackson's allegations and asserting a counterclaim for breach of contract. In her counterclaim she sought relief consisting of the face amount of the policy ($250,000), plus prejudgment interest, punitive damages, and attorney's fees. Peirce

3. Father Receconi's dermatologist testified that the keratosis was an extremely minor and very common condition. As for Fr. Receconi's thrush, when the tetracycline was discontinued the thrush completely resolved.

4. On October 2, 1987, after several treatments for viral pneumonia, Fr. Receconi had a seizure and was subsequently hospitalized until his death. The cause of death was eventually determined to be AIDS, although the Receconis were not informed of this diagnosis during the period of hospitalization. There is no evidence that Fr. Receconi was aware that he was ill on August 15, 1987, when he authorized Peirce to procure life insurance for him with Jackson.

5. Jackson also sought indemnification from Peirce in the event it was held liable to Mrs. Receconi.

moved to dismiss the claims against him, and the district court granted his motion. This Court, however, in a decision filed on March 15, 1990, reversed that dismissal and remanded the case for further proceedings. We held that the allegations in Jackson's complaint were sufficient to state a claim against Peirce based on several possible theories, including breach of Peirce's agency contract and breach of fiduciary duty.

On remand, Jackson abandoned its claims of fraud and conspiracy to defraud and proceeded against Peirce on grounds of breach of contract and breach of fiduciary duty. Additionally, the district court granted Jackson's motion to amend its complaint to allege that the policy was void because Fr. Receconi did not sign the application or authorize anyone to sign it for him, in purported violation of NMSA 1978, Section 59A-18-8 (Repl.Pamp.1988).

The case proceeded to trial, and the district court entered judgment in favor of Mrs. Receconi, awarding her $250,000 for breach of contract, prejudgment interest, and $50,000 in punitive damages. Her request for attorney's fees was denied. The court also entered a judgment in favor of Peirce, denying Jackson's claims against him for indemnification.

On appeal, Jackson seeks to overturn the judgments in favor of Mrs. Receconi and Peirce, raising the same issues it presented to the trial court. Mrs. Receconi cross-appeals, arguing that the trial court erred in denying her claim for attorney's fees, given the court's finding that Jackson's refusal of her claim was unreasonable. We turn first to what we consider to be Jackson's strongest argument: that the failure of an express condition precedent in the application—that Fr. Receconi's health would remain as represented in the application—excused Jackson from its duty to perform its promise to pay Mrs. Receconi $250,000 in the event of his death.

II.

Jackson argues that the parties did not form a valid contract of insurance because of the nonoccurrence of three conditions set forth in the application. Two of these conditions related to the applicant's health: The first required Fr. Receconi to inform Jackson in writing of any changes in his health prior to delivery of the policy;[6] the second provided that the policy would not take effect unless Fr. Receconi's health remained as represented in the application. Because Fr. Receconi's health changed dramatically during September and October 1987, and because Fr. Receconi did not inform Jackson of this change, Jackson contends that neither of these conditions was met and that no contract was formed. The third condition was that the policy would not become effective unless it was delivered to Fr. Receconi during his lifetime. Jackson maintains that because Peirce never delivered the policy, this condition also was not met, so again no contract was formed.

■ The third condition is easily dealt with. We agree with the trial court's conclusion that although Peirce never physically delivered the policy, it was constructively delivered and that this constructive delivery satisfied the condition. The trial court held that this occurred when Peirce received the policy from Jackson with instructions to deliver it to Fr. Receconi upon payment of the premium. Mrs. Receconi paid the premium on October 8.

■ There is little question that constructive delivery may satisfy a delivery condition, regardless of language requiring "delivery to the applicant." *See* 1 George J. Couch, *Couch on Insurance 2d* § 10:10, at 696 (rev. vol. 1984). Thus, delivery to the insurer's agent for subsequent delivery to the insured is the equivalent of actual delivery to the applicant, if the contract is consummated in other respects. *Id.* § 10:18, at 705-06. Jackson's delivery of

6. Jackson is ambivalent in characterizing this requirement; it variously refers to the provision as a "warranty" and as a "condition." As we discuss below, this difference in characterization ultimately does not affect our decision, but it gives rise to the important distinction between a promise and an express condition precedent—a distinction that has special significance in an aleatory contract like a life insurance policy.

the policy to Peirce satisfied the delivery requirement if Peirce complied with all of the conditions prescribed by Jackson. Undoubtedly, collection of the premium from Fr. Receconi was an express condition to delivery of the policy. Peirce complied with this condition because he procured the payment from Mrs. Receconi on October 8, prior to or on the same day he received the policy from Jackson.

Thus, as of October 8, Peirce was under an unconditional duty to deliver the policy. It is true, as Peirce and Jackson argue, that Peirce's agency agreement with Jackson provided that he would not make delivery of a policy at any time after he had knowledge that the health of the proposed insured had materially changed since the time the application had been made. But, having notified Mrs. Receconi that Jackson had approved Fr. Receconi's application and having been notified by her that her husband's health had significantly changed for the worse, and having nonetheless requested Mrs. Receconi to pay the initial premium on the policy—which she promptly did—Peirce could not then simply hold the policy and wait to see if Fr. Receconi died or improved to his former state of apparently good health. Having elected on behalf of his principal, Jackson, to request the premium without notifying either Jackson or Mrs. Receconi of the problem, Peirce waived, as we hold below, the condition that Fr. Receconi's health remain as represented in the application. This being so, the same condition could not preclude effective delivery of the policy, and Jackson cannot rely on the provision in Peirce's agency agreement to relieve Peirce of the duty to deliver the policy when, with knowledge of the insured's deteriorated health, he requested payment of the premium.

A much more serious objection, in our view, to enforcement of Jackson's promise to pay the face amount of the policy is the express condition that Fr. Receconi's health remain, at the time of delivery of the policy, as represented in the application. Jackson frames its argument on this point both in terms of failure of an express condition precedent and in terms of Fr. Receconi's breach of an obligation on his part to inform Jackson in writing if his health changed prior to delivery of the policy. With respect to the latter assertion, Jackson claims that Fr. Receconi's breach of his obligation relieved Jackson of any obligation on its part under the policy.

While ultimately we shall treat these two alternative ways of framing Jackson's argument as raising essentially the same issue, there is an important difference between them, which we pause to discuss because doing so highlights the significance of the express condition on which Jackson relies and which we find to have been waived by Jackson's agent. That difference lies in the nature of an insurance contract as an "aleatory" contract, as that term is used in the law of contracts, particularly with reference to insurance contracts. *See generally* 3A Arthur L. Corbin, *Corbin on Contracts* ch. 38 (1960) (especially § 731, "Insurance As An Aleatory Contract").[7] In an aleatory contract, one or both parties' performance is conditional on the happening of a fortuitous event. *Restatement of Contracts* § 291 (1932). Unlike most bilateral contracts, the promise of each party to an aleatory contract is not given in exchange for the prospect of performance of the other party's promise, and actual or prospective nonperformance by one party to the contract does not discharge the other. *See id.* §§ 292, 293; *Restatement (Second) of Contracts* § 379 (1981); 3A Corbin, *supra,* § 728 ("Aleatory Contracts Are Not Agreements to Exchange Equivalent Performances"). Although the contract in this case was essentially unilateral—consisting as it did of Jackson's promise to pay $250,000 conditioned on Fr. Receconi's death, given in exchange for Fr. Receconi's payment of the

7. *Black's Law Dictionary* defines an aleatory contract as: "A mutual agreement, of which the effects, with respect to both the advantages and losses, whether to all the parties or to some of them, depend on an uncertain event * * * * A contract, the obligation and performance of which depend upon an uncertain event, such as insurance, engagements to pay annuities, and the like." *Black's Law Dictionary* 70 (6th ed. 1990).

premium—to the extent the application contained promises by Fr. Receconi it can properly be characterized as bilateral.[8] Therefore, under the *Restatement* rule, Fr. Receconi's nonperformance of his promise to notify Jackson of a change in his health prior to delivery of the policy would not discharge Jackson from performance of its aleatory promise to pay Fr. Receconi's beneficiary the face amount of the policy in the event of his death.

Professor Corbin, however, qualifies the *Restatement* rule on nondischarge of one party's obligation (in an aleatory contract) because of the other party's breach of his obligation, as follows: "A promise in an aleatory contract is constructively conditional on absence of action by the promisee that substantially increases the risk that the promisor has assumed." 3A Corbin, *supra*, § 730, at 415–16. In the present case, it can be said that Fr. Receconi's failure to notify Jackson in writing of his change in health substantially increased the risk that Jackson had assumed. Thus, under Corbin's formulation, Jackson's promise was constructively conditioned on Fr. Receconi's performance of his promise to notify Jackson of his change in health.

As so viewed, the condition that Fr. Receconi notify Jackson of his changed health is substantially the same as the second of the two health conditions mentioned above—the condition (which *was* an express condition precedent in the application) that Fr. Receconi's health at the inception of the insurance agreement remain as represented in the application. The question then, and upon which decision of this case turns, is whether this condition (or these two conditions if they are viewed separately) was (were) waived by Peirce's action in obtaining payment of the premium with knowledge that Fr. Receconi's health had significantly deteriorated. As to both of these conditions, the following statement by Corbin looms as a significant obstacle to a holding that Jackson became obligated to pay the face amount of the policy on Fr. Receconi's death: "A voluntary waiver of a condition in an aleatory contract like insurance will not be effective if the extent of the risk assumed is thereby materially increased." *Id.* § 753, at 488.

There is no question that Fr. Receconi's changed health between August 15, 1987, and the date we have held the policy was constructively delivered, October 8, 1987, materially increased Jackson's risk that it would have to perform its promise—sooner rather than later. As Jackson argues, the applicant's health status is critical to a life insurer's ability to gauge and evaluate the risk it is being asked to insure. An insurer has the right to intelligently pass upon the risk insured. *Rael v. American Estate Life Ins. Co.*, 79 N.M. 379, 382, 444 P.2d 290, 293 (1968). The question here is whether it is fair to hold Jackson, as the trial court did, to a waiver of the health condition in the application, given that noncompliance with the condition undeniably increased the risk that Jackson had assumed.

It appears that no New Mexico court has considered whether an insurance company can waive a condition in an application or policy relating to the continued

8. As phrased in the "Declarations" section of the application, Fr. Receconi's obligation to notify Jackson if his health changed prior to delivery of the policy was a promise, not an express condition.

Mrs. Receconi argues, and the trial court found, that this obligation, as well as the condition that Fr. Receconi's health remain as represented in the application, was not binding because Peirce had failed to make Fr. Receconi aware of these requirements in the application. We agree with Jackson's response to this argument: Mrs. Receconi cannot claim entitlement to benefits under the policy and at the same time claim that Fr. Receconi was not bound by the obligations and conditions set out in the application that gave rise to the policy itself. *See* 1 John & Jean Appleman, *Insurance Law & Practice* § 173, at 535 (rev. vol. 1981) (insured becomes chargeable with policy terms by paying premium or bringing suit on policy). While, as stated below, we are unwilling to charge Fr. Receconi with any misstatements or omissions of fact that he did not make to Peirce and that resulted from the manner and timing of Peirce's completion and submission of the application, we think that Fr. Receconi obligated himself to Jackson's standard-form application requirements when he authorized Peirce to obtain insurance from Jackson.

good health of the applicant.[9] Numerous other jurisdictions, however, have considered this issue, and the majority rule appears to be that an insurance company can waive such a condition. *See* 1 Couch, *supra,* §§ 11:22, 11:23; 7 *id.* §§ 37:123, 37:130 (rev. vol. 1985). *See also, e.g., Southern States Life Ins. Co. v. Dunckley,* 148 So. 320, 322 (Ala.1933) (life insurer may waive provision that policy will not take effect until payment of first premium while insured is in good health); *Pomerenke v. National Life & Accident Ins. Co.,* 241 N.E.2d 390, 393 (Ind.Ct.App.1968) (provision that life policy will not take effect unless insured is in good health on date of issue is made for benefit of insurer and may be waived by it); *American Nat'l Ins. Co. v. Bailey,* 3 S.W.2d 539, 543 (Tex.Civ. App.1927) (when insurance agent knew facts concerning insured's bad health yet nevertheless collected insurance premiums and delivered policy to applicant, company waived good health condition of policy).

Those courts that have recognized waiver by an insurance company of a good-health condition have relied on general principles of good faith and fair dealing. They have recognized, as has this Court, that an insurance contract requires good faith on the part of both parties to the contract. *See Modisette v. Foundation Reserve Ins. Co.,* 77 N.M. 661, 666, 427 P.2d 21, 25 (1967) ("The obligation to deal fairly and honestly rests equally upon the insurer and the insured."). Consistently with this principle, they have identified the basic unfairness that would result from allowing an insurer to accept payment on a policy and later deny liability based on information it had when it received the payment. *See Southern States,* 148 So. at 322 (quoting *Phoenix Life Ins. Co. v. Raddin,* 120 U.S. 183, 196, 7 S.Ct. 500, 506, 30 L.Ed. 644 (1887)); *Pomerenke,* 241 N.E.2d at 393; *American Nat'l Ins. Co. v. Wiggins,* 4 S.W.2d 595, 596 (Tex.Civ.App.1928). We agree with the reasoning of these cases and hold that an insurance company can waive a condition precedent relating to the continued good health of an applicant.

Recognizing that waiver is available, however, does not automatically lead to a finding of waiver on the present facts. As this Court has stated on many occasions, waiver is the intentional relinquishment or abandonment of a known right. *E.g., J.R. Hale Contracting Co. v. United New Mexico Bank,* 110 N.M. 712, 716, 799 P.2d 581, 585 (1990). Thus, in the present case, waiver requires a showing both that Jackson had knowledge of the nonoccurrence of the condition and that Jackson intended to waive compliance with the condition.

As Jackson vigorously argues, the company itself did not know of Fr. Receconi's deteriorating health before it accepted the premium payment from its agent. However, as a general rule, knowledge of an insurer's agent may be imputed to the insurer for the purpose of waiver. *Lumbermens Mut. Ins. Co. v. Bowman,* 313 F.2d 381, 388 (10th Cir.1963); 16C Appleman, *supra* note 8, § 9101. Thus, notice to an agent, or knowledge imparted to him, is notice to the company, regardless of whether or not the agent actually communicates the information to the company. *Id.* § 9101, at 9. Here, although Jackson itself had no knowledge of Fr. Receconi's change in health before it accepted the premium, Peirce did. When Peirce telephoned Mrs. Receconi on October 6 to inform her that Jackson had approved the life insurance applications, Mrs. Receconi informed him that her husband was in the hospital, possibly suffering from viral pneumonia. After receiving this information, Peirce nonetheless requested and received premium checks from Mrs. Receconi and submitted these checks to Jackson. Peirce did not inform Jackson of Fr. Receconi's declining health at that time, but his knowledge is nevertheless imputed to Jack-

9. While, as Jackson argues, the doctrine of waiver cannot be invoked to form a contract of insurance, *Western Casualty & Sur. Co. v. City of Santa Fe,* 84 N.M. 409, 411, 504 P.2d 17, 19 (1972), that general rule applies only to the nature of the coverage afforded, not to limitations or conditions pertinent to the risk already covered by the policy. 16B Appleman, *supra* note 8, § 9090, at 588–89.

son. This knowledge, combined with Jackson's subsequent acceptance of the premium and retention of it for four months, constituted a waiver of the condition or conditions relating to Fr. Receconi's health.

We reach this decision notwithstanding the provision in the application, previously quoted, that an agent such as Peirce may not waive such a condition. As this Court has previously stated, "A nonwaiver agreement itself may be waived by conduct, the same as stipulations in the policies." *Green v. General Accident Ins. Co. of America,* 106 N.M. 523, 526, 746 P.2d 152, 155 (1987) (quoting *Miller v. Phoenix Assurance Co.,* 52 N.M. 68, 73, 191 P.2d 993, 996 (1948)).[10] Such a waiver occurs through the acts of the insurer or its general officers, by express agreement or impliedly from conduct, or by acts of the insurer inconsistent with an intent to enforce the condition. 16C Appleman, *supra* note 8, § 9236, at 291–92. And,

> Since a policy limitation of this character cannot override or supersede the law making the principal liable for the negligent or fraudulent act of its agent, and the law of equitable estoppel, this limitation may itself be waived by the insurer through its agent. This type of provision is not effectual to prevent the acts of an authorized agent of the insurance company in the conduct of its business from constituting a waiver of its conditions. Such limitation may be waived by an agent acting within his actual *or apparent* authority.

Id. at 292–93 (emphasis added; footnotes omitted). *See also* 3 Couch, *supra,* § 26:91, at 680 ("By the most liberal and probably the majority view, the insured is permitted to rely on the apparent authority of the insurer's agent, regardless of the presence in the policy of a limiting provision." (footnote omitted)).

Similarly, although there is considerable authority to the contrary, *see* 16C Appleman, *supra* note 8, § 9231,

> the general trend of modern cases is to the effect that any knowledge of an agent, while acting within the scope of the powers entrusted to him, will, in the absence of fraud or collusion between the insured and the agent, be imputed to the insurer, though the policy contains stipulations to the contrary.

Id. § 9233, at 276–77.

It has been held that a clause in a policy prohibiting a waiver except by an endorsement of an officer of the insurer is void or ineffective. *Id.* § 9232, at 273. This result sometimes is attributed to a statute permitting service of notice on agents of insurance companies or to a statute placing an agent in the position of the insurer. *Id.* at 272. New Mexico has a statute of the latter sort, which provides in pertinent part:

> Any licensed agent appointed as agent by an insurer shall, in any controversy between the insured or his beneficiary and the insurer, be held to be the agent of the insurer which issued the insurance solicited or applied for, *anything in the application or policy to the contrary notwithstanding* * * *.

NMSA 1978, § 59A–18–24 (Repl.Pamp.1988) (emphasis added).[11]

10. Jackson argues that the nonwaiver provision was effective to prevent any waiver by Peirce. It relies on *Union Life Ins. Co. v. Burk,* 169 F.2d 235, 238–39 (10th Cir.1948), for the proposition that "By the laws of New Mexico, a provision in an insurance policy providing that no person except designated individuals shall have power to waive contractual provisions is binding and renders ineffective any action on the part of others purporting to waive or to modify such policy provisions." In support of this statement, the Tenth Circuit Court of Appeals cited the following New Mexico cases: *Smith v. New York Life Ins. Co.,* 26 N.M. 408, 193 P. 67 (1920); *Bloodgood v. Woman's Benefit Assoc.,* 36 N.M. 228, 13 P.2d 412 (1932); *Warren v. New York Life Ins. Co.,* 40 N.M. 253, 58 P.2d 1175 (1936). We have reviewed these cases and, without engaging in a lengthy analysis of the opinions and with all due respect to the Tenth Circuit, we do not believe they support the blanket rule of law advanced in *Burk.*

11. It will be noted that this statute refers to "any licensed agent" and does not distinguish between "general" agents, "special" agents, "soliciting" agents, "local" agents, and other agents with similar qualifying descriptions. Such distinctions are often made in cases or treatises discussing the subjects considered in the text, *see, e.g.,* 16C Appleman, *supra* note 8, § 9237; 3 Couch, *supra,* §§ 26:99–101, 147–55; but we

We consider this statute all but dispositive of the argument that Peirce had no authority to waive the health condition in Fr. Receconi's application. He was Jackson's agent, and he solicited the insurance for which Fr. Receconi applied. In the ensuing controversy between Jackson and Mrs. Receconi, the question may be framed as follows: To whom should be allocated the risk that the agent would violate the instructions in his agency agreement that he refrain from delivering the policy after he had knowledge that the health of the proposed insured had materially changed? As we have held, he constructively delivered the policy when he requested the premium with this knowledge and failed to inform Jackson that the insured's health had changed. Reverting to the principle of good faith and fair dealing discussed above, we think it fair in this situation to allocate to the insurer the risk of the agent's violation of his duty to his principal. The insurer selected (or at least contracted with) him, received the benefit of his insurance solicitations, and presumably had the opportunity to train him in dealing with insureds. Neither the insured nor his beneficiary knew that he was violating his duty, and both presumably assumed that he would alert them to a problem if one existed. From the standpoint of Fr. and Mrs. Receconi, agent Peirce *was* Jackson National Life Insurance Company; they had no dealings with the president or a vice-president at the company's headquarters in Lansing, Michigan, and were perfectly entitled to rely on the agent with whom they dealt to disclose, before requesting payment of the premium, any information he had that the insurance would not become effective.

This conclusion may be somewhat inconsistent with Corbin's assertion that a voluntary waiver of a condition in an aleatory contract like insurance will not be effective if the extent of the risk is thereby materially increased. It is possible to view Mrs. Receconi's payment of the premium as consideration for Jackson's waiver, through Peirce, of the health condition or—perhaps more soundly—as detrimental reliance leading to an estoppel. *See Hale Contracting,* 110 N.M. at 716, 799 P.2d at 585 (discussing waiver for consideration and waiver by estoppel). However, it seems more straightforward to recognize Peirce's waiver for what it was: a voluntary waiver, on behalf of his principal Jackson, made with knowledge of the facts and with the understanding, which he either had or should have had, that his action would result in Jackson's inability to assert Fr. Receconi's deteriorated health as a defense to a policy claim. This result may not square precisely with Corbin's statement of the consequences of a voluntary waiver of condition in an aleatory contract, but in our opinion it does comport with the principle of good faith and fairness surrounding all insurance contracts.

III.

Jackson's most strenuously asserted argument on this appeal—although we do not attach nearly as much credence to it as does Jackson—is that Fr. Receconi's life insurance policy was void *ab initio* because he did not sign the application or consent to the policy in writing. This resulted, according to Jackson, in a violation of NMSA 1978, Section 59A-18-8 (Repl.Pamp.1988), which provides in relevant part:

> No life or health insurance contract upon an individual, except a contract of group life insurance or of group or blanket health insurance, shall be made or effectuated unless at the time of the making of the contract, such individual

deem such distinctions irrelevant under our statute in any controversy between the insured (or his beneficiary) and the insurer. *See also Pribble v. Aetna Life Ins. Co.,* 84 N.M. 211, 214, 501 P.2d 255, 258 (1972) ("We are unwilling to adopt a rule by which disposition of cases such as this is made on the basis of an individual's title."). Of course, if the insured has knowledge of any limitations on the agent's authority, he may well be bound by such limitations. *See, e.g.,* 3 Couch, *supra,* § 26:80, at 657. It is undisputed in this case that neither Fr. Receconi nor Mrs. Receconi knew of the limitations on Peirce's authority as contained in either Fr. Receconi's application or Peirce's agency agreement.

applies therefor or has consented thereto in writing * * *.[12]

Since a contract made in violation of statutory requirements is (under some circumstances) void, *see Farrar v. Hood,* 56 N.M. 724, 729, 249 P.2d 759, 762 (1952) (general rule that contracts in violation of statute prescribing penalties are void), and since the evidence is undisputed that Fr. Receconi neither applied for nor consented to the policy in writing, Jackson argues that the policy was void (not only void, but void "*ab initio*").

At common law, an insurance contract taken out on the life of the insured by someone other than the insured without the insured's knowledge or consent was considered adverse to the insured's interest and unenforceable. 44 C.J.S. *Insurance* § 241, at 1001–02 (1945); 1 Bertram Harnett & Irving I. Lesnick, *The Law of Life & Health Insurance* § 3.04[1][a] (1991). The reason for the rule was that an insurance contract on another without his knowledge, even when there might otherwise be an insurable interest, created the opportunity of foul play by encouraging speculation in another's life. *Id.*

Legislation similar to Section 59A–18–8 has been enacted in twenty-eight states, codifying this common law rule. *Id.* § 3.04[2][a]. Courts construing these statutes have agreed that they codify, in some form, the common law rule requiring the consent of the insured in order to guard against foul play. *See, e.g., Wren v. New York Life Ins. Co.,* 493 F.2d 839, 841 (5th Cir.1974) (applying Georgia law); *Holmes v. Nationwide Mut. Ins. Co.,* 40 Misc.2d 894, 244 N.Y.S.2d 148, 150–51 (Sup.Ct.), *aff'd,* 19 A.D.2d 947, 245 N.Y.S.2d 330 (App.Div.1963). We therefore agree with Mrs. Receconi that the statute is intended for the protection of the insured.

Jackson invokes *Wren* (along with certain Georgia cases, *Wood v. New York Life Ins. Co.,* 255 Ga. 300, 336 S.E.2d 806 (Ga. 1985), and *Time Ins. Co. v. Lamar,* 195 Ga.App. 452, 393 S.E.2d 734 (1990)) and a federal case interpreting Utah law, *Alleman v. Lincoln Nat'l Life Ins. Co.,* 636 F.2d 1195 (10th Cir.1981), for the proposition that Jackson's policy on Fr. Receconi was void *ab initio.* Mrs. Receconi responds with cases from New York and Louisiana holding that an insurance contract in violation of a consent statute similar to Section 59A–18–8 is nevertheless enforceable against the insurer. *Holmes, supra; New England Mut. Life Ins. Co. v. Caruso,* 73 N.Y.2d 74, 538 N.Y.S.2d 217, 535 N.E.2d 270 (N.Y.1989); *Adam Miguez Funeral Home, Inc. v. First Nat'l Life Ins. Co.,* 234 So.2d 496 (La.Ct.App.1970).

Without dissecting the various cases cited by the parties, we think this issue is satisfactorily resolved by reference to New Mexico authority, which we deem sufficiently analogous and persuasive to be controlling in this context. These cases hold, basically, that an insurance policy which violates a statute designed for the protection of the insured is nevertheless enforceable against the insurer. *See Foundation Reserve Ins. Co. v. Kennedy,* 79 N.M. 382, 383–84, 444 P.2d 293, 294–95 (1968); *Buck v. Mountain States Inv. Corp.,* 76 N.M. 261, 266, 414 P.2d 491, 494

12. There are three exceptions to the signature requirement, one of which applies when a spouse effectuates insurance upon the other spouse. Subsection 59A–18–8(A). Mrs. Receconi argues that this exception applies in the present case because she "effectuated" life insurance on Fr. Receconi when she signed the check in payment of the first premium and sent the check to Peirce. We find it unnecessary to address this issue because we hold that the claimed noncompliance with Section 59A–18–8 did not render the policy void *ab initio* or otherwise impair its effectiveness.

Mrs. Receconi also argues that the statute was not violated because Fr. Receconi *did* apply for the policy, albeit not in writing and not by signing the application. She maintains that the statute is intended to apply only when someone other than the insured obtains insurance on the insured's life and that, since Fr. Receconi was both the insured and the applicant, the statute has no application. We certainly do not reject this argument (which we find rather ingenious) out of hand, since its basic premise—that the purpose of the statute is to protect the insured from actions by others who might be tempted to gamble on his life—is consistent with the purpose we describe in the text. However, again we need not expressly pass on the validity of the argument, because we hold that the statute, even if "violated," did not invalidate Jackson's policy on Fr. Receconi.

(1966); *Douglass v. Mutual Benefit Health & Accident Ass'n*, 42 N.M. 190, 202–11, 76 P.2d 453, 460–66 (1937); *see also Forrest Currell Lumber Co. v. Thomas*, 81 N.M. 161, 165, 464 P.2d 891, 895 (1970) (insurance company could not have avoided liability on policy based in part on illegal consideration even though such illegality violated state criminal law); *Southern States Life Ins. Co. v. McCauley*, 81 N.M. 114, 116, 464 P.2d 404, 406 (1970) (same).

We first adopted this rule in *Douglass*, in which we held that a policy made in violation of various statutes regulating insurance policies was nevertheless an enforceable contract. 42 N.M. at 204–11, 76 P.2d at 461–66. In so holding, we recognized the general rule that an act done in violation of a statutory prohibition is void. Nonetheless, we relied on an exception to the general rule: Violation of a statute will not render a contract void if the legislature does not intend that result. In *Douglass*, the legislature had not expressly declared that contracts made in violation of the statutes were void. Moreover, a holding that such contracts were unenforceable by the insured would thwart the purpose of the statutes, which were enacted to protect the insured. We said, in language equally applicable to the present case: "If contracts made in violation of this statute release the insurer, then its object and purpose is circumvented, and the door to injustice and oppression is wide open." *Id.* at 206, 76 P.2d at 463.

In the present case, Section 59A–18–8 does not expressly state that contracts made in violation of it are void. Moreover, the statute furthers an important public policy against wagering or gambling on human lives and thereby protects persons who are, or are about to become, insured.[13] Where, as here, the insured consents to, and even directs, procurement of an insurance policy on his life and believes that he is thereby insured, permitting the insurance company to avoid liability when the insured dies would not further the purpose of Section 59A–18–8 and would, in the language of *Douglass*, open the door wide to injustice and oppression.

Finally, we agree with Mrs. Receconi's assertion that our conclusion is buttressed by NMSA 1978, Subsection 59A–18–21(A) (Repl.Pamp.1988). Assuming for present purposes that Fr. Receconi's application violated Section 59A–18–8, we think that Jackson's policy was nevertheless valid under that subsection. It provides:

> A policy delivered or issued for delivery after the effective date of the Insurance Code to any person in this state in violation of the Insurance Code [which includes Section 59A–18–8] but otherwise binding on the insurer, shall be held valid, but shall be construed as provided in the Insurance Code.

We hold that Jackson's policy was not void or otherwise unenforceable because Fr. Receconi did not sign the application or consent to the policy in writing.

IV.

Jackson devotes about a page in its brief in chief to its argument that the application contained material misrepresentations justifying rescission of the policy. The argument merits the short shrift Jackson gives it. The "misrepresentations" relied on are the omissions of Fr. Receconi's medical history during the period June–September 1987, the existence of another life insurance policy, the cancellation of the Allied application, and Fr. Receconi's resumption of cigarette smoking for a few days during early September 1987.

The short answer to Jackson's short argument is that Fr. Receconi made none of these misrepresentations; to the extent any were made, Peirce made them. When Peirce asked Fr. Receconi on August 15, 1987, whether he had undergone any major changes in his health since submission of the Allied application in March of that year, Peirce knew about the existing life insur-

13. We do not disagree with Jackson's assertion that the statute may have other purposes, such as providing the insured the opportunity to review the application for inaccuracies prior to submission. However, the existence of other legislative purposes does not negate or lessen the importance of the statute's purpose of protecting the prospective insured.

ance policy and knew that Fr. Receconi was a nonsmoker. When Peirce submitted the application, completed and signed by his secretary at his direction, he knew of the cancellation of the Allied application; it was he who canceled it. Peirce's delay for a month in submitting the application to Jackson cannot be attributed to Fr. Receconi. Fr. Receconi's answer to Peirce's only question in August—whether there had been any major changes in his health—was truthful; the dermatology treatments in June and July were for minor skin ailments and, as Jackson conceded at the trial, did not affect either its acceptance of the risk or the hazard it assumed. Fr. Receconi's treatment for viral pneumonia on several occasions in early September could not have been known when he answered Peirce's question on August 15; and it was Peirce's delay in submitting the application, not any untruthfulness by Fr. Receconi, that resulted in Jackson's failure to be informed of this part of Fr. Receconi's medical history at the time it received the application.

As noted in footnote 8, we think it is fair to charge Fr. Receconi with the promises and conditions contained in the application, because in requesting Peirce to procure insurance from Jackson, Fr. Receconi in effect authorized Peirce to assume on his behalf the standard provisions in Jackson's application. But we are unwilling to extend this principle to a holding that Fr. Receconi authorized Peirce to make misrepresentations on his behalf. By entering into an agency relationship with a soliciting agent such as Peirce, an insurer assumes the risk that the agent will incorrectly complete an application for insurance. If the agent does not submit the application to the prospective insured for review and signature, so that the insured can be charged with knowledge of the contents of the application, the insurer cannot escape liability under the ensuing insurance policy on the ground that the insured "misrepresented" facts that the agent has inserted in, or omitted from, the application. *See* 17 Appleman, *supra* note 8, § 9401, at 2–3 (agent's insertion of false answers in application, particularly when insured is not at fault, is considered act of insurer and will preclude it from defending upon such ground); *see also Douglass,* 42 N.M. at 198, 76 P.2d at 458 (agent's breach of duty to prepare application accurately and truthfully to state result of negotiations is in legal effect fault of company).

We affirm the trial court's conclusion that Fr. Receconi made no material misrepresentations in the application that would allow Jackson to rescind the policy.

V.

As its next claim of error, Jackson asserts that the trial court improperly refused to award it indemnification against its agent, Peirce. We agree that there is no justification for the judgment in favor of Peirce and against Jackson on the latter's claim for indemnification.

Following this Court's previous reinstatement of Jackson's complaint against Peirce, the trial court on remand determined that Peirce was not liable to Jackson under either theory asserted at the trial: breach of Peirce's agency contract or breach of fiduciary duty.[14] It found that Peirce did not breach the express provisions of his agency contract and that "[a]lthough he acted loosely and carelessly and was disorganized, [Peirce] did not breach the fiduciary duties owed the company by him."

We find no substantial evidence to support the trial court's finding that Peirce did not breach his duty to Jackson. On the contrary, the undisputed evidence shows that Peirce, in failing to inform Jackson of

14. In our previous decision, we held that breach of fiduciary duty was one of the theories sufficiently pled in Jackson's complaint to support a claim against Peirce for indemnification. This was one of the two theories pursued by Jackson at the trial. Neither party on appeal resists labeling Peirce's duty as a "fiduciary" one, and so there is no occasion for us to comment on the nature—as "fiduciary" or not—of Peirce's duty. For purposes of this case, we simply hold that the agent had a duty to his principal and breached that duty, and leave for another case the question whether the duty is properly characterized as a fiduciary one.

Fr. Receconi's deteriorating health, breached his duty to the company.

As an agent, Peirce owed certain duties to Jackson, one of which was to disclose any fact that might affect his principal's interests. *See Gelfand v. Horizon Corp.*, 675 F.2d 1108 (10th Cir.1982) (real estate agent breached his fiduciary duty to corporation when he failed to disclose that purchaser of property was a corporation in which his wife held a one-third interest). The *Restatement* specifically describes this duty:

> Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

Restatement (Second) of Agency § 381 (1958). The duty exists if the agent acquires knowledge of facts which, in view of his relation with the principal, he should know may affect the desires of the principal. *Id.* comment a. In the present case, Peirce knew, before he collected the premium, that Fr. Receconi had been hospitalized with viral pneumonia. Although Peirce did not know that Fr. Receconi had AIDS, the latter's hospitalization because of pneumonia was sufficiently serious that he should have communicated this information to Jackson. He should have known that Jackson would want to be notified of this development because it materially affected the risk assumed by the company. In not disclosing Fr. Receconi's change in health to Jackson, Peirce failed to protect the company's interests and breached his duty as agent.

Peirce's breach of this duty subjects him to liability in tort for the loss which results therefrom. *See id.* § 401 comments a, d. This includes the payment of damages by the principal to a third person, which in the present case equals $250,000 (the amount of the policy proceeds), plus prejudgment and postjudgment interest as awarded by the trial court. Additionally, as a general rule, an indemnitee is entitled to recover its reasonable attorney's fees incurred in defense of the claim indemnified (but not those incurred in establishing the right of indemnity) as part of its damages. *E.g., United General Ins. Co. v. Crane Carrier Co.*, 695 P.2d 1334, 1339 (Okla.1984).

The same result follows from the indemnity clause in Peirce's agency agreement with Jackson. That clause provides that the agent shall indemnify the company for any expenses, costs, causes of action, and damages resulting from or growing out of any unauthorized act or transaction by him or his employees. The unauthorized acts in this case were Peirce's collection of the premium from Mrs. Receconi with knowledge that Fr. Receconi's health had significantly changed for the worse and Peirce's submission of the application, completed by him and signed by his secretary, without verifying the accuracy of the information contained in (or omitted from) it.

Thus, Jackson is entitled to recover from Peirce its reasonable costs in bringing this declaratory judgment action (at both the trial and appellate levels), in addition to the amounts assessed against it and affirmed on this appeal, but excluding the costs it incurred in seeking indemnification from Peirce. We also exclude from the amount for which Jackson is entitled to be indemnified all amounts attributable to its resistance to Mrs. Receconi's claim on grounds other than failure of the conditions precedent in the application. In determining these various amounts on remand, the trial court will have a difficult job of allocation; but the parties will offer such evidence as they can adduce on this question, and the trial court must estimate as best it can the expenses for which Peirce must indemnify Jackson and those we have held are not subject to indemnification.

VI.

As its final point of error, Jackson asserts that the trial court erred in awarding punitive damages to Mrs. Receconi. The trial court determined that Jackson's refus-

al to pay was without just cause or excuse and was unreasonable, and that the company thereby acted "willfully, recklessly and in bad faith, demonstrating disregard and indifference to the rights of its insured and his beneficiary." Jackson attacks these findings as unsupported by substantial evidence and also argues that the award of punitive damages is inconsistent with the court's refusal to award attorney's fees under NMSA 1978, Section 39–2–1 (Repl.Pamp.1991) (authorizing attorney's fees in favor of insured upon finding that insurer acted unreasonably in failing to pay the claim).

An award of punitive damages is discretionary and will be upheld if substantial evidence supports the award. *Economy Rentals, Inc. v. Garcia,* 112 N.M. 748, ——, 819 P.2d 1306, 1322 (1991). The trial court's factual findings, however, must satisfy the legal standard or standards for a punitive damage award. *Id.* As this Court stated in *United Nuclear Corp. v. Allendale Mutual Insurance Co.,* 103 N.M. 480, 485, 709 P.2d 649, 654 (1985), the assessment of punitive damages for breach of an insurance policy requires evidence of bad faith or malice in the insurer's refusal to pay a claim. "Bad faith" has been defined as "any frivolous or *unfounded* refusal to pay." *Id.* (quoting *State Farm General Ins. Co. v. Clifton,* 86 N.M. 757, 759, 527 P.2d 798, 800 (1974) (emphasis added in *United Nuclear*)). *See also Gallegos v. Citizens Ins. Agency,* 108 N.M. 722, 730, 779 P.2d 99, 107 (1989) (stating same standard); *Chavez v. Chenoweth,* 89 N.M. 423, 429, 553 P.2d 703, 709 (Ct.App. 1976) (same).

"Unfounded" in this context does not mean "erroneous" or "incorrect"; it means essentially the same thing as "reckless disregard," in which the insurer "*utterly* fail[s] to exercise care for the interests of the insured in denying or delaying payment on an insurance policy." *Jessen v. National Excess Ins. Co.,* 108 N.M. 625, 628, 776 P.2d 1244, 1247 (1989) (emphasis added). It means an utter or total lack of foundation for an assertion of nonliability—an arbitrary or baseless refusal to pay, lacking any arguable support in the wording of the insurance policy or the circumstances surrounding the claim. It is synonymous with the word with which it is coupled: "frivolous."

Although the trial court, in support of its award of punitive damages, made numerous findings relating to other aspects of Jackson's claim of nonliability, and although these findings are supported by substantial evidence, none of the findings determined that Jackson's refusal to pay based on failure of the conditions precedent in the application was frivolous or unfounded, as we have defined that term. The trial court did find, as we have seen, that Jackson, through Peirce, waived the conditions precedent; but this finding, while sufficient to support a judgment for the policy proceeds, was not sufficient to support the judgment for punitive damages.

The findings that the court *did* make included a finding that Jackson violated the terms of its own policy (and, we would add, an applicable statute, NMSA 1978, Section 59A–20–14 (Repl.Pamp.1988)), requiring acceptance or rejection of the claim within two months after Jackson's receipt of proof of death. The company received the death claim on November 25, 1987, but did not reject it until March 18, 1988, almost four months later. The court also found that Jackson's eventual denial of the claim "was without cause or excuse and [was] unreasonable" and "demonstrated a total disregard and indifference to the rights of its insured and his beneficiary." In reaching this conclusion, the court apparently reasoned that by the time Jackson denied the claim it had sufficient knowledge of the facts to make its denial unreasonable. The court determined that as of March 18, 1988, the company knew all the relevant facts, except for the fact that Fr. Receconi himself had not signed the application.[15]

15. The trial court found that Peirce made inaccurate and misleading statements to Jackson on December 2, 1987, and February 1, 1988, regarding the completion and signing of the appli-

Again, however, the trial court made no finding that Jackson's refusal to pay based on noncompliance with the conditions precedent in the application was frivolous or unfounded, and even if it had made such a finding there was no substantial evidence that would have supported it. The plain fact is that Jackson was presented with a claim for insurance on a policy that Jackson believed had never been delivered to the insured and the application for which, apparently signed by the insured, omitted various facts called for in the application. These problems were sufficient to justify the insurer's investigation (which Mrs. Receconi concedes), and during the course of that investigation Jackson learned that Fr. Receconi's health had not remained as represented in the application. We hold as a matter of law, on these facts, that Jackson's refusal to pay the claim was neither frivolous nor unfounded.

VII.

In her cross-appeal, Mrs. Receconi agrees with Jackson that the trial court's award of punitive damages and refusal to award attorney's fees are inconsistent, but asserts that the remedy is not to vacate the punitive damage award but rather to reverse the court's denial of her request for attorney's fees. That request, again, is based on Section 39–2–1, which provides that in any action in which an insured prevails against an insurer who has not paid a claim for first-party coverage, the insured "may be awarded reasonable attorney's fees and costs of the action upon a finding by the court that the insurer acted unreasonably in failing to pay the claim." As we have seen, the trial court made several findings about the unreasonableness of Jackson's failure to pay the claim, and Mrs. Receconi argues that the court's refusal to award attorney's fees cannot stand in light of these findings.

We have already expressed our view that these findings of unreasonableness on Jackson's part—of its "total disregard and indifference to" the Receconis' rights, its lack of "just cause or excuse" in refusing to pay Mrs. Receconi's claim, and its "willful, reckless, and bad faith" action in denying that claim—insofar as the findings were made to support the award of punitive damages, lacked substantial evidentiary support because they did not address what we regard as Jackson's reasonable—albeit erroneous—position that conditions precedent in the application were not satisfied. But there is a significant difference between an insurer's conduct that will support a punitive damage award—a frivolous or unfounded refusal to pay—and the conduct that will justify an attorney's fee award under Section 39–2–1—an "unreasonable" denial of a claim, looking at the insurer's conduct from an objective standpoint and measuring it against a "reasonably prudent insurer" standard. *Cf. Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 675, 808 P.2d 955, 960 (1991) (SCRA 1986, 1–011 (Rule 11), unlike its federal counterpart, imposes sanctions based on a subjective, rather than an objective, standard).

Given this difference, we would be inclined to hold that the trial court's refusal to award attorney's fees could not stand in the face of its findings of unreasonable conduct on Jackson's part, if that conduct had been based only upon the facts to which the trial court devoted so much attention in its findings. Those findings were that by March 15, 1988, Jackson knew that the only undisclosed medical information in the application related to the minor and immaterial dermatological treatments Fr. Receconi had received in June and July 1987; that Peirce had interviewed Fr. Receconi on August 15, 1987, but delayed submitting the application until September 15; and that on August 15 Fr. Receconi was in apparent good health and had not smoked for several years. However, Jackson's conduct—its refusal to pay—was also

cation. Apparently, Jackson did not learn that Fr. Receconi had not signed the application himself until Peirce's deposition on March 23, 1989. Peirce had obtained a stay of discovery pending the disposition of his motion to dismiss, which the district court did not lift until March 15, 1989. Thus, Jackson did not learn that Fr. Receconi had not signed the application until rather late in the lawsuit.

based on the undeniable nonoccurrence of conditions precedent in the application—conditions that the application provided could not be waived by the agent (although we have held that this provision was unenforceable). In light of this latter fact and the absence of substantial evidence to support any contrary finding, we hold that Jackson's denial of the claim was both nonfrivolous and reasonable, even though it turned out ultimately to have been mistaken. *Cf. United Nuclear v. Allendale,* 103 N.M. at 486, 709 P.2d at 655 (because insurer had reasonable basis for questioning amount of claimed damages, it did not act unreasonably in failing to pay the claim).

This holding makes it unnecessary for us to resolve the issue debated in the parties' briefs on the cross-appeal: whether, given a finding of the insurer's unreasonableness in failing to pay a claim, an award of attorney's fees under Section 39–2–1 is mandatory or discretionary.[16]

The judgment in favor of Mrs. Receconi is affirmed insofar as it awards her $250,000, plus prejudgment and postjudgment interest, and denies her claim for attorney's fees; the judgment is reversed insofar as it awards punitive damages. The judgment in favor of Peirce denying Jackson's claim for indemnification is reversed; and the cause is remanded to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

827 P.2d 136

STATE of New Mexico, Plaintiff–Appellee,

v.

Frank Martin CAMPOS, Defendant–Appellant.

No. 12482.

Court of Appeals of New Mexico.

Oct. 22, 1991.

Certiorari Granted Dec. 4, 1991.

16. Since the parties have briefed the issue, we will comment, by way of admitted dictum, that the use of the word "may" in the statute suggests that awarding attorney's fees is discretionary, not mandatory; but we are inclined to agree with Mrs. Receconi that the court's range of discretion is narrow and that there is a presumption in favor of an award of attorney's fees (as there is in favor of awarding costs to the prevailing party), so that attorney's fees under the statute should ordinarily be awarded in the absence of a good reason for not doing so. *See Jacobs v. Stratton,* 94 N.M. 665, 668, 615 P.2d 982, 985 (1980) (under 42 U.S.C. § 1988, prevailing plaintiff should ordinarily receive attorney's fees absent special circumstances); *cf. Ranch World of New Mexico, Inc. v. Berry Land & Cattle Co.,* 110 N.M. 402, 404, 796 P.2d 1098, 1100 (1990) (prejudgment interest following breach of contract to pay definite sum of money "generally should be awarded absent peculiar circumstances"); *Kirby v. New Mexico State Highway Dep't,* 97 N.M. 692, 698–99, 643 P.2d 256, 262–63 (Ct.App.) (NMSA 1978, § 39–3–30 authorizes award of costs to prevailing party unless "court orders otherwise for good cause shown"), *cert. quashed,* 98 N.M. 51, 644 P.2d 1040 (1982).

Sammy J. Quintana, Chief Public Defender, Gina Maestas, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Tom Udall, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

DONNELLY, Judge.

Defendant appeals his conviction for possession of heroin, contrary to NMSA 1978, Section 30-31-23(B)(4) (Repl.Pamp.1989). We address three issues: (1) whether the trial court erred in failing to require the state to disclose the identity of a confidential informant; (2) whether the trial court erred in failing to suppress the evidence seized pursuant to the stop, arrest, and search of defendant; and (3) whether the trial court erred in denying defendant's motion for a mistrial based on alleged improper prosecutorial comments. We affirm.

FACTS

Acting on information received by a confidential informant that defendant was going to deliver heroin to a location on East Deming Street in Roswell on December 8, 1989, Lieutenant Luis Lara of the Chaves County Sheriff's Office, together with other officers, set up surveillance of the area. The confidential informant also told Lara that defendant would be driving to the location in either a silver and black pickup truck or a small blue car.

Defendant had been the subject of an ongoing investigation by law enforcement officers for approximately a year, based upon information received by Lara indicating that defendant was engaged in illicit drug activity. From Lara's prior surveillance of defendant, he was also aware that defendant frequently used either the pickup or the automobile identified by the confidential informant.

On the morning in question, defendant was observed by the officers as he approached the location described by the confidential informant as the place where the heroin was to be delivered. The officers stopped defendant's car and ordered him out of his vehicle. Defendant was then arrested without a warrant, handcuffed, and searched. The search of his person and the vehicle he was driving resulted in the seizure of seven packages of heroin. Thereafter, defendant was charged with possession of heroin with intent to distribute.

Prior to trial, defendant moved pursuant to SCRA 1986, 11-510 for disclosure of the identity of the confidential informant who had provided sheriff's deputies with the information leading to his arrest. The trial court conducted in camera examinations of both Lara and the confidential informant and thereafter denied the motion. The trial court concluded that the information relied upon by the officers was "shown to be reliable" and that the stop, arrest, and subsequent search of defendant, under the cir-

cumstances, was lawful and proper. Based on its findings and conclusions, the trial court ruled that the state was not required to disclose the identity of the confidential informant.

Defendant also moved to suppress the evidence seized pursuant to both his warrantless arrest and the ensuing warrantless search. At the hearing on the motion, Lara testified that the information given by the confidential informant indicated that defendant would be transporting heroin on the morning in question at approximately 8:00 a.m., following one of two routes, and that based upon Lara's previous contacts with the confidential informant, the informant was known to be both reliable and credible. Following the denial of defendant's motion to suppress, the case proceeded to trial. At the conclusion of the state's presentation of its case-in-chief, the trial court granted defendant's motion for a directed verdict on the charge of intent to distribute a controlled substance. At this juncture, defendant entered a plea of guilty to one count of possession of heroin, but reserved the right to appeal all pretrial issues.

DISCUSSION

I. *In Camera Hearing*

Defendant first argues that the trial court erred in failing to require disclosure of the identity of the confidential informant pursuant to Evidence Rule 11-510(C)(2). Under this rule, the trial court may order the identity of the confidential informant to be disclosed if it appears that the "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...." *Id. See also State v. Vasquez,* 109 N.M. 720, 790 P.2d 517 (Ct.App. 1990).

Rule 11-510 provides a method for balancing the state's interest in protecting the free flow of information against a defendant's right to prepare his defense. *State v. Perez,* 102 N.M. 663, 699 P.2d 136 (Ct.App.1985); *State v. Beck,* 97 N.M. 312, 639 P.2d 599 (Ct.App.1982). Regardless of the circumstances, however, there is no absolute right to disclosure of the identity of the confidential informant. *See McCray v. Illinois,* 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); *see also State v. Perez; see generally* 1 W. LaFave, *Search and Seizure* § 3.3(g) (1987). Even where the court determines that disclosure is proper, the state may elect to dismiss the pending charge rather than disclose the identity of the informant. *State v. Perez.*

On appeal, we review the trial court's decision denying disclosure of the identity of a confidential informant for an abuse of discretion. *See State v. Robinson,* 89 N.M. 199, 549 P.2d 277 (1976). As observed in *Roviaro v. United States,* 353 U.S. 53, 62, 77 S.Ct. 623, 629, 1 L.Ed.2d 639 (1957), an ad hoc balancing test is applied in determining whether the trial court properly exercised its discretion and "[w]hether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

Defendant contends disclosure of the confidential informant's identity is necessary to accord him fundamental due process. Merely providing information concerning an illegal drug transaction does not, however, without some additional showing by defendant, mandate disclosure of the identity of the confidential informant. *See State v. Perez.* In the instant case, the record indicates that the confidential informant was not present at the time defendant was stopped, arrested, and searched; thus, the confidential informant was not a witness to any sale or defendant's possession of the controlled substance found at the time of his arrest. *See id.* Instead, as indicated by evidence presented at the in camera hearing, the confidential informant conveyed information that defendant had been distributing controlled substances and that he would be engaging in illicit drug activity on the morning that he was apprehended. Testimony presented at the in camera hearing

supports the trial court's determination denying defendant's motion for disclosure. Based upon the evidence presented, the trial court could properly conclude that the informant did not possess information relevant to the preparation or presentation of his defense, or which would exculpate defendant from the charge against him. *See Schmid v. State,* 615 P.2d 565 (Alaska 1980); *see also United States v. Zamora,* 784 F.2d 1025 (10th Cir.1986). Defendant failed to establish either that (1) the informer would be able to give testimony that is relevant and helpful to his defense, or (2) that disclosure is necessary to a fair determination of defendant's guilt or innocence. *State v. Vasquez; State v. Hernandez,* 104 N.M. 268, 720 P.2d 303 (Ct. App.1986).

Where an accused, under Rule 11–510(C)(2), challenges the basis for his warrantless arrest resulting from information provided by a confidential informant, an in camera hearing permits the trial court to determine whether the confidential informant was reliable and whether the police officer had a reasonable basis to rely upon the information conveyed. *See State v. Cervantes,* 92 N.M. 643, 593 P.2d 478 (Ct. App.1979). The mechanism of the in camera hearing also gives the trial court the opportunity to examine how the confidential informant became aware of the information divulged. *Id.* Therefore, the trial court is able to accurately assess the validity of the basis for the arrest, and law enforcement officials are prevented from being the final arbiters of probable cause in situations where confidential information is relied on to support a claim that probable cause existed to effect an arrest. *See State v. Beck.* Based on the record before us, we cannot say the trial court abused its discretion in refusing to require the state to disclose the confidential informant's identity under Rule 11–510(C)(2). *See State v. Robinson.*

Next, we also examine whether disclosure of the confidential informant was required under subsection (C)(3) of Rule 11–510. This subsection provides in applicable part:

> **Legality of obtaining evidence.** If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed.

In reviewing defendant's contentions raised under this portion of the rule, the trial court is required to examine the reasonableness of the belief of the individual who effectuated the arrest and obtained the evidence in question, based upon the information received from the confidential informer. *See State v. Cervantes.* Our reading of defendant's motion indicates that he relied principally upon the provisions of Rule 11–510(C)(3) in seeking disclosure of the confidential informant because his motion refers to his desire to question Lara concerning the nature of the information the officer received from the informant leading to the stop, arrest, and the ensuing search of defendant and his vehicle. Defendant argues that by not disclosing the identity of the confidential informant, he was denied the full and fair opportunity to defend himself, and thus the proceedings against him lacked fundamental fairness. In furtherance of this contention, he reasons that without an order of disclosure, he was deprived of the opportunity to establish that the officers lacked any reliable information or probable cause to justify his stop and warrantless arrest. Alternatively, he argues that if a reasonable basis for providing the information did exist, the informant was not reliable and that it was essential that defense counsel have access to the information given by the confidential informant in order to fully cross-examine Lara concerning this issue. We find this argument unpersuasive.

The trial court conducted in camera hearings of both Lara and the confidential informant. In order to determine whether the trial court abused its discretion in refusing to require disclosure, *see State v. Robinson,* the appellate court will review the in camera proceedings to determine

whether the true identity of the confidential informant was revealed and whether the trial court conducted a thorough and vigorous investigation in order to determine the veracity of the information supplied to the police. *See State v. Wolken,* 103 Wash.2d 823, 700 P.2d 319 (1985) (en banc). In reviewing such proceedings, this court scrutinizes the record in order to determine whether the trial court conducted a vigorous and thorough examination of the confidential informant and other witnesses in order to ensure that the balancing process was fairly applied. *See generally McCray v. Illinois.*

At the in camera hearing conducted herein, the trial court inquired into the basis for the informant's knowledge of defendant's drug selling activities, other information given in the past which led to the arrest of individuals involved in illicit drug activity, and the details of Lara's prior investigation and surveillance of defendant. Reviewing the in camera proceedings and other matters in the record in their entirety, we determine that the evidence before the trial court was sufficient to enable it to properly balance defendant's right to a fair trial and the state's interest in protecting its availability of information. The trial court did not abuse its discretion in refusing to order disclosure of the confidential informant under Rule 11–510(C)(3).

When we assigned this case to the general calendar, we asked the parties to address other issues. In view of our disposition, it is not necessary to address those issues.

II. *Denial of Motion to Suppress*

Under this issue, defendant argues that the trial court erred in failing to suppress the evidence resulting from the search following his stop and arrest. He also contends that under the circumstances here, in order to uphold the validity of his warrantless arrest, the state was required to establish that the arresting officer had probable cause to believe that a felony had been or was about to be committed by defendant and, additionally, that exigent circumstances existed for making a warrantless arrest. *See State v. Martinez,* 94 N.M. 436, 612 P.2d 228, *cert. denied,* 449 U.S. 959, 101 S.Ct. 371, 66 L.Ed.2d 226 (1980); *Randall v. State,* 656 S.W.2d 487 (Tex.Crim.App.1983) (en banc). We concur with the first portion of defendant's argument concerning the necessity for establishing the existence of probable cause to carry out a warrantless arrest; however, we disagree that under the United States Constitution, amendments IV and XIV, and Article II, Sections 10 or 18 of the New Mexico Constitution, exigent circumstances were required to be shown as a prerequisite to effecting a valid warrantless arrest of defendant.

This court will not disturb a trial court's denial of a motion to suppress if it is supported by substantial evidence, unless it also appears that the ruling of the court was erroneously premised upon the law or facts. *State v. Boeglin,* 100 N.M. 127, 666 P.2d 1274 (Ct.App.1983); *see also State v. Segotta,* 100 N.M. 18, 665 P.2d 280 (Ct. App.), *rev'd on other grounds,* 100 N.M. 498, 672 P.2d 1129 (1983). In this case, we do not address the issue of whether the state constitution accords a greater breadth of protection against unreasonable searches and seizures than that provided under the federal constitution. *See State v. Sutton,* 112 N.M. 449, 816 P.2d 518 (Ct.App.1991). Defendant has not argued either at trial or on appeal that the state constitutional protections against unreasonable searches or seizures have been or should be interpreted differently from those contained in the federal constitution. Moreover, defendant's briefs do not indicate or cite to the record showing where defendant argued at trial that the state constitutional provisions against unreasonable searches and seizures should be construed differently from those contained in the United States Constitution. Under these circumstances, no issue asserting that a distinction exists between the state constitution and federal search and seizure provisions has been preserved for review on appeal. *Id.*

A law enforcement officer is empowered to arrest an individual without a warrant if, at the time of the arrest, the officer has

probable cause to believe that a crime was committed by the person arrested or he has probable cause to believe that the individual has committed, or is about to commit, a felony. *See United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (under common law and fourth amendment to United States Constitution, peace officer may arrest without a warrant for a felony committed in his presence or where officer has probable cause to believe the person arrested has committed or is committing a felony); *State v. Jones,* 96 N.M. 14, 627 P.2d 409 (1981) (warrantless arrest is valid where officer has probable cause to believe that a felony has been committed by the person he arrests); *Rodriquez v. State,* 91 N.M. 700, 580 P.2d 126 (1978) (if officer believes, and has good reason to believe, the person has committed or is about to commit a felony, warrantless arrest may be effected); *State v. Deltenre,* 77 N.M. 497, 424 P.2d 782 (1966) (search of the defendant incident to warrantless arrest held valid where arrest was based upon probable cause to believe that the defendant had committed or was committing a felony), *cert. denied,* 386 U.S. 976, 87 S.Ct. 1171, 18 L.Ed.2d 136 (1967); *State v. Garcia,* 100 N.M. 120, 666 P.2d 1267 (Ct.App.1983) (law enforcement officer may make valid warrantless arrest where he has probable cause to believe individual arrested has committed a felony); *State v. Kaiser,* 91 N.M. 611, 577 P.2d 1257 (Ct. App.1978) (where probable cause shown to exist indicating that the defendant has committed a felony or that a felony is being committed, need for police officer to obtain arrest warrant is obviated).

Defendant asserts that our supreme court in *Martinez* held that a warrantless arrest and ensuing search based on a radio dispatch to a police officer "must contain as high a standard showing probable cause and reliability as that required to support a warrant, in addition to exigent circumstances which would justify proceeding without a warrant." 94 N.M. at 440, 612 P.2d at 232. We agree that a law enforcement officer must demonstrate the existence of probable cause in order to validate an arrest made without a warrant, however, we do not read *Martinez* as modifying the general rule concerning the requirements necessary to effect a warrantless arrest articulated in *Rodriquez* and *Deltenre.* Moreover, *Jones,* decided by our supreme court after *Martinez,* sets forth the applicable rule in such cases.

Determination of whether probable cause exists for a peace officer to effect a warrantless arrest necessarily focuses upon the issue of whether the facts and circumstances known to the officer, or of which he has reasonably trustworthy information, would justify a person of reasonable caution to believe that the person arrested has committed or is committing an offense. *State v. Jones; Rodriquez v. State; State v. Rondeau,* 89 N.M. 408, 553 P.2d 688 (1976); *State v. Selgado,* 76 N.M. 187, 413 P.2d 469 (1966); *see also State v. Copeland,* 105 N.M. 27, 727 P.2d 1342 (Ct.App. 1986). In *Jones,* the court considered a case in which the initial information possessed by the arresting officer indicating that the defendant had committed a crime originated from an anonymous informant's tip. The *Jones* court reiterated the test necessary to establish the existence of probable cause to effect a valid warrantless arrest and observed that such "arrest may be based upon information from other persons where the information is corroborated or verified to an extent sufficient to establish the informant's credibility." 96 N.M. at 15, 627 P.2d at 410.

In reviewing the propriety of the trial court's ruling on a motion to suppress, the appellate court is not limited to the record of the proceedings held in conjunction with the motion, but, rather, may review the entire record to determine if the officer making the arrest acted upon probable cause supported by facts indicating that the information given by the informant was reliable. *See State v. Martinez.* The decision of a trial court as to the reasonableness of a warrantless arrest will not be disturbed on appeal if facts are found to exist in the record supporting the trial court's determination that the arrest was constitutionally reasonable and such conclusion is supported by substantial evi-

dence. *State v. Deltenre; see also State v. Martinez.* In order to effect a valid arrest, the officer need not have a knowledge of evidence sufficient to establish the guilt of an accused beyond a reasonable doubt; a showing of probable cause is sufficient. *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); *see also State v. Gibby,* 78 N.M. 414, 432 P.2d 258 (1967). Information given by an informant, which has been verified, or a showing that facts exist indicating the reliability of the informant, provides a basis to establish the existence of probable cause to believe that a felony has been or is being committed by an accused. *State v. Deltenre; State v. Barton,* 92 N.M. 118, 584 P.2d 165 (Ct.App. 1978).

We find defendant's reliance on out-of-state authority unpersuasive regarding the necessity of making a showing of the existence of exigent circumstances in order to effect a valid warrantless arrest. As the state correctly points out, West Virginia courts, although requiring a showing of exigency, have limited the requirement of exigency to warrantless arrests in a person's residence. *See, e.g., State v. Howerton,* 174 W.Va. 801, 329 S.E.2d 874 (1985); *State v. Craft,* 165 W.Va. 741, 272 S.E.2d 46 (W.Va.1980). *Randall* is similarly inapposite. In *Randall,* the court's decision turned on its determination that compliance was necessary with a statutory requirement of exigency before a warrantless arrest could be justified.

As observed by the Court in *United States v. Watson,* 423 U.S. at 421–23, 96 S.Ct. at 827:

> The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact. It appears in almost all of the States in the form of express statutory authorization....
>
> This is the rule Congress has long directed its principal law enforcement officers to follow. Congress has plainly decided against conditioning warrantless arrest power on proof of exigent circumstances. Law enforcement officers [however] may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. [Footnote omitted.]

The information from both the open court hearing on the motion to suppress and that given at the in camera hearings discloses the existence of substantial evidence from which the trial court could reasonably determine that Lara had probable cause to believe that defendant was transporting heroin at the time of his arrest. At the in camera hearing, Lara testified that he had been investigating defendant's alleged involvement in distributing illicit drugs for approximately a year. Lara further stated that he had previously set up a controlled buy of illegal drugs from defendant and the purchase was successfully completed, but he had not made an arrest because the circumstances surrounding such sale did not allow him to personally witness the sale. Lara further testified that he had previously received specific information from the confidential informant that indicated the informant's reliability. As discussed previously, the court also conducted an in camera hearing with the confidential informant. The confidential informant testified to facts and details of defendant's involvement in both past and current illicit drug activities. This information provided a valid basis for the trial court's determination that the informant had provided credible and reliable information to Lara in the past. In sum, we conclude the record supports the trial court's ruling finding that probable cause existed to justify the officers in effecting defendant's warrantless arrest and the search incident to his arrest. *See State v. Martinez; State v. Copeland.*

III. *Motion for Mistrial*

Finally, defendant argues that the trial court erred in denying his motion for a mistrial due to what he alleges were improper comments on his silence by the prosecutor. However, it is clear from both the original and amended judgment and sen-

tence that defendant reserved the right to appeal only pretrial issues pursuant to his guilty plea. Therefore, we determine that this issue was not properly preserved in the trial court and we decline to review it. *See* SCRA 1986, 12–213(A)(3) (Cum.Supp.1991); *State v. Ball,* 104 N.M. 176, 718 P.2d 686 (1986).

CONCLUSION

We affirm defendant's conviction.

IT IS SO ORDERED.

MINZNER, J., concurs.

APODACA, J., dissents.

APODACA, Judge, dissenting.

I respectfully dissent. The majority premises its decision on a holding that defendant's warrantless arrest was lawful solely because of the existence of probable cause and thus concludes that the trial court's refusal to suppress the evidence obtained in the eventual search was proper. I submit that this holding fails because it totally ignores a crucial fact—that the essential probable cause did not arise at the time of arrest but existed *the day before* the arrest, when the officer received the incriminating information from the confidential informant. The trial court later held at the in-camera hearing that the informant was a reliable source. Thus, exigent circumstances, which I maintain have always been required by our case law under facts such as present in this appeal, were nonexisting in this appeal. Consequently, I would hold that the officer's failure to obtain a search or arrest warrant, when he had almost a full day to do so, was unreasonable and thus, the evidence seized during the search should have been suppressed.

Because I would reverse on this issue, it is not essential to reach the other issues raised by defendant. However, I wish to briefly comment on the majority's conclusory discussion of the trial court's refusal to order disclosure of the confidential informant's name under SCRA 1986, 11–510(C)(2) and (3). It appears to me that disclosure of the confidential informant's identity would have eventually established that the officers possessed the necessary information the day before the arrest to obtain a warrant. Without this information, defense counsel was unable to adequately cross-examine the officer or challenge the legality of the warrantless arrest and seizure. Defense counsel found himself groping in the dark because he did not have access to the in-camera hearing transcript. But this court did have such access, and the transcript indicates, at least to me, that probable cause existed the prior day. Thus, this information would seem to be "relevant and helpful to the defense of the accused." SCRA 1986, 11–510(C)(2).

Additionally, although the majority acknowledges the need to balance the defendant's right to a fair trial and to due process with the state's need to maintain the free flow of information, it completely fails to discuss how this balance was reached. Instead, the majority simply makes the conclusory remark that it has determined "that the evidence before the trial court was sufficient to enable it to properly balance defendant's right to a fair trial and the state's interest in protecting its availability of information."

Ironically, the majority relies on the trial court's conclusion after the in-camera hearing that the information provided by the confidential informant gave the officers probable cause to make the arrest. This underscores the flimsiness of the officer's excuse that he did not seek an arrest or search warrant because he believed the informant's information had to be corroborated. If the information provided probable cause for a warrantless arrest or search, it provided probable cause for a search or arrest warrant, and there was no need for corroboration. It is thus clear to me that the officer's reason for not obtaining a search warrant was a subterfuge and inexcusable, and as such, should not be tolerated in light of constitutional requirements.

DEFENDANT HAS ADEQUATELY PRESERVED THE STATE CONSTITUTIONAL ISSUE

The majority declines to address the issue of whether Article II, section 10 of our

state constitution provides greater protection than the fourth amendment of the federal constitution. It bases its refusal to do so on the conclusion that defendant failed to preserve the issue. The majority relies on *State v. Sutton,* 112 N.M. 449, 816 P.2d 518 (Ct.App.1991) to support its assertion that defendant's failure to argue to the district court exactly how our state constitution provided greater protection failed to preserve the issue. Yet, *Sutton* cites no New Mexico authority for its proposition that a defendant must spell out to the trial court how and why a state constitutional provision should be interpreted differently from the analogous federal provision, and I know of none. I submit that defendant's mere reliance on the state constitutional provision both at trial and on appeal is sufficient to preserve the issue for our consideration. I believe defendant has met this requirement, and it is now incumbent upon us to address the state constitutional question.

However, even if there is some question that defendant did not preserve the issue or properly raise it on appeal, this court is free to consider a question of law not raised in the trial court if it is an issue "of a general public nature affecting the interest of the state at large." *Tiffany Constr. Co. v. Bureau of Revenue,* 96 N.M. 296, 299, 629 P.2d 1225, 1228 (1981). *See also State v. Sutton; In re Parental Rights to R.W.,* 108 N.M. 332, 772 P.2d 366 (Ct.App. 1989). The issue of whether Article II, section 10 of the New Mexico constitution requires both probable cause and exigent circumstances before a warrantless arrest is authorized is a question of a general public nature that merits the attention of this court.

RIGHTS GRANTED BY STATE CONSTITUTION ARE SEPARATE FROM THOSE GRANTED BY FEDERAL CONSTITUTION

Defendant argues that the arrest without a warrant was unconstitutional under both the federal *and* New Mexico constitutions. Although the majority acknowledges that defendant bases his argument for reversal both on state and federal constitutional provisions, I submit that its holding is solely premised on federal guidelines expounded by the United States Supreme Court in interpreting only federal constitutional provisions. Even so, the majority relies on several New Mexico cases for its holding that probable cause alone, without exigent circumstances, is sufficient to support a warrantless arrest or search. With all due respect, I submit that in so doing, the majority has misconstrued the true tenor of such holdings and consequently has misapplied those holdings to the facts peculiar to this appeal.

The majority initially relies on *United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), to determine that probable cause absent exigent circumstances justifies a warrantless arrest. That may or may not be true under federal constitutional standards. Granted, *Watson* has been relied on by courts of other states for the same purpose. However, it is not enough to test the lawfulness of a warrantless search or arrest under federal constitutional standards alone; it must be tested against the standards required by the New Mexico constitution as well. As noted by former United States Supreme Court Justice William J. Brennan, Jr.:

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 Harv.L.Rev. 489, 491 (1977). Many states have relied on their own constitutions to afford their citizens greater protections than those granted by the federal constitution. *See, e.g., Zehrung v. State,* 569 P.2d 189 (Alaska 1977); *People v. Disbrow,* 16 Cal.3d 101, 545 P.2d 272, 127 Cal.Rptr. 360 (1976); *State v. Brisendine,* 13 Cal.3d 528, 531 P.2d 1099, 119 Cal.Rptr. 315 (1975); *State v. Kaluna,* 55 Hawaii 361, 520 P.2d 51 (1974); *State v. Santiago,* 53 Hawaii 254, 492 P.2d 657 (1971); *State v. Johnson,* 68 N.J. 349, 346 A.2d 66 (1975);

People v. Griminger, 529 N.Y.S.2d 55, 71 N.Y.2d 635, 524 N.E.2d 409 (1988); *Commonwealth v. Triplett,* 462 Pa. 244, 341 A.2d 62 (Pa.1975); *State v. Jacumin,* 778 S.W.2d 430 (Tenn.1989); *State v. Jackson,* 102 Wash.2d 432, 688 P.2d 136 (1984). *See also* 90 Harv.L.Rev. at 498–500. The United States Supreme Court itself has recognized that states are free to grant greater rights and liberties than is required by federal constitutional law to its own citizens. *See Oregon v. Hass,* 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975) ("a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards") (emphasis in original); *Cooper v. California,* 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967).

Our own supreme court has asserted the independence of the New Mexico constitution and held that federal precedent is not controlling in interpreting state constitutional provisions. In *Chapman v. Luna,* 102 N.M. 768, 769, 701 P.2d 367, 368, *cert. denied,* 474 U.S. 947, 106 S.Ct. 345, 88 L.Ed.2d 292 (1985), the court stated: "Although the equal protection clauses of the United States Constitution and the New Mexico Constitution have been interpreted similarly, ... they nevertheless constitute independent rights and protections." *See also State v. Aragon,* 109 N.M. 197, 784 P.2d 16 (1989) (holding that state constitution guaranteed trial by an impartial jury independent of the U.S. constitution); *State ex rel. Serna v. Hodges,* 89 N.M. 351, 552 P.2d 787 (1976) ("We are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, 'unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter.' " 89 N.M. at 356, 552 P.2d 787, quoting *People v. Brisendine,* 13 Cal.3d at 541, 531 P.2d at 1112, 119 Cal.Rptr. at 328); *State v. Deltenre,* 77 N.M. 497, 424 P.2d 782, *cert. denied,* 386 U.S. 976, 87 S.Ct. 1171, 18 L.Ed.2d 136 (1967) (tested validity of warrantless arrest under both federal constitutional and state constitutional standards).

Our supreme court has explicitly held that federal precedent is not controlling in interpreting Article II, section 10 of our state constitution. *See State v. Cordova,* 109 N.M. 211, 212 n. 1, 784 P.2d 30, 31 n. 1 (1989) ("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 other federal precedent cited in the body of this opinion, albeit the reasoning of those opinions informs our result."). In *Cordova,* our supreme court rejected the "totality-of-the-circumstances" test enunciated by the United States Supreme Court in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), for reviewing the validity of a search warrant based on affidavits containing hearsay information. Instead, *Cordova* retained the two-prong test formulated by the United States 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). Our supreme court concluded that its "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.' " *State v. Cordova,* 109 N.M. at 212, 784 P.2d at 31; N.M. Const. art. II, § 10.

Thus, in New Mexico, "the decisions of [the United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them." 90 Harv. L.Rev. at 502. For these reasons, we are compelled to analyze whether a warrantless arrest made only on probable cause under the specific facts of this appeal is lawful under Article II, section 10 of the New Mexico constitution.

NEW MEXICO CONSTITUTION REQUIRES EXIGENT CIRCUMSTANCES TO JUSTIFY PROCEEDING WITHOUT A WARRANT

New Mexico has followed the general rule contained in both the fourth amendment of the federal constitution and Article II, section 10 of the New Mexico constitution that a warrant is normally required to authorize a search or an arrest. In *State v. Kaiser,* 91 N.M. 611, 577 P.2d 1257 (1978), our supreme court stated that "[a] warrantless search is per se unreasonable, subject to a very few, carefully delineated and limited exceptions." *Id.* at 613, 577 P.2d at 1259, quoting *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *State v. Ledbetter,* 88 N.M. 344, 540 P.2d 824 (Ct.App.1975); *State v. Gorsuch,* 87 N.M. 135, 529 P.2d 1256 (Ct.App.1974). It continued:

> "Exigent circumstances" are summarized ... as follows:
>
> "... (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge that 'efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged....'" [citations omitted]

Id., quoting U.S. v. Rubin, 474 F.2d 262 (3d Cir.1973), *cert. denied,* 414 U.S. 833, 94 S.Ct. 173, 38 L.Ed.2d 68 (1973). *See also State v. Corneau,* 109 N.M. 81, 781 P.2d 1159 (Ct.App.1989).

I see no reason to distinguish between the law regarding warrantless searches and warrantless arrests. Article II, section 10 of the New Mexico Constitution states "[t]he people shall be secure ... from unreasonable searches and seizures, and no warrant shall issue without describing the place to be searched, or the *persons* or things to be seized, nor without a written showing of probable cause...." N.M. Const. Art. II, § 10. (Emphasis added.) This provision grants the right to the people to be free of *both* unreasonable searches and seizures, and does not distinguish between them. As noted by Justice Marshall, "A warrant is required in the search situation to protect the privacy of the individual, but there can be no less an invasion of privacy when the individual himself, rather than his property, is searched and seized. Indeed, an unjustified arrest that forces the individual temporarily to forfeit his right to control his person and movements and interrupts the course of his daily business may be more intrusive than an unjustified search." *United States v. Watson,* 423 U.S. 411, 446, 96 S.Ct. 820, 839, 46 L.Ed.2d 598 (1976) (Marshall, J. dissenting).

New Mexico courts have thus scrutinized warrantless searches and arrests to determine that they were justified by a necessary exception to the warrant requirement. *See, e.g., State v. Calvillo,* 110 N.M. 114, 792 P.2d 1157 (Ct.App.1990) (danger that defendant would fire more shots justified unauthorized entry into house to seize gun); *State v. Copeland,* 105 N.M. 27, 727 P.2d 1342 (Ct.App.1986) (probable destruction of evidence justified warrantless entry into motel room and arrest of defendant); *State v. Chavez,* 98 N.M. 61, 644 P.2d 1050 (Ct.App.1982) (possible escape of suspect justified warrantless entry and arrest within 20 minutes of officers' interviewing rape victim); *State v. Bramlett,* 94 N.M. 263, 609 P.2d 345 (Ct.App.1980) (search of vehicle left parked on the street for several hours did not fall into "inventory search" exception to warrant requirement), *overruled on different issue, Armijo v. State Through Transp. Dept.,* 105 N.M. 771, 737 P.2d 552 (Ct.App.1987).

A common thread running through these exceptions is exigency. *See State v. Capps,* 97 N.M. 453, 454, 641 P.2d 484, 485 (1982) ("Two well recognized exceptions to obtaining a search warrant are: search incident to an arrest and the automobile exception.... The common element running through these two exceptions is exigency.") Our supreme court stated in *State v. Mar-*

tinez, 94 N.M. 436, 612 P.2d 228, *cert. denied,* 449 U.S. 959, 101 S.Ct. 371, 66 L.Ed.2d 226 (1980), that:

> [W]e state with great caution that an arrest or search warrant must be supported by affidavit, when based upon information from an informant, setting forth facts showing the reliability of the informant and probable cause. *We reiterate that the radio dispatch upon which a warrantless arrest or search is based must contain as high a standard showing probable cause and reliability as that required to support a warrant, in addition to exigent circumstances which would justify proceeding without a warrant. It must not be forgotten that in all cases the ultimate question is whether the search and seizure was reasonable.* (Citation omitted.) (Emphasis added.)

State v. Martinez 94 N.M. at 440, 612 P.2d at 232. This pronouncement by our supreme court clearly indicates to me that court's understanding that, in New Mexico, warrantless arrests or searches must be justified by showing both probable cause and exigent circumstances.

The cases relied on by the majority do not alter the general rule that to proceed lawfully without a warrant, an officer must have probable cause *and* exigent circumstances must be present. In fact, the existence of such circumstances was implicit in the holdings of those cases. That is why they did not deal explicitly with the question. The majority relies on *State v. Jones,* 96 N.M. 14, 627 P.2d 409 (1981), stating that that case, "decided by our supreme court after *Martinez,* continues to set forth the applicable rule in such cases." However, *Jones* merely set out the standard for determining probable cause. *State v. Jones,* 96 N.M. at 15, 627 P.2d at 410. It did not address the issue of exigent circumstances because it was not necessary to do so—exigent circumstances were clearly present there since it was obvious that there was no time to present an affidavit to a magistrate before the arrest occurred. *Id. Jones* did not hold that probable cause *alone* justified a warrantless arrest.

The other cases relied on by the majority are equally inapposite. *Rodriquez v. State,* 91 N.M. 700, 580 P.2d 126 (1978), is consistent with the general rule. In *Rodriquez,* there was no lengthy delay (as was present in this appeal) between the time when the informant gave the information regarding a possible crime to the officer and when the officer approached the house to investigate. Additionally, no arrest occurred until after the officer had seen drug paraphernalia from the doorway and in plain view. *Rodriquez v. State.* Thus, it was not the informant's tip but rather the drug paraphernalia in plain view that provided probable cause to support the arrest. *Id.* at 703, 580 P.2d at 129.

The facts of *State v. Kaiser* also indicate the existence of exigent circumstances, although they were not discussed because their existence was obvious. Probable cause was established by both a train conductor's suspicions before the fact *and* the reaction of two police dogs trained to detect marijuana shortly before the search and seizure. The court pointed out that neither of these two facts alone would have established probable cause, but that both, coming together at the moment of seizure, did so establish. The probable cause in this appeal, on the other hand, existed *the previous day,* not at the moment just prior to the arrest or search. This is an important distinction that has escaped the majority's analysis. In *Kaiser,* the luggage containing the marijuana was on an Amtrak train. Thus, it was quite apparent that there was insufficient time to obtain an arrest warrant before the train had to leave. There is one other extremely important aspect of the *Kaiser* decision that is not only revealing but pertinent to the point I make—although our supreme court upheld the warrantless search of the suitcase that the dogs had indicated contained marijuana, it nonetheless held that the warrantless search of the other luggage in the train compartment was unlawful. As to that seizure, the court stated that the police should have "just removed the luggage, taken it to the police station, and then secured a search warrant." *Id.* at 614, 577 P.2d at 1560. Why is this part of

the holding important? Because the court recognized that the exigency had ceased—the defendants were under arrest and they and their belongings could be taken into custody; the officers had all the time they needed to obtain the warrant, because the luggage was going nowhere.

The majority's reliance on *State v. Deltenre* is likewise misplaced. Again, the facts demonstrate exigent circumstances justifying the warrantless arrest. The informant corroborated his information by displaying marijuana he had obtained from the defendant and told the officers that the defendant would be leaving his apartment soon to peddle the drugs. Thus, there was insufficient time to obtain an arrest warrant between the moment when the officer spoke with the informant and the time when he went to the apartment to investigate. Additionally, the defendant displayed guilty knowledge when the officers approached, thus corroborating what the informant had said. *State v. Deltenre.*

State v. Garcia, 100 N.M. 127, 666 P.2d 1274 (Ct.App.1983), did not discuss state constitutional issues. Also, the facts are distinguishable—the delay between the time of learning of the possible crime and the moment of arrest was considerably shorter than the delay in this appeal. Equally important, the defendant, by attempting to flee when the officers wanted to question him, indicated a guilty conscience. *State v. Garcia.*

If one closely examines the facts of the New Mexico cases relied on by the majority, it is apparent that a common theme or thread runs through them—namely, the existence of exigent circumstances was so glaring that the courts found it unnecessary to note their presence. Significantly, in none of the cases relied on by the majority was there a delay, in both nature and time, similar to the delay that occurred in this appeal. In the cases involving informants, there was little delay between getting the informant's tip, corroborating the tip and effecting the arrest. Additionally, as I noted previously, our supreme court has repeatedly emphasized that warrantless searches and arrests must be closely scrutinized and that few exceptions to the warrant requirement should be allowed. I conclude that the cases relied on by the majority to conclude that probable cause alone will make a warrantless arrest lawful actually lead to the opposite conclusion: in New Mexico, both probable cause and exigent circumstances are required.

In *State v. Copeland,* 105 N.M. 27, 727 P.2d 1342 (Ct.App.1986), a case not relied on by the majority, this court discussed the necessity of having both probable cause and exigent circumstances to justify a warrantless arrest. Although this case concerned the warrantless, nonconsensual entry into a motel room, I find no New Mexico case law limiting the requirement of probable cause and exigent circumstances to "private places." Significantly, until now, no New Mexico court has ever embraced the broad exception apparently adopted in *U.S. v. Watson.* Instead, New Mexico courts have consistently required the presence of exigent circumstances, as well as probable cause, to justify warrantless searches and seizures.

The majority would create a new exception—naked probable cause as determined by the officer alone—to the constitutional requirement that police officers obtain a warrant before conducting a search or making an arrest. I consider this exception unacceptable, in light of our own supreme court's pronouncement in *Cordova* that federal precedent is not binding in interpreting Article II, section 10 of the New Mexico constitution and the consistently close scrutiny New Mexico courts have always applied to warrantless searches and arrests. I concede that, although state constitutional grounds may have been raised in the New Mexico cases I have discussed, the cases' holdings were based generally on federal constitutional requirements. However, the fact that we have not yet unequivocally asserted that our constitution provides greater protection to the people of New Mexico than the federal constitution on this issue does not prevent us from asserting the independence of our constitution now in this appeal. *See State v. Cordova.*

The majority's holding undermines "the fundamental precepts of the constitutional requirement that no warrant issue without a written showing of probable cause before a detached and neutral magistrate." *State v. Cordova,* 109 N.M. at 216, 784 P.2d at 35. As observed in *Cordova,* "[i]t is not possible to argue that since certain information, if true, would be trustworthy, therefore, it must be true. The possibility remains that the information may have been fabricated." *State v. Cordova,* 109 N.M. at 214–25, 784 P.2d at 33–34, quoting *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.). It is to protect against this possibility that the New Mexico constitution requires that the existence of probable cause be considered by a neutral magistrate whenever possible before a search or an arrest is made. N.M. Const. art. II, § 10.

Our supreme court, despite affirming the validity of the warrantless arrest in *Rodriquez,* nonetheless emphasized the desirability of proceeding with a warrant in the strongest language. It stated:

> In discussing the fourth amendment policy against unnecessary invasions of privacy, it was stated in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), that informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over the hurried action of officers who may happen to make arrests. In *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)[,] the United States Supreme Court strongly supported the preference to searches under a warrant and they indicated that in a marginal case a search under a warrant may be sustainable where without one it would fail. In speaking for the court in *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), Mr. Justice Jackson stated:
>
> > The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies 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.
> >
> > Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. (Footnotes omitted.)
>
> *Id.* at 13–14, 68 S.Ct. at 369.

Rodriquez v. State, 91 N.M. at 704, 580 P.2d at 130. Thus, our supreme court emphasized its belief that searches performed without warrants are disfavored and should be closely scrutinized. The same rationale clearly applies to an arrest, which is even more intrusive than a search. "Surely there is no reason to place greater trust in the partisan assessment of a police officer that there is probable cause for an arrest than in his determination that probable cause exists for a search." *United States v. Watson,* 423 U.S. at 447, 96 S.Ct. at 839 (Marshall, J., dissenting).

The majority's holding wreaks the evil that the courts in this state have previously strived to avoid, namely, leaving the determination of whether the evidence is sufficient to justify a warrant solely to the discretion of police officers, thus depriving the people of their constitutional right to have the evidence scrutinized by a disinterested, neutral magistrate before their homes, persons and possessions are seized. *See State v. Baca,* 97 N.M. 379, 381, 640 P.2d 485, 487 (1982) ("it is for the neutral and detached judge to determine from the affidavit whether probable cause exists. A police officer is not vested with that authority.").

Requiring police officers to comply with the warrant requirement of the New Mexico constitution is not unduly burdensome. As noted by Justice Marshall's dissent in *United States v. Watson:*

> The Government's assertion that a warrant requirement would impose an intolerable burden stems, in large part, from the specious supposition that procurement of an arrest warrant would be necessary as soon as probable cause ripens. There is no requirement that a search warrant be obtained the moment police have probable cause to search. The rule is only that present probable cause be shown and a warrant be obtained before a search is undertaken. The same rule should obtain for arrest warrants, where it makes even more sense. Unlike probable cause to search, probable cause to arrest, once formed, will continue to exist for the indefinite future, at least if no intervening exculpatory facts come to light. (Citations omitted.)

United States v. Watson, 423 U.S. at 449, 96 S.Ct. at 840 (Marshall, J. dissenting). Justice Marshall continued:

> Police would not have to cut their investigation short the moment they obtain probable cause to arrest, nor would undercover agents be forced suddenly to terminate their work and forfeit their covers. Moreover, if in the course of the continued police investigation exigent circumstances develop that demand an immediate arrest, the arrest may be made without fear of unconstitutionality, so long as the exigency was unanticipated and not used to avoid the arrest warrant requirement. Likewise, if in the course of the continued investigation police uncover evidence tying the suspect to another crime, they may immediately arrest him for that crime if exigency demands it, and still be in full conformity with the warrant rule.... *Other than where police attempt to evade the warrant requirement, the rule would invalidate an arrest only in the obvious situation: where police, with probable cause but without exigent circumstances, set out to arrest a suspect. Such an arrest must be void, even if exigency develops in the course of the arrest that would ordinarily validate it; otherwise the warrant requirement would be reduced to a toothless proscription.*
>
> In sum, the requirement that officers about to arrest a suspect ordinarily obtain a warrant before they do so does not seem unduly burdensome, at least no more burdensome than any other requirement that law enforcement officials undertake a new procedure in order to comply with the dictates of the Constitution. (Citations omitted.) (Emphasis added.)

U.S. v. Watson, 423 U.S. at 449–51, 96 S.Ct. at 840–41. *See also State v. Gorsuch,* 87 N.M. 135, 529 P.2d 1256 (Ct.App. 1974). "[The warrant requirement] is not a convenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well intentioned but mistakenly over-zealous executive officers' who are a part of any system of law enforcement." *Garcia v. State,* 103 N.M. 713, 715, 712 P.2d 1375, 1377 (1986) (Sosa, J. specially concurring). The majority would reduce the warrant requirement mandated by Art. II, section 10 of the New Mexico Constitution, to a "toothless proscription" limited only by police officers' independent determination of probable cause, and, in doing so, eliminating this important check on the ability of police to intrude on the lives of our citizens. It is such over-zealous conduct that our constitutional warrant requirement was meant to protect against.

CONCLUSION

The state has made no attempt whatsoever to show that exigent circumstances existed, nor has it shown that there was inadequate time for the officer to obtain a search or arrest warrant. Instead, the state has steadfastly maintained that exigent circumstances were not required. I would conclude from the state's failure that the warrantless search and arrest of defendant therefore violated the New Mexico constitution and that the evidence seized should have been suppressed. I would thus hold that the trial court erred in not suppressing the evidence, would reverse defendant's conviction, and remand for a new trial.

This appeal comes at the discomforting time when the Supreme Court of our land is whittling away at the fundamental and sacred rights and privileges guaranteed by our federal constitution to all people from all walks of life. Regrettably, a growing number of that court's members is apparently swayed by a false public perception that the courts in this country have somehow become soft on crime in general and criminals in particular and that the rights of victims have been trampled upon in the process. Although ordinarily I would be inclined to sympathize with this often-expressed view, to me, it is only a misconception. We must take the precaution that the general public does not become its own victim of this trend. I myself usually have to work hard to resist the knee-jerk tendency of reacting to a perceived extremism by adopting an extremist point of view at the opposing end of the ideological spectrum.

To those who may be continually repelled by application of our constitutional safeguards to suppress evidence that would otherwise convict those depicted as merciless criminals, I would say—let one of their own loved ones, their own flesh and blood, or a dear and close friend, become a defendant in a criminal proceeding. It is then that they will realize the value of protecting those treasured constitutional rights they too often take for granted. It is not enough to answer that the same constitutional guarantees will permit even those perceived to be less deserving to go free. I once read a profound truism, by an author unknown, that justice in a society is measured not by how it treats its best citizen, but by how it treats its worst. As noted by now-retired, Chief Justice Sosa:

> There exist countless cases on record in which officers, either from their overzealous efforts to enforce the law or solve a crime, or because of their particular dislike of members of a certain minority group, commit acts which violate our constitution....
>
> I intend these examples simply as illustrations that courts must continually enforce constitutional rights as a reminder that such fundamental rights are not to be violated. Once we commence lowering the barriers of constitutional protections because of a particular defendant's guilt, then we lower the barriers for all, and for the countless number of people who may be unduly harassed by officers from whom we never hear because of their innocence, and because they chose to endure the harassment rather than speak up.

State v. Capps, 97 N.M. at 463–64, 641 P.2d at 494–95 (Sosa, J., dissenting).

I suppose the "good news" is that each of the states is free to fall back on its own state constitutional provisions to protect its citizens. Thus, a workable check and balance can be maintained between the federal constitution and the respective state constitutions—when one fails to protect us, let us hope the other one will not. This appeal affords us the opportunity to assert the independent rights guaranteed to the people of New Mexico by our own constitution. I believe we should welcome that opportunity.

827 P.2d 152

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert S. ORTEGA, Defendant-Appellant.

No. 12952.

Court of Appeals of New Mexico.

Jan. 14, 1992.

Tom Udall, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

C. Barry Crutchfield, Templeman and Crutchfield, Lovington, for defendant-appellant.

OPINION

BIVINS, Judge.

Convicted of battery upon a peace officer contrary to NMSA 1978, Section 30–22–24 (Repl.Pamp.1984), Defendant appeals. He raises two issues. First, Defendant claims that since the uncontradicted evidence shows that he never touched the person of the peace officer—only grabbed or knocked a flashlight out of the officer's hand—substantial evidence does not support a conviction of battery upon a peace officer. Second, and closely related to the first issue, Defendant claims that the trial court erred in giving a jury instruction defining the crime of battery upon a peace officer to include knocking or taking of a flashlight from the hand of the officer. We answer these contentions as follows: First, there was direct evidence from the officer that blows were exchanged between Defendant and the officer which, if believed, would support direct touching or application of force to the person of the peace officer. Second, even if the jury did not believe that there was direct touching or application of force by the exchange of blows, nevertheless, the grabbing or knocking of the flashlight from the hand of the officer, which Defendant admits he did, suffices as intentional touching or application of force to the person of the peace officer. The instruction correctly described the crime. Therefore, we affirm Defendant's conviction.

On October 12, 1989, at approximately 8:30 p.m., Officer Greg Adams of the Hobbs Police Department, accompanied by rookie Officer Mark Hargrove, responded to a call of a disturbance at the Greystoke Lounge. As the two officers arrived at the lounge, they noticed a silver 1982 Firebird stopped at a light adjacent to the lounge, headed in the opposite direction from which the officers were travelling. An individual in the parking area of the lounge pointed at the Firebird. The officers turned their unit around and stopped the car for what Officer Adams described as an investigative stop.

Noticing that the driver of the vehicle appeared to be intoxicated, Officer Adams took the driver, later identified as Mark Alvarado, to a flat concrete slab for a field sobriety test. At that time, Officer Hargrove was talking to the other two occupants of the vehicle, one of whom was Defendant. Officer Adams overheard Defendant shouting obscenities at Officer Hargrove and went over to assist, since Officer Hargrove was inexperienced.

As he approached, Officer Adams told Defendant to calm down and that if he did not cease shouting obscenities, he would be arrested for disorderly conduct. Officer Adams had a flashlight in his hand. Officer Adams testified that Defendant grabbed the flashlight, pulled it out of his

hand and tried to hit the officer with his right fist. The officer said that he was able to knock the flashlight out of Defendant's hand. "At that point several blows between Mr. Ortega and myself were exchanged and then I was jumped by the other two occupants of the vehicle." Officer Adams described the blows as "hitting each other with our fists."

On cross-examination, defense counsel questioned Officer Adams concerning previous testimony that he had given a year earlier at the preliminary hearing. When questioned as to whether he testified that Ortega struck him, the officer said he did not recall his earlier testimony but reiterated, "I believe he did, yes sir." Defense counsel was then able to obtain a concession from Officer Adams that he, at the time of trial, was making an assumption that blows were exchanged with Defendant. "That's the way I had it written in my report," he testified, referring to a police report filed shortly after the incident.

The officer also conceded that it was possible that when Defendant grabbed the flashlight, it was one or both of the Alvarado brothers who jumped him. When pressed as to whether the officer could remember, as of the time of trial, whether Defendant actually did more than grab the flashlight, the officer agreed he could not.

On redirect examination, the prosecutor attempted to rehabilitate the officer's prior direct testimony regarding the exchange of blows. In response to questions, Officer Adams said that he did make a report, that it was accurate at the time it was made, and that he presently did not remember all the details of the occurrence. When the prosecutor inquired again if blows were exchanged, an objection was lodged and a bench conference held. The bench conference is not audible but the prosecutor then proceeded with his questions, at which time the officer answered that, according to his report, blows were exchanged between himself and Defendant. The judge admonished the jury to disregard the answer. Officer Adams then said he and Defendant may have fought but that he was not sure when he was testifying.

SCRA 1986, 11–803(E) permits the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection, when it is shown that the record was made or adopted by the witness when the matter was fresh in his memory. While it may have been an error to refuse to allow the officer to read what was in his report, nevertheless, the trial court's admonition to the jury did not affect the officer's prior direct testimony regarding the exchange of blows. That evidence came in without objection. If the jury believed that testimony, then Defendant's argument on appeal fails because there was direct evidence of intentional touching or application of force to the person of Officer Adams. Even if the jury did not believe that blows were exchanged, it would nevertheless have been justified in convicting based upon Defendant's own admission that he grabbed or knocked the flashlight out of the hand of the officer.

Section 30–22–24(A) states: "Battery upon a peace officer is the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner." Defendant contends that the knocking of the flashlight from the officer's hand did not constitute a battery under Section 30–22–24(A) because there was never any actual contact between Defendant and Officer Adams. Further, Defendant argues that the statute should be construed to require a direct touching or application of force to Officer Adams' person.

New Mexico law provides ample guidance to this court in construing a statute.

> The cardinal rule of statutory construction is that there is no need to construe an unambiguous statute. Instead, the reviewing court will give a literal meaning to such a statute to give effect to its plain meaning. However, a court will not give a statute a literal reading when to do so leads to absurd or unreasonable results * * *.

State v. Wyrostek, 108 N.M. 140, 142, 767 P.2d 379, 381 (Ct.App.1988) (citations omit-

ted), *cert. denied,* 108 N.M. 115, 767 P.2d 354 (1989). Defendant's reading of Section 30–22–24(A) would permit a person to actually touch or apply force to something closely associated to the person of a peace officer without violating the statute. We do not read the statute so narrowly.

Although the issue Defendant raises is one of first impression in New Mexico, commentaries and case law from other jurisdictions provide support for the result we reach. Commentators explain that battery does not require actual physical contact between the defendant and the victim. In W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 9, at 39–40 (5th ed. 1984), it is stated:

> Protection of the interest in freedom from intentional and unpermitted contacts with the plaintiff's person extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus, if all other requisites of a battery against the plaintiff are satisfied, contact with the plaintiff's clothing, or with a cane, a paper, *or any other object held in the plaintiff's hand,* will be sufficient. * * * The interest in the integrity of person includes all those things which are in contact or connected with the person. [Emphasis added and footnotes omitted.]

Similarly, in 6A C.J.S. *Assault & Battery* § 70, at 440–41 (1975), it is stated:

> It is essential to the offense of battery ... that there be a touching of the person of the prosecutor, or of something so intimately associated with, or attached to, his person as to be regarded as a part thereof. * * *
>
> Accordingly, battery may consist in the ... snatching or wresting something from his possession. * * * The contact may have been with the clothes of the prosecutor or with something carried by him. [Footnotes omitted.]

Defendant contends that the application of authority relating to common law battery concepts would be erroneous. However, "[t]he elements of civil and criminal assault and battery are essentially identical." 6A C.J.S. *Assault & Battery* § 2 at 319 (1975); *see also Virgin Islands v. Stull,* 280 F.Supp. 460, 462 (D.C.V.I.1968). The elements of Section 30–22–24(A) are substantially similar to those stated in the *Restatement (Second) of Torts* § 18 (1965), which provides:

> (1) An actor is subject to liability to another for battery if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) an offensive contact with the person of the other directly or indirectly results.

Criminal law commentators also suggest that physical contact between the defendant and the victim is not required. *See generally* 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 7.15, at 303 (1986) (force in criminal battery need not be applied directly to the body of the victim; it may be applied indirectly.) In addition, case law from other jurisdictions supports the proposition that there need not be direct touching of the victim's person in order for a battery to occur. Touching something intimately connected with the victim's body is sufficient. In *Fisher v. Carrousel Motor Hotel, Inc.,* 424 S.W.2d 627, 629 (Tex.1967), for example, cited by the State in this action, the defendant snatched a patron's dinner plate from his hands without touching the patron. The court held that the intentional grabbing of the patron's plate constituted a battery. The court stated that "[t]he intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body." *Id.; see also Stokes v. State,* 233 Ind. 10, 115 N.E.2d 442, 443 (1953) (where defendant fired gun, bullet perforated victim's necktie and creased victim's shirt, defendant's action constituted battery); *Morgan v. Loyacomo,* 190 Miss. 656, 1 So.2d 510, 511 (1941) (defendant's action of forcibly seizing package from under customer's arm constituted battery); *cf. State v. Gammil,* 108 N.M. 208, 210, 769 P.2d 1299, 1301 (Ct.App.1989) (discuss-

ing merger, held that aggravated battery, consisting of grabbing victim's purse and then spinning and throwing her to the ground, merged with robbery).

We reject Defendant's literal reading of the statute and hold that the word "person" as used in New Mexico's battery upon a peace officer statute includes anything intimately connected with person. Accordingly, the flashlight which Officer Adams carried was part of Officer Adams' "person" as contemplated by Section 30–22–24(A). That is the way the trial court read the statute and we agree. It would be strange, indeed, if one could with impunity grab an item in a peace officer's hand, such as a night stick, flashlight, or weapon, spin the officer around, causing the officer to fall to the ground, or even worse, fall from a building, out a window, into a mine shaft, off a ship, or out of an airplane, and then claim no battery occurred because, "I never touched his person."

Not only is the safety of a peace officer at stake, we believe the legislature, by enacting Section 30–22–24, intended to avoid a challenge to the officer's authority. The case before us illustrates that purpose clearly. After the flashlight was knocked from Officer Adams' hand, Defendant's companions jumped Officer Adams. Defendant then fought with Officer Hargrove. Testimony reflects that the assistance of several citizens was required to subdue Defendant and his companions.

The trial court's jury instruction stated, in part, that the offense of battery upon a peace officer could be proved by showing that Defendant "knocked or took a flashlight from Greg Adams; or hit Greg Adams." Defendant contends that the jury instruction was erroneous. Based on the discussion above, the jury was properly instructed that it could find Defendant guilty if it found that Defendant knocked or took the flashlight out of Officer Adams' hand. *See, e.g., State ex rel. State Highway Dep't v. Strosnider,* 106 N.M. 608, 612, 747 P.2d 254, 258 (Ct.App.1987) (party entitled to jury instruction on correct legal theories of its case if supported by evidence); *cf. State v. Isiah,* 109 N.M. 21, 31–32, 781 P.2d 293, 303–04 (1989) (no error in refusing instruction which incorrectly states applicable law). We affirm Defendant's conviction.

IT IS SO ORDERED.

ALARID, C.J., and MINZNER, J., concur.

827 P.2d 156

Hector NORIEGA, Sr., and Rosa Noriega, Individually and as Parents and Next Friends and Guardians of Hector Noriega, Jr., Plaintiffs–Appellants,

v.

STAHMANN FARMS, INC., and Elephant Butte Irrigation District, Defendants–Appellees.

No. 12534.

Court of Appeals of New Mexico.

Jan. 24, 1992.

Certiorari Denied Feb. 26, 1992.

Fred Abramowitz, Albuquerque, for plaintiffs-appellants.

Jack T. Whorton, Whorton Law Offices, Alamogordo, for defendant-appellee Elephant Butte Irrigation Dist.

OPINION

CHAVEZ, Judge.

Plaintiffs, Hector Noriega and Rosa Noriega, brought suit against defendants, Elephant Butte Irrigation District (EBID) and Stahmann Farms, Inc., alleging negligence, *inter alia,* in failing to keep the area adjacent to an EBID ditchbank in a safe condition and in failing to install warning signs or fences, resulting in injuries to five-year-old Hector Noriega, Jr. Waiver of immunity of EBID was alleged in plaintiffs' first amended complaint pursuant to NMSA 1978, Sections 41-4-6 and 41-4-11 (1989 Repl.Pamp.) EBID, not joined by Stahmann Farms, Inc., moved to dismiss the first amended complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted. SCRA 1986, 1-012(B)(1), (6). This is an appeal from the trial court's order granting the motion to dismiss. We affirm.

FACTS

The alleged facts of this case, which for the purpose of the motion to dismiss are admitted, are that Hector Noriega, a child five years of age, suffered injuries while playing on property owned by EBID. The area in question was in the vicinity of housing owned by defendant Stahmann Farms, Inc., and occupied by Stahmann Farms' farmworkers. The child was visiting relatives employed by Stahmann Farms when he wandered near the irrigation ditch. The child was discovered lying in the ditch where he had apparently been for several minutes.

The issue, as presented, is whether the trial court erred in granting the motion to dismiss the first amended complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6). Accordingly, we apply the test applicable to Rule 12(b)(6). The general rule is that this court assumes the truth of the facts alleged in the complaint. *Castillo v. County of Santa Fe,* 107 N.M. 204, 755 P.2d 48 (1988). A motion to dismiss for failure to state a claim should be granted only if it appears that plaintiff cannot recover, or be entitled to relief, under any state of facts provable under the complaint. *Id.*

Under the pleaded facts, EBID is a state governmental entity and the area adjacent to the irrigation ditchbank and canal,

owned by EBID, was overladen with weeds and grass which obscured the porous dirt siding of the irrigation ditchbank and canal. The area adjacent to the irrigation ditchbank and canal had no warning signs or notices of any kind.

The trial court found that plaintiffs did not allege any facts to establish that immunity of EBID had been waived regarding plaintiffs' claim, and that the first amended complaint alleged facts that established only that the incident from which their claims arose occurred on an irrigation ditch, which is a work used for the diversion or storage of water, as set forth in Section 41-4-6.

LIABILITY UNDER THE TORT CLAIMS ACT

The Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (Repl.Pamp.1989), shields both governmental entities and public employees from liability for torts except when immunity is specifically waived in the Act. *See Wittkowski v. State Corrections Dep't*, 103 N.M. 526, 710 P.2d 93 (Ct.App. 1985); NMSA 1978, § 41-4-2. It is undisputed that EBID is a local public body and a governmental entity as defined in the Tort Claims Act. NMSA 1978, § 41-4-3(B) and (C). Plaintiffs assert that immunity was waived pursuant to Section 41-4-6.

Section 41-4-6 reads:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings. Nothing in this section shall be construed as granting waiver of immunity for any damages arising out of the operation or maintenance of works used for diversion or storage of water.

In this case, the first amended complaint states that the "area adjacent to the irrigation ditchbank and canal had not been properly maintained in that it was overladen with extensive weeds and grass which obscured the porous dirt siding of the irrigation ditchbank and canal." It also alleges that Hector Noriega slipped and fell into the ditchbank as a consequence of the condition of the property. Even if the weeds obscured the embankment, this would still be within the bounds of the immunity. If these facts are admitted as true, there would be no liability because the injuries arose out of the operation and maintenance of the irrigation ditch. The first sentence of Section 41-4-6 is not a general waiver of immunity with respect to negligent maintenance of all public lands. It is restricted to negligent maintenance of buildings, public parks, machinery, equipment, and furnishings. However, maintenance of a structure encompasses maintenance of the property surrounding the structure. *See Castillo; Schleft v. Board of Educ.*, 109 N.M. 271, 784 P.2d 1014 (Ct.App.1989). Thus, the first sentence of Section 41-4-6 could be read to waive immunity for negligent maintenance of the property bordering an irrigation canal. But if maintenance of the canal encompasses maintenance of adjacent property for purposes of the waiver of immunity in the first sentence of Section 41-4-6, "maintenance" must have the same meaning for purposes of the second sentence of the section, thereby withdrawing the waiver of immunity in this case.

Plaintiffs' brief-in-chief also alleges that the complaint states a claim against EBID pursuant to NMSA 1978, Section 41-4-11. This section of the Tort Claims Act provides for waiver of immunity for the negligent maintenance of a roadway. Although plaintiffs' amended complaint alleges a waiver of immunity under Section 41-4-11, the complaint fails to allege any facts that would bring the claim within that section. The complaint does not even allege the existence of a road, much less that the road was owned by EBID or that the road had any causal relationship with the accident. Plaintiffs attempt to remedy this shortcoming by attaching to their brief-in-chief on appeal an excerpt from a deposition of William J. Stahmann taken five months after the trial court dismissed the

claim against EBID. Mr. Stahmann testified to the existence of a road near the irrigation canal. Even were we to consider such an untimely addition to the record, we note that the deposition does not support a claim that the road was EBID's. On the contrary, Mr. Stahmann testified that the road was constructed by Stahmann Farms. Thus, plaintiffs have not established a basis for liability and a waiver of immunity pursuant to Section 41–4–11. Without a waiver of immunity pursuant to Section 41–4–11 or Section 41–4–6 in this case, the allegations in the complaint were insufficient to state a claim upon which relief could be granted.

CONCLUSION

The order of the trial court dismissing the complaint is affirmed. No costs are awarded.

IT IS SO ORDERED.

HARTZ and PICKARD, JJ., concur.

827 P.2d 159

Anselmo SERRANO, Plaintiff–Appellee,

v.

STATE of New Mexico, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Defendant–Appellant.

No. 11729.

Court of Appeals of New Mexico.

Feb. 4, 1992.

Andres A. Benavidez, Albuquerque, for plaintiff-appellee.

Tom Udall, Atty. Gen., Albert Roland Fugere, Special Asst. Atty. Gen., Santa Fe, for defendant-appellant.

OPINION

FLORES, Judge.

The Department of Alcoholic Beverage Control (ABC) appeals from the district court's order reversing the State Personnel Board's (Board) decision to terminate Anselmo Serrano (Serrano) from his employment. ABC raises several issues which will be consolidated for purposes of this appeal. We address three issues: (1) whether Serrano met the definition of "police officer" pursuant to NMSA 1978, Section 29-7-7(F) (Cum.Supp.1981), (2) whether Serrano was subject to the law enforcement certification requirements of NMSA 1978, Section 29-7-8 (Cum.Supp.1981), and (3) whether ABC's termination of Serrano was in violation of article II, Section 19, of the New Mexico Constitution. We reverse.

FACTS

Serrano was hired as a full-time employee of ABC in 1972. At that time ABC agents were not required to be certified as police officers under New Mexico law. The attorney general's office stated in a letter-opinion, dated September 1984, that the certification requirement of Section 29-7-8 applies to ABC officers. Pursuant to that attorney general's letter-opinion, ABC informed Serrano in November 1984 that he must meet the law enforcement certification requirement of Section 29-7-8 because Serrano, as an employee of ABC, fell within the new expanded definition of a police officer. After repeated attempts, Serrano failed to meet the law enforcement certification requirement and was eventually terminated from his employment in March 1986.

Serrano appealed his termination to the Board, which upheld the termination by ABC. Serrano appealed to the district court, which found that Serrano's termination was arbitrary, capricious, and not in accordance with law. The district court ordered that the decision of the Board be reversed and remanded to the Board for proceedings consistent with the district court's order.

STANDARD OF REVIEW

Appellate review of an administrative agency decision 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." *In re Mountain Bell,* 109 N.M. 504, 505, 787 P.2d 423, 424 (1990).

We employ the whole record standard of review in making this determination. *See id.*

DEFINITION OF A POLICE OFFICER PURSUANT TO SECTION 29-7-7(F)

In 1971, the legislature enacted a law defining a police officer as "any full-time employee of a police department which is part of or administered by the state or any political subdivision thereof and which employee is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this state." 1971 N.M.Laws, ch. 247, § 3 (codified at NMSA 1953, 2d Repl.Vol. 6 (1972), § 39-6-11). At the time of Serrano's initial hiring in 1972, his employment position did not fall within the definition of a police officer pursuant to Section 39-6-11. Therefore, Serrano was not required to comply with the provisions of Section 39-6-10, requiring police officers to obtain a law enforcement certificate. NMSA 1953, 2d Repl.Vol. 6 (1972), § 39-6-10.

However, in 1981 the legislature expanded the coverage of the certification requirement for law enforcement officers by changing the definition of "police officer" from full-time employees of a "police department" to include those individuals who were full-time employees of a "law enforcement agency." 1981 N.M.Laws, ch. 114, § 6 (codified at § 29-7-7(F), formerly § 39-6-11). Section 29-7-7(F) provides in pertinent part:

> "[P]olice officer" means any full-time employee of a law enforcement agency which is part of or administered by the state or any political subdivision thereof and which employee is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this state.

The duties performed primarily determine whether a person's employment position is of a law enforcement nature or whether an agency is a law enforcement agency. *See Anchondo v. Corrections Dep't,* 100 N.M. 108, 666 P.2d 1255 (1983). At all pertinent times, ABC has been a state agency authorized to administer and enforce the Liquor Control Act (Act). NMSA 1978, § 60-4B-2(A)(1) (Repl.Pamp.1987). Part of ABC's duties have been to engage in the prevention and detection of crime, and to enforce numerous penal provisions of the Act. *See, e.g.,* NMSA 1978, § 60-7A-19 (Repl.Pamp.1987). ABC's agents and other employees have been commissioned as peace officers in the performance of their duties. NMSA 1978, § 60-4B-2(B) (Repl.Pamp 1987). Therefore, ABC has been a law enforcement agency, and Serrano, as a full-time employee of ABC, has come within the new expanded definition of "police officer" pursuant to Section 29-7-7(F).

CERTIFICATION REQUIREMENT OF SECTION 29-7-8

Having determined that Serrano was a full-time employee of ABC, and as such, a "police officer" within the meaning of Section 29-7-7(F), we consider whether Serrano was subject to the law enforcement certification requirement of Section 29-7-8. In 1981, the legislature amended the requirements for police officers, but retained the law enforcement certification requirement of Section 39-6-10, which had been in effect since 1971. 1981 N.M.Laws, ch. 114, § 9 (codified at § 29-7-8, formerly § 39-6-10). Section 29-7-8 provides in pertinent part:

> **Prerequisites for permanent appointment and continued employment as a police officer.**
>
> A. Notwithstanding any provisions of any general, special or local law to the contrary, no person shall receive an original appointment on a permanent basis as a police officer to any law enforcement agency in this state unless such person:
>
> ....
>
> (6) has previously been awarded a certificate by the director attesting to such person's satisfactory completion of an approved basic law enforcement training program.

First, Serrano contends that Section 29-7-8 does not apply to him because he was employed in 1972 as a permanent employee of ABC and had never received an "original appointment" as a police officer. We do

not agree. Section 29–7–8 became applicable to Serrano by operation of law in 1981 when the legislature expanded the definition of "police officer" to include employees of law enforcement agencies. Therefore, on April 3, 1981, the effective date of Section 29–7–7(F), Serrano received his "appointment" as a police officer and as such he became subject to the completion of the certification requirement of Section 29–7–8.

Serrano had twelve months from the date of his appointment as a police officer to complete his law enforcement certification requirement under Section 29–7–8(B). Section 29–7–8(B) states:

> B. Every person who is employed on a temporary basis by any law enforcement agency in this state shall forfeit his position as such unless within twelve months from the date of his employment he satisfactorily completes a basic law enforcement training program and is awarded a certificate attesting thereto.

Serrano received his "appointment" on a temporary basis under Section 29–7–7(F) on its effective date in April 1981 and was required to obtain law enforcement certification by April 1982, pursuant to Section 29–7–8(B). However, Serrano continued as an employee of ABC, without obtaining certification before his termination in March 1986. In this regard, Serrano contends that he in fact obtained such certification. But the record reflects that the certification he obtained was pursuant to a different statute and was not an equivalent or substitute for the certification required by Section 29–7–8.

Second, Serrano argues that because he was appointed to his employment position prior to the statute's effective date of April 3, 1981, he was exempted from the law enforcement certification requirement of Section 29–7–8. We do not agree.

Our construction of the statute is supported by the heading of the 1981 enactment. In 1981, the legislature changed the heading of Section 29–7–8 from "Prerequisites for permanent appointment as a police officer" to "Prerequisites for permanent appointment and *continued* employment as a police officer." (emphasis added). While the heading cannot be used to produce an ambiguity in a statute which is otherwise clearly drafted, *State v. Ellenberger*, 96 N.M. 287, 629 P.2d 1216 (1981), a legislatively enacted section heading may be useful in determining legislative intent in a statute which is ambiguously drafted. *American Auto. Ass'n v. Bureau of Revenue*, 88 N.M. 148, 538 P.2d 420 (Ct.App.), *rev'd on other grounds*, 88 N.M. 462, 541 P.2d 967 (1975). Here, to the extent that the statute is ambiguous in failing to address explicitly whether the statutory provisions apply to employees hired prior to April 3, 1981 (the effective date of Section 29–7–8), it is appropriate to use the heading as a guide in determining legislative intent. The legislatively enacted heading of Section 29–7–8 specifically added the word "continued," thereby indicating the legislative intent to require that the certification requirement be met not only by new employees but also by employees of law enforcement agencies hired prior to the effective date of the definition change of "police officer" in 1981.

Additionally, Serrano argues that public policy requires that those persons appointed before April 3, 1981 (the effective date of Section 29–7–8) be "grandfathered in." We do not agree. Public policy in this regard is governed by legislation. The original version of Section 29–7–8 provided that "[t]he Director of the New Mexico Law Enforcement Academy shall waive the * * * training requirements for all officers who are serving full time three months after the effective date of this section and shall award each such officer a certificate." In 1979, the legislature repealed the original version of Section 29–7–8 and enacted a new Section 29–7–8 which omitted the "grandfather" clause. 1979 N.M.Laws, ch. 202, § 48. In this circumstance, the enactment of a statutory amendment is presumptive evidence of a legislative intent to change the provisions of the former law and to accord a meaning different from that which existed prior to the amendment. *See State ex rel. Bird v. Apodaca*, 91 N.M. 279, 573 P.2d 213 (1977). The omission indicated a legislative inten-

tion to require all employees to fulfill the law enforcement certification requirement of Section 29–7–8.

IMPAIRMENT OF CONTRACT

Although Serrano states in his brief that this case does not involve a contract issue, he argues that ABC violated article II, Section 19, by forcing him to meet the certification requirements of Section 29–7–8. We need not reach the constitutionality argument raised by Serrano. Serrano is foreclosed from arguing this issue because of the statutory requirement of a valid written contract under NMSA 1978, Section 37–1–23 which states that "[g]overnmental entities are granted immunity from actions based on contract, except actions based on a valid written contract." We have reviewed the record and fail to find any written contractual provision before us. However, assuming without deciding that a written contract existed, changing the requirements for Serrano's employment position would not be an unconstitutional impairment of contract. *See Temple Baptist Church, Inc. v. City of Albuquerque,* 98 N.M. 138, 147, 646 P.2d 565, 574 (1982) ("Existing contracts are subject to the legitimate exercise of police power".).

CONCLUSION

We reverse the district court's order and affirm the decision of the Board. The parties shall bear their own costs on appeal.

IT IS SO ORDERED.

HARTZ and BLACK, JJ., concur.

827 P.2d 838

Mollie WHITTENBERG, Claimant–Appellant,

v.

GRAVES OIL AND BUTANE COMPANY, INC., and Mountain States Mutual Casualty, Respondents–Appellees.

No. 12171.

Court of Appeals of New Mexico.

Dec. 9, 1991.

Certiorari Denied Feb. 20, 1992.

George Wright Weeth, Albuquerque, for claimant-appellant.

Reed L. Frost, Palmer & Frost, P.A., Farmington, for respondents-appellees.

OPINION

HARTZ, Judge.

Mollie Whittenberg (Claimant) appeals from an order dismissing her claim for medical expenses and disability benefits under the Workers' Compensation Act. The workers' compensation judge (WCJ) found that Claimant was not an employee covered by the Act at the time of her injury and that her claim for disability benefits was barred by the statute of limitations. Claimant contends that the WCJ erred in (1) concluding that Claimant's claim for disability benefits was barred by the statute of limitations; (2) failing to find that the statute of limitations was tolled by the representations of an employee of the New Mexico Workers' Compensation Division (WCD); (3) determining that Claimant was an independent contractor and not an employee at the time of her injury; (4) failing to find that Graves Oil and Butane Company, Inc., (Company) and Mountain States Mutual Casualty Company (Insurer) were estopped from denying Claimant's status as an employee; (5) concluding that the pre-1987 workers' compensation law applies to this case; (6) failing to find that Claimant was covered by workers' compensation insurance; and (7) failing to award Claimant witness costs. We affirm the denial of disability benefits because the award of such benefits was barred by the statute of limitations and the statute-of-limitations defense was not precluded by estoppel. As for Claimant's medical benefits, we remand for further findings regarding whether Claimant was an employee or independent contractor at the time of the injury.

FACTS

Claimant, a certified public accountant, was hired by Theron Graves (Graves), Company's president, as a bookkeeper in January 1981. She indicated to Graves that she did not want anything withheld from her paychecks and they therefore agreed that she would be paid as "contract labor." Claimant's first assignment was to investigate the financial position of a truck stop owned by Graves and leased to Company. She completed this assignment by March or April of 1981 and then worked on other tasks for Company.

Claimant performed duties with respect to payroll, inventory, financial statements, deposits, and credit card processing. It appears that initially Graves supervised Claimant, but he eventually left the supervision to Company employees. Claimant worked on Company premises and used Company equipment, although she provided her own typewriter, typewriter stand, and calculator. She received the same Christmas bonuses and departmental raises as Company employees, and took her turn on the Company switchboard with Company employees. Some testimony indicated, however, that she did not work the same hours as other employees, and apparently she was paid in a unique manner. Contract laborers for Company submitted invoices for their time and were paid out of the general account. Company employees were paid out of a separate payroll account. Claimant, in contrast, was paid a monthly salary out of the general account, but she never submitted invoices for her time. No state or federal tax deductions were taken out of Claimant's pay.

On May 13, 1981, Claimant fell and broke her hip while in the course and scope of her employment. Claimant was unable to return to work until that July. Insurer paid all the medical expenses and temporary total disability benefits incurred during her absence. Claimant was still on crutches when she returned to work. By October 1981, however, she had abandoned the crutches. The following February she was declared to be totally asymptomatic.

In 1984 Claimant changed the label for her relationship with Company from "contract labor" to "employee" in order to take advantage of group health insurance and profit-sharing plans. Although the change caused payroll deductions to be taken out of her salary, her responsibilities and working relationship with Company remained the same.

In late 1986 Claimant began to experience pain in the same hip she had injured in 1981. She consulted her physician on April 6, 1987. The physician advised her that she had developed aseptic necrosis and that she eventually would require reconstructive surgery. (Her doctor had told her at the time of her initial surgery in 1981 that she should "probably expect" to develop aseptic necrosis in the future.) Claimant then contacted the WCD and received a letter from a WCD employee indicating that Insurer would accept the claim. Claimant thereafter underwent surgery, with Insurer paying all the medical bills.

Claimant returned to work in September 1987, two days after her hip replacement surgery. She was unable to work as quickly or as efficiently as before and required assistance from co-workers to perform her task. Her condition gradually deteriorated. On November 10, 1988, Claimant was fired by Company for reasons unrelated to her condition. She has been unable to work since March 18, 1989. She has been hospitalized three times for complications related to her hip surgery. Insurer has not paid the medical bills.

STATUTE OF LIMITATIONS

Claimant filed her claim under the Workers' Compensation Act against Company and Insurer on April 7, 1989. The WCJ ruled that the claim was not timely, thereby barring the award of disability benefits. This ruling was based on the WCJ's conclusion "[t]hat the statute of limitations started to run on July 18, 1981 or, at the latest, during the months of October/November 1986, as to a claim for weekly compensation benefits."

We affirm the WCJ's ruling on the ground that the statute-of-limitations period began on July 18, 1981, and had expired by the time the claim was filed. We address Claimant's contentions on appeal that the limitations period did not begin on July 18, 1981; that even if it began at that time, it was tolled for the great bulk of the time from that date until the claim was filed; and that even if the limitations period had otherwise expired, Company and Insurer were estopped from raising a statute-of-limitations defense.

Claimant agrees that the limitations period began when she knew or should have known that she was suffering a disability. *See Martinez v. Darby Constr. Co.*, 109 N.M. 146, 782 P.2d 904 (1989); *Smith v. Dowell Corp.*, 102 N.M. 102, 692 P.2d 27 (1984). The WCJ found that when Claimant returned to work on July 18, 1981, she "was restricted from performing her work in the usual manner because of the use of crutches for 4 to 6 months after her return" and "knew or should have known of her impairment and disability at the time she returned to work in July, 1981." On appeal, Claimant contends that there is no evidence to support the finding that she knew or should have known of a disability in 1981.

We disagree. Claimant testified that after she returned to work on crutches she "couldn't do a lot of things I did before." Although her office before had been upstairs, it was moved downstairs to accommodate her. During the time that she worked downstairs, somebody else had to do her work that involved going upstairs.[1]

1. In her deposition Claimant testified that while she was on crutches others had to carry folders, books, and boxes of checks for her. We do not rely on this testimony, however, because it is

She also testified that when she returned to work after the accident she could no longer drive to the bank to make deposits, as she had before the accident. To be sure, Claimant continued with the same job title and at the same rate of pay. Disability is defined, however, in terms of capacity to perform work, not wage-earning ability. *Shores v. Charter Servs., Inc.*, 112 N.M. 431, 816 P.2d 500 (1991). Thus, in *ABF Freight System v. Montano*, 99 N.M. 259, 260, 657 P.2d 115, 116 (1982), our supreme court held that although the plaintiff had returned to full-time employment and resumed the same job, he "had a disability as evidenced 'by his working with pain, by the reduction of his activities of his employment, by his requesting others to assist him in the duties of his employment, by seeking medical attention and by his application of home remedies to relieve his pain and disability.' " Similarly, in the recent decision in *Shores v. Charter Services, Inc.*, our supreme court rejected the employer's argument that the worker could not be disabled because she had resumed her pre-injury job full-time and at full pay and then took a job paying better than her injury-related job. The court wrote:

> Here there was substantial evidence in the record to support the trial court's determination of partial disability. That evidence included worker's ongoing pain, her inability to lift heavy objects and to turn her torso fully while working. The fact that she can be gainfully employed at a greater salary than before does not detract from the court's finding of disability. It is perfectly rational and consistent to find that a worker fully can perform her job duties while at the same time being 15% disabled.

Id. at 433, 816 P.2d at 502. The record in that case indicates that the worker had a desk job as manager of a travel agency's service department. Thus, decisions by our supreme court compel us to sustain the WCJ's determination that Claimant was disabled at the time she returned to work in July 1981.[2]

Claimant contends that even if she was disabled when she returned to work in July 1981, the disability was only temporary and should not bar recovery for the permanent disability that she suffered beginning in 1987. It is settled law, however, that the running of the statute of limitations under the Workers' Compensation Act may not be delayed because a disability is relatively minor. As we wrote in *Noland v. Young Drilling Co.*, 79 N.M. 444, 446–47, 444 P.2d 771, 773–74 (Ct.App.1968):

> The wording of the limitation statute indicates that the period of limitation begins to run from the time of employer's failure to pay compensation when the disability can be ascertained and the duty to pay arises.
>
> * * * * * *
>
> It is not meant that a workman will lose the statutory benefit unless he files claim for a non-compensable injury which he has no reason to believe will result in a serious and compensable injury. Nor does it mean that he can disregard a compensable injury and wait until permanent injury results therefrom before he is obliged to file his claim. As soon as it becomes reasonably apparent, or should become reasonably apparent to a workman that he has an injury on account of which he is entitled to compensation and the employer fails or refuses to make payment he has a right to file a claim

unclear whether the deposition was admitted into evidence, although reference to it is made in Company's written final argument to the WCJ and it was included in the record on appeal.

2. We note that Claimant had the burden of persuading the WCJ that her claim was not barred by the statute of limitations. *See Baker v. Shufflebarger & Assocs.*, 77 N.M. 50, 419 P.2d 250 (1966). We need not decide, however, whether this placement of the burden of persuasion on Claimant means that she had the burden of proving that she was *not* disabled when she returned to work and that therefore the WCJ could be sustained simply if it was rational for the WCJ to reject the contention that Claimant was not disabled when she returned to work. *See Sosa v. Empire Roofing Co.*, 110 N.M. 614, 798 P.2d 215 (Ct.App.1990) (appellate court will sustain finding against party with burden of persuasion if it was rational for the fact-finder to disbelieve the evidence contrary to the finding).

> and the statute begins to run from that date. *There is nothing in the act as we read it which indicates that the running of the statute may be delayed until a more serious disability is ascertainable.* [Emphasis added.]

The statute begins to run once the worker is entitled to disability benefits and the employer fails or refuses to pay the benefits to which the worker is entitled. NMSA 1978, § 52–1–31(A) (Orig.Pamp.). In this case employer failed to pay any benefits to Claimant for disability during the time she was working while on crutches beginning in July 1981. Therefore, the limitations period for all disability benefits arising out of the 1981 accident began at the time of her return to work. *See ABF Freight Sys. v. Montano,* 99 N.M. at 260 n. 2, 657 P.2d at 116 n. 2.

We recognize that *Cordova v. City of Albuquerque,* 71 N.M. 491, 379 P.2d 781 (1962), reasoned that the employer is relieved of the duty to pay compensation for a period during which the worker is not disabled and therefore "it is only logical to conclude that the employee's obligation to file a suit during such period is suspended and the statute of limitations is thereby tolled." *Id.* at 493, 379 P.2d at 782. Applying that rule, the statute of limitations in this case would be tolled from at least early 1982 to late 1986, during which time Claimant suffered no disability. *Cordova,* however, did not remain controlling law for long. The legislative history is summarized by Judge Lopez in his dissent in *De La Torre v. Kennecott Copper Corp.,* 89 N.M. 683, 686–87, 556 P.2d 839, 842–43 (Ct.App.1976):

> In 1963, the statute [of limitations for workers' compensation cases] was amended, probably as a reaction to *Cordova* * * *. *Cordova* read into the statute a tolling if the employer was relieved of the duty to pay compensation. The 1963 version reversed *Cordova* and clearly stated that the statute of limitations *shall not* be tolled.
>
> In 1967, the legislature apparently had a change of heart. [The statute of limitations] was amended to permit the statute of limitations to toll for up to one year. (Emphasis in original.) (Citation omitted.)

That amendment is the one that governs this case. Section 52–1–31(A), after stating that the worker must file a claim within "one year after the failure or refusal of the employer or insurer to pay compensation," then adds: "This one-year period of limitations shall be tolled during the time a workman remains employed by the employer by whom he was employed at the time of such accidental injury, not to exceed a period of one year." Reading this provision in light of the legislative history beginning with *Cordova,* it is clear that the legislature rejected indefinite tolling of the limitations period when a worker regains full capacities after a period of partial disability. The sole tolling period permitted by the statute is a one-year period during which the worker remains employed by the employer, regardless of whether the worker recovers from partial disability during that one-year period.

In reaching this result, we must reject some of the language in *Zengerle v. City of Socorro,* 105 N.M. 797, 737 P.2d 1174 (Ct. App.1986). Starting with the proposition that temporary and permanent disability "are two concepts," in that opinion we stated that failure to bring a claim for temporary disability in the past would not bar a claim for permanent disability. To the extent that *Zengerle* is inconsistent with our holding in this case, however, we overrule *Zengerle,* pointing out that the opinion relied on the legislatively-overruled decision in *Cordova,* made no reference to the legislative history of Section 52–1–31(A), and did not point to any statutory language to support the proposition that the statute of limitations for a permanent disability does not begin to run until the disability becomes permanent. We note that the passage from *Noland v. Young Drilling Co.* quoted above supports the proposition that one suffering a temporary disability cannot wait until the disability becomes permanent before filing a claim.

Thus, the statute of limitations on Claimant's claim began to run in July 1981 and, even allowing for the one-year tolling while

Claimant remained employed with Company, the limitations period expired long before she filed her claim.

Finally, Claimant contends that the statute of limitations was tolled by representations made to her in a letter from a WCD employee in 1987. We need not consider whether the legal theory supporting this proposition is a valid one. By 1987 the statute of limitations had expired. Claimant does not suggest that a representation by the WCD could revive a claim that had already been time-barred. Nor are we aware of any doctrine that would provide for such revival. Therefore, we reject this contention.

For the foregoing reasons, we hold that Claimant's claim for disability benefits is barred by the statute of limitations.

MEDICAL EXPENSES—WAS CLAIMANT AN EMPLOYEE?

Although the statute of limitations bars an award of disability benefits to Claimant, she may still recover medical benefits. Under New Mexico law there is no statute of limitations with respect to claims for medical expenses under the Workers' Compensation Act. *See Lasater v. Home Oil Co.*, 83 N.M. 567, 494 P.2d 980 (Ct.App.1972), *overruled on different issue, Schiller v. Southwest Air Rangers, Inc.*, 87 N.M. 476, 535 P.2d 1327 (1975).

Nevertheless, the WCJ denied medical benefits to Claimant. The basis for the denial was that Claimant was not an employee of Company at the time of her injury. This case thus presents the question of when a professional performing services for a business is an employee of that business for purposes of the Workers' Compensation Act.

The WCJ made the following findings with respect to the employment relationship between Claimant and Company:

2. Claimant and * * * [Company] entered into an agreement in January, 1981, whereby Claimant would do contract bookkeeping for [Company].
3. Claimant and * * * [Company] participated in the agreement and acknowledged its validity by their conduct and verified the independent contractor relationship by their testimony at the formal hearing on January 4, 1990.
4. Claimant * * * provided a bookkeeping service for [Company] for which she was paid $1200 per month. No deductions for Federal or State taxes or FICA were deducted from payments made to Claimant and she was not paid out of the payroll account.
5. That the Claimant with her superior knowledge of bookkeeping chose the arrangement of being an independent contractor rather than that of an employee.
6. That the nature of the work of bookkeeping is one that is consistent with the independent contractor relationship.
7. That as a result of Claimant not being included as an employee in the payroll account of * * * [Company], workers' compensation insurance coverage was not carried on Claimant * * * *
8. Claimant indicated to employees at * * * [Company's] office that she was not a fellow employee subject to the direction and control of management and that her arrangement was independent with [c]ompany president, Theron Graves.
9. That the * * * [Company] did not exercise detailed control over the work of the Claimant nor was the Claimant required to report to work on a specific schedule but worked the hours she determined necessary to accomplish the [task?].
10. That the services of the Claimant were generally performed on * * * [Company's] premises. Support equipment was furnished both by Claimant and * * * [Company] for the performance of her bookkeeping function.

* * * * * *

14. Claimant reported to the emergency room personnel who treated her immediately after the injury that she was not an employee covered by worker's compensation.

15. Claimant's status changed to that of an employee in 1984 when she desired to become a member of * * * [Company's] pension and profit sharing plan by approval of * * * [Company], and being included as an employee on the payroll ledger.
16. Claimant * * * was not an employee of * * * [Company] on May 13, 1981.

The WCJ's pertinent conclusions of law were:

4. That at the time of the accident on May 13, 1981, Claimant was an independent contractor and not an employee covered by the Worker's Compensation Act.
10. Claimant is not entitled to an award for medical expenses because she was not an employee at the time of the accident causing the injury on May 13, 1981.

Several of these findings relate to the desire of the parties to have Claimant treated as an independent contractor. Clearly Claimant perceived tax advantages to being treated as an independent contractor rather than an employee and Company was willing to accommodate her in that regard. Nevertheless, even though the desires of the parties are pertinent and on occasion may be dispositive as to whether or not an independent-contractor relationship existed, *see* 1C A. Larson, *The Law of Workmen's Compensation* § 46.30 (1990) [hereinafter Larson], those desires are not entitled to great weight when all that the parties have done is agreed upon a label, without establishing the relative powers and duties of the parties in a way that conforms to the criteria for an independent-contractor relationship. *See id.* "[T]he relationship of the parties is not to be determined from the name attached to it by them, but from the consequences which the law imputes to their agreement to prevent evasion of the obligations which the act imposes upon employers." *Yerbich v. Heald,* 89 N.M. 67, 69, 547 P.2d 72, 74 (Ct.App.1976). *Cf. Christensen v. Dysart,* 42 N.M. 107, 76 P.2d 1 (1938) (employment contract depriving worker of benefits under Workmen's Compensation Act is void). We suspect that the Internal Revenue Service would not feel bound by the label affixed by Claimant and Company with respect to the nature of their relationship. Likewise, for purposes of determining coverage under the Workers' Compensation Act, findings regarding the intent of the parties in this case cannot substitute for findings on other pertinent factors.

Other findings relate to the degree to which Company exercised control over Claimant's work. We have recognized two tests for determining whether a person is an employee or an independent contractor: the "power to control" test and the "relative nature of the work" test. *See Quintana v. University of Cal.,* 111 N.M. 679, 681–82, 808 P.2d 964, 966–67 (Ct.App.1991); Larson, *supra,* § 43.50. We have inconsistently said that the first test is the principal consideration, *Yerbich v. Heald; Tafoya v. Casa Vieja, Inc.,* 104 N.M. 775, 727 P.2d 83 (Ct.App.1986), and that the second test is the better method of determining status. *Burton v. Crawford & Co.,* 89 N.M. 436, 553 P.2d 716 (Ct.App.1976). The findings in this case suggest that the WCJ focused on the control test, in which the right to control the details of the work is often the overriding consideration. *See Dibble v. Garcia,* 98 N.M. 21, 644 P.2d 535 (Ct.App.1982).

In our view, however, the control test is not particularly helpful in determining the status of a professional, such as a doctor, lawyer, nurse, or accountant. After all, it would be foolhardy for a nonprofessional executive in a business to try to control the details of a professional's work. Yet there are myriad examples of such professionals whom we think of as employees of the businesses they serve—be they in-house counsel, a school nurse, or the company accountant. We should not lose sight of the proposition that the "words 'employer and employee' as used in the Workmen's Compensation Act are used in their natural sense and are intended to describe the conventional relationship between an employer who pays wages to an employee for his labor." *Id.* at 23, 644

P.2d at 537. Given the common understanding of the term "employee," we have no reason to doubt that the benefits of workers' compensation legislation were intended to extend to such professionals. Larson states, "[T]he appropriate test is not control of professional discretion, but chiefly the question whether the doctor, lawyer, or nurse is regularly at the disposal of the employer to perform a portion of the employer's work, as distinguished from being available to the public for professional services on his [or her] own terms." § 45.32(a). In particular, "[i]f the professional person is paid a straight salary for full-time service to the employer, he is an employee for compensation purposes regardless of any arguments about professional discretion." *Id.* § 45.32(b). We agree and add accountants to the list of professionals covered by the test. A professional giving full-time, exclusive services to a business should not be excluded from the definition of "employee" under the Workers' Compensation Act simply because no one in the business has the skills to oversee the details of the professional's work. We recognize the possibility of other factors overriding the conclusion that would be reached under Larson's test, but we are not aware of any presented by the evidence in this case.

Because the WCJ did not make findings with regard to whether at the time of the accident Claimant was potentially available to other clients or was committed to serving Company exclusively for the foreseeable future, we remand for further findings and conclusions. The compelling evidence that Claimant was an employee might tempt us to reverse outright the WCJ's ruling that she was an independent contractor. There is apparently no dispute that she had her own office on Company's premises, she was employed full-time by Company and did not serve other clients, she was paid a regular monthly salary and received raises and bonuses on the same schedule as other employees, she was not free to skip workdays, and she even performed non-professional tasks such as taking her turn at answering the phone. Nonetheless, remand is appropriate. Much of the evidence establishing an employee-employer relationship postdates Claimant's accident. It is not certain that at the time of the accident it had been established that Claimant would work exclusively for Company, have a regular salary, and receive the same raises and bonuses as Company employees. Claimant had been working at the Company premises for only a few weeks prior to the accident. Claimant's burden at the hearing was to prove that she was an employee of Company at the time of the accident. We cannot say on this record that it would have been irrational for the WCJ to be unpersuaded by the evidence that Claimant was an employee. *See Sosa v. Empire Roofing Co.* Indeed, because the record would appear to support the WCJ's ruling, we might even affirm on that basis. We have doubts, however, concerning whether the WCJ used the proper legal standard in determining whether Claimant was an employee or an independent contractor. Such an error by the WCJ would hardly be surprising, because our precedents give little guidance on this point and may improperly suggest that the control test should apply to professionals. Justice therefore requires a remand.

Finally, we dispose briefly of Claimant's contention that Company and Insurer are estopped from denying her status as an employee. Of course, if this contention is meritorious, there would be no need for a remand.

Claimant raises two estoppel arguments. First, she claims that Company is collaterally estopped from denying that she was an employee because that issue was decided adversely to Company in proceedings before the New Mexico Department of Labor at which Claimant was awarded unemployment compensation benefits resulting from her termination in 1988. For collateral estoppel to apply, however, it is necessary that the issue in question in the pending litigation was "actually litigated" and "necessarily determined" in the prior litigation. *See Reeves v. Wimberly,* 107 N.M. 231, 755 P.2d 75 (Ct.App.1988). We question whether Claimant's employment

status was "actually litigated" before the Department of Labor because Company failed to appear at the departmental hearing. *See Restatement of Judgments (Second)* § 27 comment e (1982). *But cf. Callison v. Naylor,* 108 N.M. 674, 777 P.2d 913 (Ct.App.1989). In any event, the issue before the Department of Labor was Claimant's employment status at the time of her termination in 1988. The issue in this case was her employment status at the time of her accident in 1981. A finding that Claimant was an employee in 1988 does not require the inference that she was an employee in 1981. Thus, the issue in this case was not determined by the Department of Labor. Collateral estoppel cannot be invoked by Claimant.

Second, Claimant contends that Company and Insurer are estopped from denying her status as an employee because of their repeated conduct in acknowledging that status. For example, Insurer paid Claimant disability benefits for the eight weeks from the time of the accident until her return to work, paid all of her medical bills from her 1981 hospitalization, and then paid medical bills for her hospitalization in 1987. Claimant also mentions that a letter in 1987 from an employee of the WCD indicated that her benefits would be paid; Claimant contends that the employee was acting "as the apparent agent" of Insurer.

To prevail under this estoppel theory, Claimant must at least establish that she relied to her detriment on the conduct of Employer and Insurer. *See Orcutt v. S & L Paint Contractors, Ltd.,* 109 N.M. 796, 791 P.2d 71 (Ct.App.1990). In her brief on appeal, Claimant contends that the conduct by Employer and Insurer caused her not to pursue a potential tort claim against Company for her 1981 accident and caused her not to pursue a workers' compensation claim at a time when she could better gather evidence to establish her status as an employee. Those contentions, however, raise questions of fact to be determined by the WCJ. Yet they were not raised by any requested findings (or conclusions) proposed by Claimant to the WCJ. The sole proposed finding that raises the issue of reliance is No. 85, which states, "Claimant reasonably relied on the letter of April 28, 1987 in forming her opinion that she would be paid whatever benefits to which she was entitled by [Insurer]." The WCJ rejected this proposed finding. On appeal, Claimant does not cite evidence that would have required the WCJ to find that Claimant had indeed reasonably relied on the letter. In any event, Claimant has not explained how any reliance by her on the letter prejudiced her in establishing her employee status for the purpose of bringing her claim for payment of medical bills. Therefore, we must affirm the WCJ's denial of this estoppel argument.

ISSUES DISCUSSED SUMMARILY

We treat the remaining issues summarily. (1) Claimant challenges the applicability of the pre–1987 workers' compensation law only because the choice of governing law may well affect the rate of disability benefits. This issue was therefore mooted by our affirmance of the denial of such benefits. (2) We do not consider Claimant's contention that the WCJ erred in ruling that the failure of Company to pay premiums based on her employment meant that she was not covered by workers' compensation insurance. We do not understand the WCJ to have based the denial of benefits on that ground. (3) Finally, we find no abuse of discretion in the WCJ's denial of an award to Claimant of costs incurred for subpoenaing a witness to the hearing.

CONCLUSION

For the reasons stated above, we affirm the denial of disability benefits to Claimant but reverse the denial of medical benefits, with instructions to the WCJ to prepare further findings and conclusions consistent with this opinion regarding Claimant's employee/independent-contractor status at the time of her 1981 accident.

IT IS SO ORDERED.

APODACA and CHAVEZ, JJ., concur.

827 P.2d 847

Mary Ann MIRELES, Plaintiff-Appellant,

v.

Thomas BRODERICK, M.D., Defendant-Appellee.

No. 11054.

Court of Appeals of New Mexico.

Jan. 29, 1992.

Certiorari Granted Feb. 27, 1992.

William S. Ferguson, Ferguson & Lind, P.C., Albuquerque, for plaintiff-appellant.

Bruce D. Hall, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendant-appellee.

OPINION

HARTZ, Judge.

The Plaintiff, Mary Ann Mireles, appeals from an adverse verdict in a medical malpractice case. She contends that the district court committed reversible error by refusing to give the jury her tendered instruction on res ipsa loquitur. The Defendant, Dr. Thomas Broderick, argues that (1) the doctrine of res ipsa loquitur was inapplicable because (a) a claim under res ipsa loquitur should not be based, as it was here, on expert testimony, (b) Plaintiff also relied upon a specific theory of how the accident occurred, and (c) Plaintiff did not establish the exclusive control by Defendant that is a necessary predicate for application of res ipsa loquitur; (2) the res ipsa loquitur instruction tendered by Plaintiff was incorrect; and (3) if failure to give the tendered instruction to the jury was error, the error was harmless. We affirm on the second ground; the instruction tendered by Plaintiff was not a proper res ipsa loquitur instruction and therefore the district court

had no duty to give the instruction. We need not address Defendant's other contentions.

I. Introduction

For the purpose of deciding this appeal we need provide only a brief summary of the evidence at trial. We view the evidence in the light most favorable to Plaintiff's res ipsa loquitur theory, because the district court should reject an otherwise proper instruction only if there is insufficient evidence to support the factual predicate of the instruction. *See Thompson Drilling v. Romig,* 105 N.M. 701, 704–05, 736 P.2d 979, 982–83 (1987).

Defendant served as the anesthesiologist when a bilateral mastectomy was performed on Plaintiff. Sometime after the surgery (the parties disputed how soon after surgery) Plaintiff developed symptoms that were subsequently diagnosed as ulnar neuropathy, which caused the degeneration of the fourth and fifth fingers of her right hand. Plaintiff's expert witness, Dr. Randall Waring, testified that the ulnar nerve, which passes by the elbow, can be injured during surgery if it is subjected to excessive stretching or compression that compromises the blood supply to the nerve. Therefore, he testified, an anesthesiologist should properly position and cushion the arm to avoid such pressure and should monitor the arm during surgery to be sure that proper positioning and cushioning is maintained. He described in detail the proper positioning and cushioning and the monitoring that should be conducted. (For ease of reference, we shall use the term "Waring protective procedures" to label the positioning, cushioning, and monitoring described by Dr. Waring.) He also testified that the injury to Plaintiff's ulnar nerve must have occurred during the surgery and that such an injury to the nerve cannot occur during surgery unless the anesthesiologist fails to follow Waring protective procedures. Such a failure, in his view, constitutes negligent care. In response, Defendant put on evidence that he had properly positioned and cushioned Plaintiff's arm during surgery, the injury could have occurred while Plaintiff was sedated by heavy pain medication after surgery, and injury to the ulnar nerve can appear after surgery despite the exercise of proper care by those performing the surgery.

Plaintiff tendered the following instruction:

> In support of her claim that Dr. Broderick was negligent, Plaintiff relies in part upon the doctrine of "res ipsa loquitor [sic]" which is a Latin phrase and means "the thing speaks for itself". To rely on this doctrine, Plaintiff has the burden of proving each of the following propositions:
>
> 1. That the injury to Plaintiff was proximately caused by inadequate protection of Plaintiff's extremities during anesthesia while her condition was under the exclusive control and management of Dr. Broderick.
>
> 2. That injury to Plaintiff was of the kind which does not ordinarily occur in the absence of negligence on the part of the person in control.
>
> If you find that Plaintiff proved each of these propositions, then you may, but are not required to, infer that Dr. Broderick was negligent and that the injury or damage proximately resulted from such negligence.
>
> If, on the other hand, you find that either one of these propositions has not been proved or, if you find, notwithstanding the proof of these propositions, that Dr. Broderick used ordinary care for the safety of others in his control and management of the Plaintiff, then the doctrine of res ipsa loquitor [sic] would not support a finding of negligence.

Most of the language of the instruction is taken from our uniform jury instruction on res ipsa loquitur, SCRA 1986, 13–1623.[1]

The district court dismissed Plaintiff's res ipsa loquitur claim and rejected

1. Although this court is restricted in finding fault with uniform jury instructions, *see State v. Jennings,* 102 N.M. 89, 93, 691 P.2d 882, 886 (Ct.App.1984), we note the potentially misleading language: "does not ordinarily occur in the absence of negligence." The language may improperly suggest that the jury can infer negligence if the injury rarely occurs when a person

the tendered instruction on the ground that Plaintiff had failed to establish the requisite "exclusive control and management of Dr. Broderick." The district court made the observation that the injury could have occurred after surgery as well as during surgery. The district court also noted that there was evidence that the injury suffered by Plaintiff does occur in the absence of negligence. *See Schmidt v. St. Joseph's Hosp.*, 105 N.M. 681, 684, 736 P.2d 135, 138 (Ct.App.1987) (in medical malpractice claim that ulnar neuropathy was caused by surgery, plaintiff's admission that the injury was "of a kind which can occur in the absence of negligence on the part of any person" is fatal to patient's res ipsa loquitur claim). We need not rest affirmance on the grounds expressed by the district court, however, because we can affirm if the district court was correct for any reason. *See Naranjo v. Paull,* 111 N.M. 165, 170, 803 P.2d 254, 259 (Ct.App.1990).

As already noted, we base our affirmance on the conclusion that the tendered instruction is not a proper res ipsa instruction. *See* SCRA 1986, 1–051(I) (correct instruction must be tendered to preserve error in failure to instruct on a point of law). The analysis below will establish that the sole purpose of a res ipsa instruction is to inform the jury that it is permitted to draw a certain type of inference—an inference that might otherwise be considered improperly speculative. The tendered instruction, however, does not serve that function. Although it is labelled a res ipsa instruction and contains much language that belongs in a true res ipsa instruction, the tendered instruction at best states a pedestrian proposition for which no special instruction is necessary. It was therefore properly rejected.

II. Purpose of the Doctrine of Res Ipsa Loquitur

The doctrine of res ipsa loquitur has performed various functions. *See generally* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 40 (5th ed. 1984). In some jurisdictions it creates a presumption or shifts the burden of proof. *See Restatement (Second) of Torts* § 328D cmt. m (1965). It has also served as a way station in the development of the substantive law, such as the law of common carriers, *see* William L. Prosser, *Res Ipsa Loquitur in California,* 37 Cal.L.Rev. 183, 185–89 (1949), and the law of strict liability, *see* Louis L. Jaffe, *Res Ipsa Loquitur Vindicated,* 1 Buff.L.Rev. 1, 12–13 (1951) [hereinafter Jaffe] (commenting on *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944), in which the majority rested liability of the manufacturer of an exploding bottle on res ipsa loquitur, while Justice Traynor concurred on an absolute liability theory). In New Mexico, however, res ipsa loquitur is simply "a rule of evidence." *Strong v. Shaw,* 96 N.M. 281, 283, 629 P.2d 784, 786 (Ct.App.1980). As stated by the reporter to the *Restatement (Second) of Torts,* "A res ipsa loquitur case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it." *Restatement (Second) of Torts* § 328D cmt. b at 157. *See Tipton v. Texaco, Inc.*, 103 N.M. 689, 697, 712 P.2d 1351, 1359 (1985).

If the doctrine of res ipsa loquitur accomplishes no more than to authorize the fact-finder to draw an appropriate inference from circumstantial evidence, one may question the utility of continuing to refer to the doctrine. In particular, why should the jury be instructed on the doctrine? As a general rule, when a party rests a claim on circumstantial evidence, the only instruction given is the uniform jury instruction on circumstantial evidence:

> A fact may be proved by circumstantial evidence. Circumstantial evidence

in the position of the defendant is careful. If the language is so interpreted, doctors could be found liable whenever a rare complication occurs. *See Brannon v. Wood,* 251 Or. 349, 444 P.2d 558, 562 (1968) (en banc) ("The test is not whether a particular injury rarely occurs, but rather, when it occurs, is it ordinarily the result of negligence."); David Kaye, *Probability Theory Meets Res Ipsa Loquitur,* 77 Mich.L.Rev. 1456 (1979).

> consists of proof of facts or circumstances which give rise to a reasonable inference of the truth of the fact sought to be proved.

SCRA 1986, 13–308. A party relying on circumstantial evidence ordinarily is not entitled to an instruction specifically describing the chain of inference upon which the party relies. For example, the uniform jury instructions say that failure of a party to produce evidence, SCRA 1986, 13–2104, failure of a party to testify, SCRA 1986, 13–2105, and a party's flight from the scene of an accident, SCRA 1986, 13–2106, are not to be the subjects of jury instructions. Although instructions permitting the jury to draw inferences from such acts or omissions would correctly state the law, these are matters for argument to the jury by counsel. The approach taken in our uniform jury instructions is to keep the court out of disputes concerning the inferences that may be drawn from the evidence. Such matters are left to the skills of counsel. Why, then, should a party be entitled to a res ipsa instruction which serves only to spell out the desired chain of inference? We note that there is apparently only one reported New Mexico decision in which a judgment was reversed because of failure to give a res ipsa instruction. *Tuso v. Markey,* 61 N.M. 77, 294 P.2d 1102 (1956) (chair collapsed when restaurant patron sat on it).

Perhaps the best explanation for having a res ipsa instruction is that it rebuts the view that the expressed inference is too speculative to be permissible. After all, one of our uniform jury instructions tells the jury: "Your verdict should not be based on speculation, guess or conjecture." SCRA 1986, 13–2005. Professor Jaffe has suggested that the chief, perhaps sole, virtue of the doctrine of res ipsa loquitur is that, for sound policy reasons, it permits an inference that under customary standards would be considered too speculative to support a verdict. He observed:

> Liability—in the traditional view—is not based on the "balance of probabilities" but on a finding of the fact. I am perfectly aware that abstract probability may play a role in finding a fact, but what is referred to in the traditional formula is the greater probability in the case at hand. The "probabilities" in the abstract or statistical sense is only a datum. The jury's quest for the fact can only be undertaken if there is evidence in addition to that upon which the mere abstraction is based which will enable the jury to make a reasoned choice between the competing possibilities. The conditions for a finding are not satisfied merely by showing a greater statistical probability. If all that can be said is that there are 55 chances of negligence out of 100, that is not enough. There must be a *rational,* i.e., evidentiary basis on which the jury can choose the competing probabilities. If there is not, the finding will be based (in the words of the formula) on mere speculation and conjecture.

Jaffe, *supra,* at 3–4. He then contended:

> The doctrine of *res ipsa does* rest on probability. It takes a case to the jury where the degree of probability is indeterminate and there is not sufficient evidence to apply it to the case at hand.... What justification can there be for putting to a jury a case in which a "rational" finding of liability cannot be made? The reason is two-fold. Our experience and understanding of such situations indicates a substantial, if indeterminate, probability of negligence. In short, there is a substantial probability that the plaintiff may have a cause of action. Now ordinarily that fact alone would not warrant a judgment against the defendant. But typically, if not invariably, in this class of case the defendant has greater access to the facts than the plaintiff. This is the significance of the usual requirement for *res ipsa* that the defendant be in control of the mischief-working instrumentality. *Res ipsa* rests on the notion that it is fair to treat the probability as the fact if the defendant has the power to rebut the inference. (Footnote omitted.)

Id. at 6. And he concluded:

> There is in my opinion a legitimate place for a doctrine of *res ipsa* which operates in the absence of a less than adequate

> inference where the defendant is typically in control of the key facts. (Footnote omitted.)

Id. at 7.

We need not agree fully with Professor Jaffe concerning when it is appropriate to apply res ipsa loquitur. The purpose of quoting his analysis at length is just to point out that a res ipsa instruction can serve to give the jury a green light to cross what we shall call the "res ipsa bridge" from the predicate facts to what might otherwise be considered a too-speculative conclusion regarding the probable causes of the injury. We see no other purpose for the doctrine under New Mexico law.

In particular, we note that the doctrine serves no role in determining whether specific conduct is negligent. The jury determines whether specific conduct is beneath the standard of care by looking to its own view of what can be expected of a reasonable person or, in appropriate cases, by relying on an expert's opinion regarding the standard of care for someone with special skills or responsibilities. The fact that conduct resulted in an accident is, of course, irrelevant to determining whether the conduct was negligent. When the doctrine of res ipsa loquitur permits an inference of negligence from the occurrence of an accident, it is not establishing a standard of care. It is simply saying that one can infer from the accident that the most likely causes are causes involving negligence of the defendant. The circumstantial inference is from the accident to the likelihood of the various possible causes. The jury then factors in its own view of which possible causes would involve negligence, a process that relies upon no inferences from the fact of the injury. Whether the jury draws the res ipsa inference of negligence is determined by the jury's view of (1) which possible causes would involve negligence and (2) which possible causes are most likely.

III. Application to This Case

At trial, Plaintiff's counsel asked what he called at the time "my res ipsa question":

> Q. * * * Assuming that it was proven to your satisfaction that the injury occurred during surgery, that the ulnar nerve injury occurred during surgery, is an ulnar nerve injury, in a healthy patient, the kind of injury that normally occurs in the absence of a failure of care by the anesthesiologist?

Dr. Waring responded:

> A. I believe the answer is no * * *. My feeling is that if I exercised due diligence in positioning and padding the patient, that I will not have a nerve injury.

We assume, without deciding, that this testimony would support application of the doctrine of res ipsa loquitur to permit drawing an inference of the probable cause of the injury from the mere fact that the injury occurred. Dr. Waring's answer tells the jury that it can cross the res ipsa bridge from (a) the occurrence of the injury during surgery to (b) the inference that the cause of the injury was negligent care, even in the absence of any direct evidence of what care was provided during surgery.

Dr. Waring's testimony contained two components necessary for an inference of liability. First, he provided an expert opinion on causation—why the ulnar nerve injury occurred. He testified that the injury could occur during surgery only if Defendant did not follow the Waring protective procedures. Second, he provided an expert opinion on standard of care. He testified that failure to follow those procedures constitutes professional negligence. Thus, only with Dr. Waring's assistance could the jury infer (1) the likely causes of the ulnar nerve injury and (2) that those causes involved negligence by Defendant. The first inference—which is derived from the occurrence of the injury during surgery—is a res ipsa-type inference. The testimony would permit the jury to cross a res ipsa bridge from the fact of the ulnar nerve injury to the inference of the likely causes of the injury. The second inference—regarding the standard of care—is not predicated on the occurrence of the injury and involves no circumstantial inference whatsoever.

The instruction submitted by Plaintiff, however, does not track Dr. Waring's answer to the "res ipsa question." The pertinent portion of the tendered instruction reads:

> To rely on [the res ipsa] doctrine, Plaintiff has the burden of proving each of the following propositions:
>
> 1. That the injury to Plaintiff was proximately caused by inadequate protection of Plaintiff's extremities during anesthesia while her condition was under the exclusive control and management of Dr. Broderick.
>
> 2. That injury to Plaintiff was of the kind which does not ordinarily occur in the absence of negligence on the part of the person in control.

Although there may be some ambiguity in the meaning of "inadequate protection of Plaintiff's extremities" in the first proposition, the most natural interpretation in the context of this trial derives from Dr. Waring's testimony. He testified at length concerning the proper methods of protecting the extremities of an anesthetized patient by positioning, padding, and monitoring. He repeatedly made clear his opinion that Plaintiff's injury could have occurred during surgery only if there had been a failure to employ those methods. Consequently, "inadequate protection of Plaintiff's extremities" would likely be construed by the jury to mean failure to employ the Waring protective procedures,[2] and the heart of the first proposition is simply that Plaintiff's injury was caused by failure to follow those procedures. (For present purposes we ignore any concerns that may arise from the language in the first proposition that Plaintiff's "condition" was under the exclusive control and management of Defendant. Clearly the surgeon, as opposed to Defendant, had ultimate control over many aspects of Plaintiff's "condition" during surgery. We will assume "condition" refers only to Plaintiff's extremities, although the language is sufficiently indefinite that the instruction might be properly rejected on that ground alone.)

The core problem with the tendered instruction is that the first proposition begins after the jury has crossed the res ipsa bridge constructed by Dr. Waring. The proposition assumes that the jury has already inferred from the occurrence of the injury during anesthesia that the injury was caused by failure to follow Waring protective procedures. But once the jury finds that the injury was caused by failure to follow Waring protective procedures, the step from that finding to a determination of negligence does not involve any res ipsa inference. The only element needed to take that step is the finding that failure to follow Waring protective procedures constitutes negligence. That finding would not even be based on circumstantial evidence; it would be based on direct testimony by an expert witness, Dr. Waring, regarding the standard of care.

Not only is a res ipsa inference not necessary to travel from the first proposition to a determination of negligence, but also a res ipsa inference cannot provide the transportation because, as we have already pointed out, the doctrine of res ipsa loquitur cannot supply the element of the standard of care. One cannot infer the standard of care from the occurrence of an accident.

In sum, once the jury finds the first proposition (that the injury was caused by failure to employ Waring protective procedures), (1) the jury does not need a res ipsa inference to find liability, and (2) res ipsa loquitur cannot supply the link (standard of care) from the first proposition to liability. In other words, once the jury has found the first proposition, res ipsa loquitur has no role to play in the determination of liability. On this ground alone, the tendered instruction, which assumes that the jury has already found the first proposition, should have been rejected.

Proposition two in the tendered instruction—"[t]hat injury to Plaintiff was of the kind which does not ordinarily occur in the

2. Even if Plaintiff did not intend the words "inadequate protection" to have this meaning, it is proper to refuse the instruction if it could naturally be interpreted to have a meaning that would make the instruction improper.

absence of negligence on the part of the person in control"—looks like res ipsa language but it cannot save the instruction. Unless it is read as superseding the first proposition (which would make the instruction hopelessly confusing), the second proposition must mean that the specific event described in the first proposition—"inadequate protection of Plaintiff's extremities during anesthesia"—does not ordinarily occur in the absence of negligence. That proposition, however, is in essence a statement of the standard of care, which is established by expert testimony, not through a res ipsa inference.

Thus, the tendered instruction does not inform the jury that it is permissible to cross the res ipsa bridge from the predicate (the occurrence of the ulnar nerve injury during surgery) to the conclusion (negligent care of Plaintiff's extremities). Construed to be meaningful, it says that the jury can hold Defendant liable if it finds that Plaintiff's extremities were not adequately protected during anesthesia, Defendant had exclusive control of Plaintiff's extremities, and it is negligence not to adequately protect the extremities during anesthesia. The instruction, as so construed, may accurately state the law, but it is not a res ipsa instruction. There was no need for an instruction to tell the jury that it could infer negligence from (1) the first proposition of the tendered instruction and (2) Dr. Waring's testimony concerning the standard of care.

Nothing we say here is inconsistent with *Harless v. Ewing,* 81 N.M. 541, 469 P.2d 520 (Ct.App.1970). That opinion did not discuss the instruction used at the trial of that case. It merely held that the doctrine of res ipsa loquitur would permit the jury to infer from (1) the fact that the wheel came off the truck, that (2) the defendant had been negligent in maintenance of the truck. Such an inference is a proper res ipsa inference. The analogue in our case to the res ipsa theory in *Harless* would be an inference from (1) the occurrence of Plaintiff's ulnar nerve injury during anesthesia, that (2) Defendant had been negligent in protecting Plaintiff's arm. That, however, was not the theory stated in Plaintiff's tendered instruction.

■ Having been rather harsh in our criticism of the tendered instruction, we should note that there are extenuating circumstances that may explain the errors. The errors undoubtedly were the result of efforts by Plaintiff's counsel to force his res ipsa theory into the format of the uniform jury instruction on res ipsa loquitur. The uniform instruction, however, was not written with the present context in mind. Indeed, still open in New Mexico is the question of when, if ever, res ipsa is applicable in a medical malpractice case. Certainly, as pointed out in our first footnote, the language of the instruction stating that the injury "was of a kind which does not ordinarily occur in the absence of negligence" seems inappropriate in the medical malpractice context when experts recognize the occurrence of rare but unavoidable complications; the uniform instruction would need to be revamped if res ipsa doctrine were to be used in medical malpractice cases. *Cf.* SCRA 1986, 13–1118 (no instruction drafted for res ipsa loquitur in medical malpractice cases); 1 Cal.Jury Inst.Civ. 6.35, 6.36 (7th ed. 1986) (California res ipsa loquitur instructions for medical malpractice).

In its most recent decision on res ipsa loquitur, our supreme court stated that a res ipsa instruction should not have been given because the inferences arising from the doctrine, given the evidence of negligence, were "unnecessary crutches to reach the issues of negligence." *Tipton v. Texaco, Inc.,* 103 N.M. at 698, 712 P.2d at 1360. Here, perhaps a true res ipsa instruction would have been appropriate, but the instruction tendered by Plaintiff was, at best, an "unnecessary crutch" that set forth an obvious proposition for which no additional instruction was necessary. *See Kirk Co. v. Ashcraft,* 101 N.M. 462, 466, 684 P.2d 1127, 1131 (1984) ("It is not error to deny requested instructions when the instructions given adequately cover the law to be applied."); *State ex rel. State Highway Dep't v. Strosnider,* 106 N.M. 608, 612, 747 P.2d 254, 258 (Ct.App.1987) ("It is

not error to refuse instructions that are incomplete, erroneous or repetitious.").

Because the district court did not err in denying Plaintiff's request to give the tendered instruction, we affirm the judgment below.

IT IS SO ORDERED.

BIVINS, Judge (concurs).

PICKARD, Judge (dissents).

BIVINS, Judge (concurring).

I concur in both the discussion and the result of Judge Hartz' opinion, and write separately only to briefly comment on Judge Pickard's dissent.

Prefatory to those comments, I think it useful to restate why Plaintiff's tendered instruction on res ipsa loquitur is incorrect. A party is entitled to an instruction on his or her theory of the case if there is evidence to support that theory. *State ex rel. State Highway Dep't v. Strosnider,* 106 N.M. 608, 611–12, 747 P.2d 254, 257–58 (Ct.App.1987). The right to an instruction, however, is not absolute; the party must tender a correct instruction. *Dessauer v. Memorial Gen. Hosp.,* 96 N.M. 92, 99, 628 P.2d 337, 344 (Ct.App.1981). In this case, the majority has assumed, without deciding, that the facts would support the giving of a proper res ipsa loquitur instruction; nevertheless, we have concluded that Plaintiff did not submit a proper instruction.

The directions for use for SCRA 1986, 13–1623 (the res ipsa loquitur uniform jury instruction) state "[t]he names of the various individuals and *the name or description of the instrumentality or occurrence* should be inserted in the appropriate blanks." (emphasis added). Instead of inserting in the blank a description of the occurrence, such as "operation for bilateral mastectomy" or similar wording, Plaintiff chose to describe her injury or damage as proximately caused by "inadequate protection of Plaintiff's extremities." Inadequate protection of her extremities was not the occurrence that would have justified giving a res ipsa loquitur instruction; rather, inadequate protection is a term that describes the specific acts of negligence Plaintiff relied on to prove Defendant negligent.

This misdescription is made clear when one examines the issues instruction given to the jury. The district court instructed the jury that in order to establish medical malpractice on the part of Defendant, Plaintiff had the burden of proving that at least one of the following occurred during surgery:

1. The defendant failed to properly position plaintiff's right arm; or
2. The defendant failed to properly pad plaintiff's right arm, or
3. The defendant failed to properly observe that plaintiff's right arm had become mispositioned on the arm board.

The three specific acts of negligence can reasonably be interpreted as asserting that Defendant failed to adequately protect Plaintiff's extremities.

Had Plaintiff's tendered instruction been given, the jury would have been told in the issues instruction that in order to find Defendant negligent, it must find one of the three specific claimed acts by Defendant, and then later told in the res ipsa loquitur instruction that it could infer Defendant was negligent if it found "inadequate protection of Plaintiff's extremities." When the issues instruction and the tendered res ipsa loquitur instruction are examined together, it is easy to see why the district court did not err in refusing to give Plaintiff's res ipsa loquitur instruction in the form tendered. The jury would have been instructed to infer negligence based on the very same acts which the court instructed Plaintiff must establish in order to prove negligence. This is not only confusing, but incorrect.

The dissent suggests that the tendered instruction did nothing more than instruct the jury on Plaintiff's theory of the case with reference to the specific negligence that Plaintiff attempted unsuccessfully to prove. I disagree. The tendered instruction did much more. It attempted to mix the two theories. This could only cause confusion since res ipsa loquitur is not premised on specific acts of negligence.

Furthermore, I disagree with the dissent that the fault in the instruction is that it is too specific in its description of the occurrence causing the injury. The fault lies not in specificity, but rather in the failure to describe the occurrence at all. The defective language refers to the specific acts of negligence and thus negates the need for res ipsa loquitur which is based on an inference.

Nor does the majority necessarily find fault with the res ipsa loquitur uniform jury instruction in the manner indicated by the dissent. Although the majority does comment that the language of the instruction may be misleading, the fault found with the tendered instruction is not with language found in the uniform jury instruction but with language added by Plaintiff. The dissent contends that it was appropriate for Plaintiff to have filled in the blank with the description of what her expert said caused her injury. This misses the point. Plaintiff's expert, Dr. Waring, referred to what we have called the "Waring protective procedures" which were and should have been incorporated in the issues instruction for proof of specific acts of negligence, not in the res ipsa loquitur instruction.

Finally, the dissent argues that it is not possible to read the first element of Plaintiff's requested res ipsa loquitur instruction as requiring the jury to find all the elements of a specific type of negligence. Perhaps not, if read in isolation; however, when read in conjunction with the issues instruction, that is the only reasonable interpretation. This interpretation is made clear when one considers the purpose of res ipsa loquitur. Judge Hartz, writing for the majority, has adequately discussed the purpose; however, the examination of a typical res ipsa loquitur case demonstrates the point. In *Pillars v. R.J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365, 366 (1918), the court applied the following logic when res ipsa loquitur was argued in the case involving contaminated chewing tobacco: "We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless."

In *Pillars*, a proper res ipsa loquitur instruction would likely have called for insertion of language such as "damage to plaintiff was proximately caused by the presence of foreign matter in chewing tobacco the packaging of which is under the exclusive control and management of defendant." Had the plaintiff in that case inserted instead that the injury was proximately caused by "inadequate quality control" there would have been nothing for the jury to infer.

In sum, res ipsa loquitur is appropriate when the injured party encounters difficulty in proving how the injury occurred. When the injury results from an occurrence that does not ordinarily happen in the absence of negligence on the part of the person in control, i.e., a toe in chewing tobacco or, perhaps, ulnar neuropathy following a surgical procedure, the jury may infer negligence. It does not, however, infer negligence from the proof of acts of negligence. Here, Plaintiff wanted the court to tell the jury that the act of negligence, "inadequate protection of Plaintiff's extremities during anesthesia," does not ordinarily occur in the absence of negligence. I agree the court properly refused to do so.

PICKARD, Judge (Dissenting).

The crux of the majority's opinion is that plaintiff's tendered instruction was not a res ipsa instruction because the first element begins after the res ipsa bridge is crossed, and therefore the instruction is nothing more than a dressed-up negligence instruction, an "unnecessary crutch" to reach the issue of negligence. I cannot agree with the majority's formulation because (1) as I understand res ipsa loquitur, it is merely one form of circumstantial evidence; (2) as a form of circumstantial evidence, a plaintiff is permitted to rely on res ipsa loquitur although he or she attempts to prove, and may be successful at proving, specific negligence; (3) the tendered instruction did nothing more than instruct the jury on plaintiff's theory of the case

with reference to the specific negligence that plaintiff attempted, obviously unsuccessfully, to prove; (4) the formulation of the instruction was invited by the format of SCRA 1986, 13–1623; and (5) the majority opinion appears to read plaintiff's requested instruction in an unnecessarily technical fashion.

When res ipsa loquitur applies to a case, it is as one form of circumstantial evidence. *Schmidt v. St. Joseph's Hosp.*, 105 N.M. 681, 683, 736 P.2d 135, 137 (Ct.App.1987). Res ipsa loquitur requires plaintiff to establish that (1) the instrumentality causing the injury is in defendants' exclusive control, and (2) the injury is of a kind that does not ordinarily occur in the absence of negligence. *Id.;* UJI Civ. 13–1623. If the predicate facts are established, the jury can infer both negligence (duty and breach, *see Restatement (Second) of Torts* § 328A (1979)) and causation, *see id.* § 328D cmt. b at 157.

The majority finds fault with plaintiff's rendition of the first element of the uniform jury instruction. The fault appears to be that it is too specific in its description of the instrumentality causing injury. I do not believe that including a specific description in the res ipsa instruction turns the instruction into a "pedestrian proposition for which no special instruction is necessary." Nor do I agree with defendant's argument that plaintiff's use of the words "inadequate protection" violates the UJI directions requiring plaintiff to describe the "instrumentality" causing her harm in the instruction. The uniform jury instruction requires plaintiff to name the "instrumentality or occurrence" that "proximately caused" her injury. UJI Civ. 13–1623. For plaintiff to have filled in the blank with a description of what her expert said caused her injury seems, to me, to be appropriate. In any event, I do not believe that this court can say it is inappropriate in light of the rule prohibiting us from finding fault in uniform jury instructions. *See State v. Jennings*, 102 N.M. 89, 691 P.2d 882 (Ct. App.1984).

In my view, under the specific facts of this case, the only way plaintiff's res ipsa instruction would be so poorly drafted as to justify denial would be if the first element encompassed all facts necessary to establish liability under a negligence theory. There is a line of cases, including *Tuso v. Markey*, 61 N.M. 77, 294 P.2d 1102 (1956), and *Harless v. Ewing*, 81 N.M. 541, 469 P.2d 520 (Ct.App.1970), that stands for the proposition that the doctrine of res ipsa loquitur is not available to a plaintiff who proves specific acts of negligence. The key word here is "prove" because it is equally well-established by these cases that plaintiff can introduce evidence of specific acts of negligence without "waiving" the right to rely on res ipsa loquitur.

I would agree with the majority if the first element of the instruction required plaintiff to "prove" her case of specific negligence. If that were the case, then a jury's finding that plaintiff established the first element would negate her right to proceed on a res ipsa theory, according to *Tuso* and *Harless*. However, I do not believe it is possible to read the first element of plaintiff's requested instruction as requiring the jury to find all the elements of a specific type of negligence.

The first element of plaintiff's instruction requires the jury to find that plaintiff's injury was caused by "inadequate protection" of her extremities while her condition was under defendant's exclusive control. Plaintiff's expert established, though not without contradiction, that the only way plaintiff's neuropathy could have arisen would be from "inadequate protection": ulnar neuropathy is caused by failure of the blood supply to the nerve, which in this case is caused by pressure on the nerve due to compression or stretching; in the operating room, pressure is caused by inadequate protection.

Plaintiff's theory of the case instruction was considerably more specific as to what caused the inadequate protection. Plaintiff contended that defendant either (1) failed to properly position plaintiff's arm, (2) failed to properly pad it, or (3) failed to properly observe that it became mispositioned during the surgery. While all of these theories are variations of a failure to

protect the arm, they are analogous to the various methods in *Harless,* where negligence was shown in connection with why the wheels on a truck fell off. Yet, the plaintiff in *Harless* was entitled to an instruction on res ipsa loquitur.

My difference with the majority may be that I read "inadequate protection" as merely descriptive and not necessarily implying negligence, despite the use of the value-laden term "inadequate," and despite Dr. Waring's testimony that such inadequate protection is negligence. The majority's retort, then, is that the instruction is ambiguous and, when an instruction can be read in one of two ways, one of which is meaningful (mine) and one of which is nonsensical or tautological (theirs), then the trial court does not err in failing to give the instruction. I agree with the majority's premise that it is not error to fail to give an ambiguous instruction.

I disagree that their interpretation of the instruction is a natural one. I cannot see the necessity of several pages of explanation if the interpretation of the instruction is natural. It seems to me that the majority is reading the instruction in an unduly technical way and certainly not in the way that any lay jury would read it. I believe a lay jury would read the words "inadequate protection" as I do—as being merely descriptive of what happened to plaintiff during her anesthesia.

The function of res ipsa in this case is to permit the inference of both causation and negligence from the exclusive control of the instrumentality causing injury when the injury does not ordinarily occur in absence of negligence. Thus, here, the res ipsa instruction permits the jury to infer causation and negligence from defendant's exclusive control of the protection of plaintiff's extremities. The tendered instruction did inform the jury that it could draw this inference, and therefore it was a proper res ipsa instruction.

Nor do I believe that the requested instruction was an unnecessary crutch to reach the issue of negligence. An instruction on res ipsa loquitur counters other instructions and allows plaintiff's counsel to argue what is established by expert testimony in this case: that the mere happening of an accident like this is evidence of negligence. The following discussion also shows why failure to give the requested instruction was not harmless.

In ordinary negligence cases, the jury is instructed that the mere occurrence of an accident is not evidence that someone has been negligent. SCRA 1986, 13–1616. On the other hand, if the case is appropriate for a res ipsa instruction, then once the jury finds the predicate facts, it is almost entitled to conclude that the mere happening of the accident does show negligence. Thus, the res ipsa instruction allows plaintiff's counsel to explain to the jury, with approval from the judge, that the fact the accident happened can be evidence of negligence.

In medical malpractice cases, the equivalent of SCRA 1986, 13–1616 is SCRA 1986, 13–1112, telling the jury that doctors do not guarantee good results and the fact of a bad result is not evidence of negligence. In fact, defendant here closed his final argument by relying on this instruction. The res ipsa instruction would have allowed plaintiff to rebut this argument by relying on another instruction from the judge. That other instruction was plaintiff's tendered instruction, which would have allowed the jury to infer specific negligence from the fact that the injury was caused by an instrumentality in defendant's exclusive control (inadequate protection of plaintiff's arm) because plaintiff's expert testified that these injuries do not ordinarily occur in the absence of negligence on the part of the person in control. Instead, plaintiff was left to arguing that "bad result" cases involve only the organ on which the surgery was performed, thereby merely implying, without judicial approval, that it must be negligent to injure an arm when a patient is being operated on for a mastectomy.

In short, I believe that the majority has read plaintiff's instruction in a way that attempts to unfairly lock plaintiff into a specific negligence theory. Then, the majority has used this reading to hold that her

instruction was properly refused. I do not believe it is reasonable to read the instruction as the majority does. Thus, I do not believe that it is possible to read the instruction in one of two ways or that the instruction is ambiguous. I find that the instruction is meaningful as a more general res ipsa instruction and, accordingly, believe that the court erred in its failure to give it.

Because of this view, it is necessary for me to address issues the majority assumes without deciding: (1) whether res ipsa can be based on expert testimony, and (2) whether plaintiff established exclusive control. I believe the answer to both of these questions is "yes."

Defendant contends that allowing the doctrine of res ipsa loquitur to be used in medical malpractice cases, upon the introduction of expert testimony of the foundational propositions, is an expansion of the doctrine which the New Mexico Supreme Court would not make. I disagree. Application of the doctrine of res ipsa loquitur based on expert testimony to cases such as this one is solidly grounded in the decisions of several other jurisdictions. *E.g., Holloway v. Southern Baptist Hosp.,* 367 So.2d 871 (La.Ct.App.1978); *Parks v. Perry,* 68 N.C.App. 202, 314 S.E.2d 287 (1984); *Jones v. Harrisburg Polyclinic Hosp.,* 496 Pa. 465, 437 A.2d 1134 (1981). Comment d to the *Restatement (Second) of Torts* Section 328D specifically notes that the basis of the res ipsa loquitur inference can be expert testimony. The *Jones* case, relying on the *Restatement,* and recognizing that the " 'law must be responsive to new conditions and to the persuasion of superior reasoning[,]' " *Jones,* 437 A.2d at 1138 (quoting *Griffith v. United Air Lines, Inc.,* 416 Pa. 1, 203 A.2d 796, 806 (1964)), adopted the position that res ipsa loquitur may apply to medical malpractice cases when either common knowledge or medical evidence establishes that the event does not ordinarily occur without negligence. In light of recent supreme court opinions, *e.g., Bober v. New Mexico State Fair,* 111 N.M. 644, 808 P.2d 614 (1991) (expanding premises liability to harm caused outside the premises); *Collins v. Tabet,* 111 N.M. 391, 806 P.2d 40 (1991) (adopting a functional analysis in determination of scope of immunity for guardians ad litem); *Lovelace Medical Ctr. v. Mendez,* 111 N.M. 336, 805 P.2d 603 (1991) (permitting parents to recover costs of raising a healthy child born as consequence of failed tubal ligation); *Schmitz v. Smentowski,* 109 N.M. 386, 785 P.2d 726 (1990) (adopting prima facie tort), I have no doubt that our supreme court would readily adopt the *Restatement* position in this case.

Defendant contends that plaintiff has not established the requisite exclusive control for the doctrine of res ipsa loquitur to apply. Defendant relies on cases which state that the requisite control must be absolutely sole control. *E.g., Waterman v. Ciesielski,* 87 N.M. 25, 528 P.2d 884 (1974); *Begay v. Livingston,* 99 N.M. 359, 658 P.2d 434 (Ct.App.1981), *rev'd on other grounds,* 98 N.M. 712, 652 P.2d 734 (1982). I do not believe that either these cases or those others cited in the comment to UJI Civ. 13–1623 are applicable. *See State v. Scott,* 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977) (court of appeals may consider whether supreme court precedent is applicable).

In the first place, for the reasons noted above in connection with my discussion of expert testimony, I believe the supreme court would adopt the *Restatement*'s view that exclusive control is but one way of proving the necessary responsibility on the part of the defendant for res ipsa to apply. *Restatement (Second) of Torts* § 328D cmt. g at 161–62. In the second place, the tenor of plaintiff's expert's testimony was that it was ultimately the responsibility of the anesthesiologist to insure that plaintiff's arm was properly padded and positioned, and that the padding and positioning was maintained despite the fact that others present at the operation may have accidentally moved the arm. The fact that this testimony may have been called into question by another doctor did not mean that plaintiff did not establish a factual basis for the giving of her requested instruction. *See Thompson Drilling, Inc. v. Romig,* 105 N.M. 701, 736 P.2d 979 (1987).

The simple fact of this case is that plaintiff proved facts entitling her to proceed to the jury on a res ipsa theory. She tendered an instruction conforming to the uniform jury instruction model. Because the instruction was not given, defendant had the unfair advantage of being allowed to argue to the jury, without judicially-sanctioned rebuttal from plaintiff, that the jury could not find negligence just because plaintiff was injured, although the sense of Dr. Waring's testimony and the function of res ipsa loquitur under the facts of this case were precisely to permit that inference of negligence.

Accordingly, I would reverse and remand for a new trial.

827 P.2d 859

C.K. "Rocky" MEDINA,
Plaintiff–Appellee,

v.

GRAHAM'S COWBOYS, INC.,
Defendant–Appellant,

and

Steven Trujillo, Defendant.

No. 12496.

Court of Appeals of New Mexico.

Feb. 4, 1992.

Jeff Romero, Albuquerque, for plaintiff-appellee.

Mark E. Komer, Jerrald J. Roehl, Corbin P. Hildebrandt, the Roehl Law Firm, P.C., Albuquerque, for defendant-appellant.

OPINION

HARTZ, Judge.

On December 13, 1984, Steven Trujillo assaulted C.K. "Rocky" Medina (Medina) in the parking lot of Graham's Cowboys, Inc. (Cowboys). Medina filed a complaint for personal injury against Trujillo and Cowboys on April 1, 1985. Medina raised three theories of liability against Cowboys: (1) Cowboys was liable under the doctrine of respondeat superior because Trujillo was acting within the course and scope of his employment with Cowboys when he assaulted Medina, (2) Cowboys was liable for negligently hiring and supervising Trujillo, and (3) Cowboys was liable for failure to comply with its duty to provide safe premises for its patrons. After a non-jury trial the district court rejected the respondeat superior claim but held Cowboys liable on the other two theories. Cowboys appeals on the grounds that (a) liability was not proper under either theory, (b) substantial evidence did not support the damage award, and (c) under the doctrine of comparative fault, Cowboys should have been held liable for only a portion of Medina's damages. We affirm.

I. LIABILITY

Because we can sustain the judgment under Medina's negligent hiring theory, we need not address the claim of premises liability.

The district court made the following findings concerning the negligent hiring and training of Trujillo:

> 10. Trujillo's employment with Cowboys was that of a doorman.
>
> 11. The duties of a Cowboys doorman included assisting in maintaining peace and order in Cowboys, using force if necessary.
>
> 12. Cowboys doormen were necessarily in constant contact with members of the public, most of whom would have been drinking and ma[n]y of whom might tend to be argumentative.
>
> . . . .
>
> 15. Trujillo had been involved in several fights at Cowboys and in the parking lot as a Cowboys patron.
>
> 16. Trujillo was unfit to be employed as a Cowboys doorman.
>
> 17. Cowboys knew or should have known that Trujillo had previously been involved in fights at Cowboys and elsewhere and that he was unsuitable for employment considering the risk he posed to those with whom he would foreseeably come into contact during his employment.

We accept these findings as correct because Cowboys' brief-in-chief does not attack these findings or challenge the contention that Cowboys was negligent in hiring Trujillo. In addition, the district court concluded:

> 7. Trujillo's attack on Plaintiff was foreseeable by Defendant Cowboys.
>
> 8. Cowboys was negligent in hiring and training Trujillo, which negligence was the proximate cause of Plaintiff's injuries.

Cowboys predicates its challenge to the negligent-hiring theory on the ground that Trujillo was not on duty the night of the assault. (There was also a substantial dispute at trial as to whether Trujillo had ever been hired by Cowboys, but there was clearly sufficient evidence to justify the district court's finding in that regard, and Cowboys does not press that point in its brief-in-chief.) Because Trujillo was not on duty, Cowboys argues, Medina did not meet Trujillo as a direct result of the employment, and therefore Cowboys had no duty to Trujillo, the act of hiring Trujillo could not be the proximate cause of Medina's injuries, and Cowboys could not have reasonably foreseen that hiring Trujillo would result in the injury to Medina.

Even if he was not on duty, however, Trujillo was present on the premises at Cowboys' request. *Cf. Restatement (Sec-*

ond) of Agency §§ 219 cmt. d, 233 cmt. c (1957) [hereinafter *Restatement (Second) of Agency*] (relating to responsibility of employer for acts of on-call employee). The district court made the following finding:

> 9. Trujillo was not actually working when the incident occurred. He had come to Cowboys to work that night and had been told by a Cowboys employee to remain, and he did remain inside Cowboys or in the parking lot. Trujillo was not paid for waiting to see [i]f he would be needed to work.

At trial Cowboys vigorously contested that Trujillo was on call the evening of the incident. Nevertheless, there was sufficient evidence to support the district court's finding. One witness testified that Trujillo was wearing a jacket with the Cowboys logo on it. Trujillo himself had testified in a deposition read at trial that "if I wasn't working I probably would have left and went home"; and he testified at trial that the assistant door manager had told him "to show up in case they needed me." Although Trujillo encountered Medina in the parking lot, Trujillo testified that he was heading toward the front door of the bar at the time.

In its reply brief Cowboys challenges the finding that Trujillo remained inside Cowboys or in the parking lot. It points to evidence that Trujillo was returning from a nearby nightclub at the time of the incident. Even were we to consider a challenge to a finding of fact not made until a reply brief, *but see Jaramillo v. Fisher Controls Co.*, 102 N.M. 614, 625, 698 P.2d 887, 898 (Ct.App.1985) (issue raised for first time in reply brief will not be considered), the alleged error does not affect the result. The point is that the district court could properly find that at the time of the incident Trujillo was on the premises at Cowboys' request for the purpose of being available to work.

The district court's findings establish the duty of Cowboys to Medina. Liability for negligent hiring "flows from a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring." *Valdez v. Warner*, 106 N.M. 305, 307, 742 P.2d 517, 519 (Ct.App.1987). *See Garcia v. Duffy*, 492 So.2d 435 (Fla.App.1986). That duty encompasses a duty of Cowboys not to endanger patrons by negligently hiring violent persons who are on call on the premises at Cowboys' request.

We also sustain the district court's conclusions regarding proximate cause and foreseeability. The district court's findings establish that Trujillo encountered Medina as a direct result of Trujillo's employment relationship with Cowboys. Also, Findings Nos. 16 and 17, regarding Trujillo's propensity to engage in fights, provide a proper basis for concluding that Cowboys could have reasonably foreseen the danger of Trujillo's engaging in a fight with a patron if Trujillo were asked to remain "on call" on the premises.

We therefore affirm the district court's determination that Cowboys was liable for damages under a negligent-hiring theory.

II. DAMAGES

Cowboys contends that the damage award was not supported by substantial evidence. The sole point raised in its brief-in-chief is that there was insufficient evidence to support a finding that Medina's condition had remained and would remain the same. We acknowledge that Cowboys offered evidence to the contrary, but our function is not to reweigh the evidence; it is only to determine whether there was substantial evidence to support the district court's findings. *See Clovis Nat'l Bank v. Harmon*, 102 N.M. 166, 168–69, 692 P.2d 1315, 1317–18 (1984).

Cowboys' brief-in-chief fails to note the following testimony by Dr. Don F. Seelinger, a neurologist who had examined Medina in July 1986:

> Q. Let me ask you a hypothetical question if I could. If Mr. Medina today were to tell you that he's continuing to have headaches; he continues to have memory lapse and he continues to complain of the

symptoms that he complained to you, pointed out to you at the same time that you saw him, would you have an opinion as to whether or not his condition, number one, had improved and, number two, would be likely to improve?

A. If the symptoms were essentially unchanged, I would think subsequent future improvement would be unlikely. If I were to learn that the symptoms were essentially unchanged, that would not surprise me greatly even if someone had been in a treatment program.

Q. Why is that?

A. Because the kind of complaints that are seen following trauma often are sustained and enduring and continue to be problems for long, long periods of time, if not indefinite.

Medina testified that he was suffering the same symptoms he had previously reported to Dr. Seelinger.

This evidence is sufficient to sustain a finding that Medina's condition had not improved and was unlikely to improve. In its reply brief Cowboys suggests that Medina's testimony concerning his symptoms at the time of trial cannot be considered in the absence of medical testimony establishing those symptoms. Cowboys cites no authority for that proposition, and we know of none. Dr. Seelinger's response was predicated on the continuation of symptoms described by Medina, not on the existence of symptoms that could be detected only by a medical expert. There is no reason to require that Medina express his symptoms to a physician rather than testify to them at trial.

We therefore reject Cowboys' challenge to the amount of damages.

III. COMPARATIVE FAULT

Cowboys' final contention is that its fault should be compared to the fault of Trujillo and it should be liable only for the percentage of fault attributable to it. This argument raises an issue of first impression in this jurisdiction. New Mexico abolished joint and several liability for negligent tortfeasors in *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct.App.1982). Yet no New Mexico opinion has addressed what happens when one tortfeasor commits an intentional tort and a concurrent tortfeasor is negligent. *Cf. Trujillo v. Berry*, 106 N.M. 86, 738 P.2d 1331 (Ct.App.1987) (considering strict products liability and comparative fault). In particular, no case has addressed what happens when the negligent tort was the tort of negligently hiring the intentional tortfeasor. The New Mexico statute on several liability provides that joint and several liability still applies "to any person or persons who acted with the intention of inflicting injury or damage[.]" NMSA 1978, § 41–3A–1(C)(1) (Repl.Pamp.1989). This statute does not, however, address the liability of a negligent tortfeasor when a co-tortfeasor committed an intentional tort; and, in any case, the statute does not apply here because the complaint was filed before July 1, 1987. *See* 1987 N.M. Laws, ch. 141, § 5.

We have found only one case in point from another jurisdiction. Although Kansas has abolished joint and several liability for concurrent negligent tortfeasors, the Kansas Supreme Court recently held that an employer is liable in full for damages caused by the intentional tort of a negligently retained servant. *Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 249 Kan. 348, 819 P.2d 587 (Kan.1991). The court wrote, "Negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent." *Id.* 819 P.2d at 606. To determine whether we agree with the Kansas holding, we look to the related body of law for underlying principles that suggest the proper rule. We reach the result that would be required under Kansas law, but our rationale is narrower than that adopted by the Kansas court.

We start with the notions of fairness embodied in New Mexico's adoption of comparative negligence, *see Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981), and the abolition of joint and several liability between negligent tortfeasors. *See Bartlett v. New Mexico Welding Supply, Inc.* Un-

der those decisions, when an injury is the consequence of the concurrent negligence of several persons, each is apportioned a percentage of the blame and is responsible for that percentage of the damage caused. If one negligent party is only five percent at fault, that party must bear only five percent of the loss. It would seem inconsistent with this approach to hold a negligent tortfeasor responsible for the entirety of the damage if the concurrent tortfeasor happens to have committed an intentional tort rather than a negligent tort. Why should a negligent tortfeasor be worse off when the concurrent tortfeasor is "evil" rather than merely inattentive? *See* William E. Westerbeke & Reginald L. Robinson, *Survey of Kansas Tort Law,* 37 Kan. L.Rev. 1005, 1049 (1989). Thus, the first rule that suggests itself is that the fault of Cowboys and the fault of Trujillo should be compared, with Cowboys bearing responsibility for only its percentage of the damage suffered by Medina. *See* Jake Dear & Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations,* 24 Santa Clara L.Rev. 1 (1984) (advocating the application of comparative fault to intentional torts). (Of course, Trujillo, as an intentional tortfeasor, could still be liable for the entire damage. *See* § 41–3A–1(C)(1).)

On the other hand, the abolition of joint and several liability when cotortfeasors are negligent does not necessarily undermine principles of vicarious liability. There are still situations in which a party who is without fault is responsible for paying compensatory damages caused by the fault of another. *See* § 41–3A–1(C)(2). To take the example closest in point, the rule of respondeat superior provides that a faultless employer is nevertheless liable for torts committed by an employee in the course and scope of employment. *Gonzales v. Southwest Sec. & Protection Agency,* 100 N.M. 54, 665 P.2d 810 (Ct.App.1983). Because liability is not predicated on the fault of the employer, the abolition of joint and several liability does not eliminate respondeat superior liability.

We recognize that the traditional rule of respondeat superior does not apply in this case. The district court found that Trujillo's tort was not committed within the course and scope of his employment with Cowboys, presumably because Trujillo's assault on Medina was not in any way "actuated ... by a purpose to serve" Cowboys. *Restatement (Second) of Agency, supra,* § 228(1)(c); *see id.* § 235. Nevertheless, we believe that it is a natural extension of the doctrine of respondeat superior to hold that an employer who is liable for negligently hiring an intentional tortfeasor should be vicariously liable for the fault attributed to the tortfeasor-employee.

Scholars have provided a number of justifications for the doctrine of respondeat superior, such as distribution of costs, the master's right of control over the servant, and the encouragement of risk avoidance and prevention. *See generally Restatement (Second) of Agency, supra,* § 219 cmt. a; W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 69, at 500–01 (5th ed. 1984) [hereinafter *Prosser*]; 2 Floyd R. Mechem, *A Treatise on the Law of Agency* § 1856 (2d ed. 1914) [hereinafter Mechem]; Warren A. Seavey, *Handbook on the Law of Agency* § 83, at 141 (1964) [hereinafter Seavey]; William O. Douglas, *Vicarious Liability and Administration of Risk,* 38 Yale L.J. 584, 720 (1929) [hereinafter Douglas]; Fleming James, Jr., *Vicarious Liability,* 28 Tul.L.Rev. 161, 165–73 (1954) [hereinafter James]; C. Robert Morris, Jr., *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight,* 70 Yale L.J. 554 (1961); Young B. Smith, *Frolic and Detour,* 23 Colum.L.Rev. 444, 716 (1923) [hereinafter Smith]. There is less agreement on the strength of the various justifications than on the conclusion to which they point.

Although the traditional statement of the respondeat superior rule limits liability to employee torts committed within the scope of employment, *see Restatement (Second) of Agency, supra,* § 219(1), commentators explaining the rule often speak in terms of greater generality. Professor Seavey wrote that vicarious liability is a just result "if it can be said rationally that the employ-

ment is the primary cause of the tort." Seavey, *supra,* at 148. *Prosser* states, "The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business." *Prosser, supra,* at 500. Professor James explained that the doctrine covers unauthorized acts that are "reasonably foreseeable" in the broad sense that the risk "may fairly be regarded as typical of or broadly incidental to the enterprise[.]" James, *supra,* at 175. Professor Mechem wrote that the master is liable "[f]or those [acts or defaults of a servant] and those only for which he can in some way fairly be deemed to be responsible." Mechem, *supra,* at 1459.

The above statements by commentators suggest that the doctrine of respondeat superior might properly be extended to impose upon employers vicarious liability for any tort by a servant that is a reasonably foreseeable result of the employment relationship. *Cf. Gonzales v. Southwest Sec. & Protection Agency,* 100 N.M. at 55, 665 P.2d at 811 (following *Restatement (Second) of Agency, supra,* § 245 in imposing liability on master for intended tortious harm by servant that was "not unexpectable"). Such an extension of vicarious liability of employers may be inappropriate in some contexts, but we see no principled ground upon which to deny vicarious liability here—where the district court found both foreseeability (in the narrow sense of the term ordinarily employed in tort law) and causal connection of the tort with the employment—when such liability is imposed in circumstances coming within the traditional rule of respondeat superior. In other words, if the special nature of the employer-employee relationship requires that a faultless employer pay for all damages caused by a negligent employee acting within the scope of employment, then it should also require an employer who has negligently hired an employee to pay for all damages arising from an intentional tort of the employee when the tort was a reasonably foreseeable result of the negligent hiring. Indeed, some of the justifications for vicarious liability under respondeat superior, such as encouragement of risk avoidance and prevention, *see* Douglas, *supra,* at 588; James, *supra,* at 168, apply with greater force when the employer was negligent in hiring the servant.

Our view is not undercut by the absence of authority placing negligent hiring cases under the rubric of respondeat superior. After all, respondeat superior was developed as a doctrine to impose vicarious liability without fault upon employers. In a negligent hiring case, fault of the employer is present. Under a regime of joint and several liability, there is no need to theorize regarding the vicarious liability of such a negligent employer for the fault of an employee, because the employer is liable for all damages anyway, once negligence and causation are found. It has been only recently that a few jurisdictions have limited the application of joint and several liability in tort cases. Therefore, it is not surprising that the question posed here apparently has been considered in only one reported decision. *Kansas State Bank & Trust Co. v. Specialized Transp. Servs.*

This is not to say that principles of comparative negligence may not still apply in the negligent hiring context. For example, if the victim of the negligently hired employee has also been negligent (say, in exposing himself or herself to the danger), then that fault of plaintiff may reduce the damages for which the negligently hiring employer is liable, even if the employee who committed the intentional tort would still be liable for all the damages. This case, however, does not require us to decide that issue.

IV. CONCLUSION

For the above reasons, we affirm the judgment below.

IT IS SO ORDERED.

ALARID, C.J., and PICKARD, J., concur.

827 P.2d 1291

In the Matter of the Applications of MISSION PETROLEUM CARRIERS, INC. and Oil Transport Company,

In the Matter of the Application of ASH, INC.,

GROENDYKE, INC., Ash, Inc., Steere Tank Lines, Appellants,

v.

NEW MEXICO STATE CORPORATION COMMISSION, Eric P. Serna, Jerome D. Block and Louis Gallegos, Appellees,

and

Oil Transport Company, Intervenor–Appellee.

No. 19824.

Supreme Court of New Mexico.

March 3, 1992.

Rehearing Denied March 25, 1992.

Civerolo, Hansen & Wolf, Wayne C. Wolf, Albuquerque, for appellant Groendyke.

Ray Sanchez, Albuquerque, for appellant Ash.

Jack Smith, Albuquerque, for appellant Steere Tank Lines.

Jones, Snead, Wertheim, Rodriguez & Wentworth, James G. Whitley, Santa Fe, for intervenor-appellee Oil Transport.

Avelino A. Gutierrez, Sp. Asst. Atty. Gen., Albuquerque, for appellees Corp.

OPINION

FRANCHINI, Justice.

This matter is before us pursuant to the Extraordinary Writ of Certiorari that was entered on July 24, 1991. At issue is the State Corporation Commission's February 1, 1991 grant of a Certificate of Public Convenience and Necessity to Oil Transport Company (OTC). The grant is being challenged by Groendyke Transport, Inc. (Groendyke), Steere Tank Lines, Inc. (Steere), and Ash, Inc. (Ash). The grant to OTC was issued after the original denial of its application was vacated by this court in *Oil Transport Co. v. New Mexico State Corporation Commission,* 110 N.M. 568, 798 P.2d 169 (1990) (*OTC I*). In *OTC I,* we reversed and remanded to the Commission with instructions that:

> having determined a lack of mutual exclusivity, it enter additional findings of fact and conclusions of law, based upon the entire consolidated record, as to whether the grant of a certificate to OTC would be, "inconsistent with public convenience and necessity" and whether OTC is, "fit, willing and able to provide the transportation to be authorized by the certificate and to comply with the Motor Carrier Act and regulations of the commission." NMSA 1978, § 65–2–84(D)(1) (Repl.Pamp.1981).

OTC I, 110 N.M. at 574, 798 P.2d at 175.

We therefore must determine whether the Commission complied with the mandate of this court in *OTC I.* We determine that the Commission did not comply and reverse and remand with instructions.

"Upon review of a second appeal the only issue is whether the trial court [in this case the Commission] followed the appellate mandate." *Genuine Parts Co. v. Garcia,* 92 N.M. 57, 60, 582 P.2d 1270, 1273 (1978). The Commission had only the jurisdiction necessary to comply with the mandate of this court. *Id.* As stated above, we instructed the Commission to determine whether the grant of a certificate to OTC would be inconsistent with public convenience and necessity, and whether OTC is fit, willing, and able to provide transportation. Appellants do not challenge the Commission's findings as to OTC's fitness, and thus, we will accept them as true. *City of Roswell v. Reynolds,* 86 N.M. 249, 522 P.2d 796 (1974). What appellants challenge is the Commission's finding that a grant of authority would not be inconsistent with public convenience and necessity. Based on a comparative review, it is inconceivable to appellants that the Commission could find the total opposite of what it found in two prior hearings. The Commission had twice found a grant of authority to OTC would be inconsistent with public convenience and necessity. Additionally, appellants challenge the Commission's interpretation of our mandate. The Commission's answer brief states: "Indeed, reviewing the directions of the Mandate, as well as the consolidated records before the Commission, there was but one result [that] could be reached on remand, and that was to grant a certificate to Oil Transport Company."

It appears the Commission felt compelled to reach the result that the grant to OTC was a foregone conclusion. It was not the intention of this court to force the Commission to grant OTC a certificate. What this court intended was that the Commission would make a comparative review of the OTC and Ash applications based on the consolidated record; determine whether OTC was a fit and proper person to be granted a certificate; and determine whether granting OTC a certificate would be inconsistent with public convenience and necessity. It appears the Commission did not do what we contemplated in our opinion and mandate. It also appears that the Commission rubber-stamped its counsel's recommendation that this court left no other choice than to grant a certificate to OTC.

This case has become confused by two propositions of law that became the law of the case. The first was that the district court ordered an *Ashbacker*[1] comparative review of the OTC and Ash applications, based upon the entire consolidated records. This order was never appealed. The second was that the Commission determined that the applications were not mutually exclusive. "Under the doctrine of the law of the case, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." 1B James W. Moore et al., *Moore's Fed. Practice* ¶ 404[1] (2d ed. 1991); *see Reese v. State,* 106 N.M. 505, 745 P.2d 1153 (1987) (definition of doctrine); *First Nat'l Bank of El Paso v. Cavin,* 28 N.M. 468, 214 P. 325 (1923) (all matters determined by former decision of case become law of case and are binding upon court and litigants).

Although comparative review is usually only necessary when there is mutual exclusivity, *see* Bernard Schwartz, *Administrative Law* § 6.2 (1984); *Great Western Packers Express, Inc. v. United States,* 263 F.Supp. 347 (D.Colo.1966), here, each application may have prejudiced the other, *Great Western,* at 351, and so a comparative review should have been provided to afford a fair review. A comparative review did not preclude the Commission from determining that more than one applicant could be awarded a certificate. It did not prejudge this issue. Whether the Commission determined that there was room for more than one applicant, it still could have found that granting OTC a certificate would be inconsistent with the public interest based on all relevant factors. Additionally, the finding that the applications were not mutually exclusive did not prevent the Commission from granting or denying OTC's application. With non-mutual exclusivity, the Commission still should have looked at the effect on existing carriers and the public convenience and necessity with respect to each of the applications.

In *OTC I,* we ordered the Commission to "make additional findings of fact as may be necessary to support its decision." *OTC I,* 110 N.M. at 573, 798 P.2d at 174. Having shown public need and fitness, the only element left in the statutory scheme was public convenience and necessity. The Commission's findings on that issue were its conclusions that insufficient evidence was presented by persons objecting to the issuance of the certificates, that the transportation policy section was considered, and that issuing the certificates to OTC would be consistent with public convenience and necessity. NMSA 1978, Section 65–2–84(F) (Repl.Pamp.1990) states:

> Before granting a certificate * * * the commission shall take into consideration the transportation policy of Section 65–2–81[,] NMSA 1978 and the effect of issuance of the certificate on existing carriers; provided, however, that the commission shall not find diversion of revenue or traffic from an existing carrier to be, in and of itself, inconsistent with the public convenience and necessity.

The transportation policy of NMSA1978, Section 65–2–81 (Repl.Pamp. 1990) states that the motor vehicle should be:

> [S]upervised and regulated so as to provide for the development, coordina-

1. *See Ashbacker Radio Corp. v. Federal Communications Comm'n,* 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945). In *Ashbacker,* two applications were made to operate radio stations on the same frequency. The FCC granted the first application without a hearing and then designated the second application for hearing. The Court held that the FCC acted improperly: "For if the grant of one [application] effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing." *Id.* at 330, 66 S.Ct. at 150.

A good definition of the doctrine is as follows: When the grant of a license to one applicant precludes granting a license to another applicant, a consolidated, comparative hearing on the fitness of the competing applicants must be held. The factor causing the mutual exclusivity need not be physical interference, but may be economic. 4 Jacob A. Stein et al., *Administrative Law* § 41.04 (1992).

tion and preservation of a safe, sound, adequate, economical and efficient intrastate motor carrier system that is vital to the public interest of New Mexico. To that end, it is necessary that regulation promote competitive, economical and efficient service by motor carrier, and reasonable charges therefor without undue preference or advantage; enable efficient and well-managed motor carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; and provide for competitive motor carrier services at affordable rates for all municipalities, towns, villages and rural communities of New Mexico.

This statute is a regulatory statute and the Commission must weigh and balance the relevant evidence. *Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n,* 101 N.M. 470, 475, 684 P.2d 1135, 1140 (1984). Under existing law, public convenience and necessity means the convenience and necessity of the general public for the service in question. *Ferguson–Steere Motor Co. v. State Corp. Comm'n,* 63 N.M. 137, 146, 314 P.2d 894, 900 (1957); *Transcontinental Bus Sys. v. State Corp. Comm'n,* 61 N.M. 369, 372, 300 P.2d 948, 950 (1956). It considers adequacy of existing service as well as whether duplication of facilities would occur. *See Ferguson–Steere; Transcontinental; Whitfield Transp., Inc. v. New Mexico State Corp. Comm'n,* 85 N.M. 632, 515 P.2d 557 (1973). The diversion of revenue and traffic to existing carriers are also elements to be considered, although standing alone they will not establish inconsistency with the public convenience and necessity. § 65–2–84(F).

The Commission did not make findings comparing the merits of carriers and addressing evidence of the effect on existing carriers and its relationship to public convenience and necessity. No findings were made showing any rational connection between factors such as competition, duplication of facilities, deteriorating market causing decreased service potential, and the welfare of existing New Mexico citizens as those factors would affect public convenience and necessity.

We therefore, reverse and remand this case to the Commission to determine whether the grant of a certificate to OTC is inconsistent with public convenience and necessity. There is not only one result that can be reached on remand but whatever result is reached must be supported.

IT IS SO ORDERED.

MONTGOMERY and FROST, JJ., concur.

827 P.2d 1294

Carolyn G. LIETZMAN, individually, and Gary L. Smart, as Personal Representative for the Estate of Robert W. Lietzman, Deceased, Plaintiffs–Appellees,

v.

RUIDOSO STATE BANK, a New Mexico banking corporation, and Fred R. Heckman, Jr., Defendants–Appellants.

No. 19571.

Supreme Court of New Mexico.

March 10, 1992.

Kemp, Smith, Duncan & Hammond, John P. Eastham, Charlotte Lamont, Albuquerque, for defendants-appellants.

Calvin Hyer, Jr., Albuquerque, for plaintiff-appellee Smart.

J.S. Campbell & Associates, John S. Campbell, Albuquerque, for plaintiff-appellee Lietzman.

OPINION

RANSOM, Chief Justice.

This suit arises out of failed efforts by Carolyn Lietzman to prevent the withdrawal of funds from an account at the Ruidoso State Bank after the death of her husband, Robert Lietzman. Carolyn Lietzman claimed that funds in the O–Bar–O Property Development account belonged to her and her husband even though neither of their names appeared on the account signature card maintained by the Bank. The only signatory was Fred Heckman, who was able to transfer the funds to another account despite Carolyn Lietzman's efforts. Heckman was a business associate of Robert Lietzman, but purportedly had been hired by a corporate entity, O–Bar–O Ranch, Inc., to pursue a real estate development project on the O–Bar–O Ranch where the Lietzmans lived. Carolyn Lietzman and the personal representative of the estate of her deceased husband later brought suit against the Bank for loss of the funds. The Bank appeals from the judgment entered against it on a jury verdict awarding $157,222 compensatory and $75,000 punitive damages jointly to Carolyn Lietzman and to Gary Smart as personal representative. The Bank asserts on appeal that there was an absence of substantial evidence upon which to instruct the

jury on certain claims of the plaintiffs.[1]

The instructions referred to Carolyn Lietzman and Smart as "the plaintiff," and we will not look back from those instructions to the pleadings to consider whether the respective plaintiffs asserted distinct claims for relief.[2] The court instructed the jury that "the plaintiff seeks compensation from the defendant for damages which plaintiff claims were proximately caused by the breach of contract, breach of fiduciary duty, breach of the covenant of good faith, negligence and the prima facie tort committed by Ruidoso State Bank." There was no objection to any jury instruction at the trial. We therefore cannot review the correctness of the instructions, which became the law of the case. But we will review whether substantial evidence supported submission to the jury of the claims to which the motion for a directed verdict was directed on substantial evidence grounds, *Gerety v. Demers*, 86 N.M. 141, 142–43, 520 P.2d 869, 870–71 (1974), at least to the extent any lack of substantial evidence on a material issue was called to the attention of the trial court with some measure of specificity. *See Romero v. Mervyn's*, 109 N.M. 249, 784 P.2d 992 (1989) (where record for directed verdict lacks reference to claimed absence of evidence of consideration to support contract, appellate court will not address issue).

As considered on the motion for directed verdict and stated in the court's instructions to the jury, the contract claim was that, following the death of Robert Lietzman, the Bank agreed with Carolyn Lietzman that it would freeze (or seize) an account known as the O–Bar–O Property Development account, would do nothing to allow any person to remove any money therefrom, or would at least give Carolyn Lietzman the opportunity to obtain a court order to put a hold on the account. It was claimed that an implied term of the contract was that the Bank would not go out of its way or take affirmative action to notify the signatory on the account that he should withdraw money and transfer it to another account before Carolyn Lietzman could obtain a court order. It was claimed that the Bank breached the contract by notifying Heckman, the signatory, that he should withdraw all money from the O–Bar–O Property Development account, and by not allowing Carolyn Lietzman the opportunity to obtain the court order.

The fiduciary duty claim was that a fiduciary duty existed between the Bank and the Lietzmans and that the Bank breached that fiduciary duty in the manner more particularly set forth in the breach of contract and prima facie tort claims.

The good faith claim was that, under the Uniform Commercial Code, "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement." NMSA 1978, § 55–1–203. The Bank, it was therefore urged, owed a duty to the Lietzmans to deal with them in good faith. " '[G]ood faith' means honesty in fact in the conduct or transaction concerned." Section 55–1–201(19). It was claimed that the duty was to deal with the Lietzmans in good faith in all respects whatsoever, which the Bank failed to do in the manner more particularly set forth in

1. No specific contest of punitive damages has been raised by the Bank under the points of its briefs or in argument, and, indeed, the Bank did not object at trial to the presentation of punitive damages for jury determination. Consequently, we do not separately address punitive damages in this opinion.

2. At trial Carolyn Lietzman represented herself pro se. At the request of the Bank, in response to the respective claims asserted by the plaintiffs in their amended complaints, the court did instruct the jury that defendant denied the contentions of Smart under the theories of breach of fiduciary duty, breach of implied contract and covenant of good faith, negligence, and prima facie tort; and that the Bank denied Carolyn Lietzman's contentions of breach of duty to stop payment, breach of duty of good faith, and breach of a fiduciary duty. Nonetheless, as with the statement of the plaintiffs' claims, the court's damage instructions to the jury and the verdict form treated the plaintiffs jointly and without distinction as to the various claims for relief.

the breach of contract and prima facie tort claims.

The negligence claim was that the Bank owed a duty to the Lietzmans not to do anything to cause them harm or damage, and the claim refers to a breach in the manner more particularly set forth in the breach of contract and prima facie tort claims. In addition to informing the jury of the standard definitions of "negligence" and "ordinary care," the court instructed the jury:

> There was in force in this state, at the time of the occurrence in question, a certain statute which provided that:
>
> 55–4–405. Death or incompetence of customer.
>
> (1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.
>
> (2) Even with knowledge a bank may for ten days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account.
>
> If you find from the evidence that Ruidoso State Bank conducted itself in violation of the statute, then you are instructed that such conduct constituted negligence as a matter of law.

The jury also was instructed that "Every person has a duty to exercise ordinary care for the safety of the persons and the property of others."

Finally, the prima facie tort claim was that (1) the Bank acted intentionally and lawfully, (2) the Bank intended to injure the plaintiff, (3) the plaintiff suffered damages when the Bank allowed Heckman to withdraw the proceeds of the O–Bar–O Property Development account, and (4) the acts of the Bank were completely without any justification whatsoever, or with insufficient justification.

The thrust of the Bank's position, in its opposition to the plaintiffs' claims, was that Heckman, the sole signatory on the O–Bar–O Property Development account, was the sole customer of the Bank in relation to that account. Consequently, the Bank argued that it did not violate NMSA 1978, Section 55–4–405 because neither of the Lietzmans was a customer within the meaning of the statute. In its motion for directed verdict at the close of the plaintiffs' case, the Bank asserted that it clearly honored its contractual agreement under the O–Bar–O Property Development account. As to the covenant of good faith and as to negligence, the Bank based its motion for directed verdict "upon the facts that have been presented to the Court, that neither Ms. Lietzman nor her husband were on the signature account, that, I think, the testimony has been before the Court that Mr. Isaacs, although he may have known that the O–Bar–O was associated with Mr. Lietzman, I think that's the only fact before the Court...." Although the jury was not so instructed, Carolyn Lietzman made it clear, in response to a question by the court during argument on the Bank's motion for directed verdict, that she relied for her fiduciary duty claim on Sections 55–4–405 and 55–1–203. The Bank did not specifically reference fiduciary duty in its motion for directed verdict, but we deem that claim to be subsumed within the contract and the covenant-of-good-faith claims that were referenced. The Bank also moved for directed verdict on the prima facie tort claim "because there's just been no evidence by the Plaintiff that any officer of the bank knew anything. There's not been sufficient evidence to show that the bank in any way, by that

telephone call, was a direct or proximate cause of anything occurring." [3]

From our reading of the objections raised, we now consider what could be found to be the relationship of Robert Lietzman and Carolyn Lietzman to the O-Bar-O Property Development account, and our decision in turn will determine whether there was substantial evidence upon which to instruct the jury (1) on Section 55-4-405, (2) on breach of contract, breach of fiduciary duty, breach of the covenant of good faith, or negligence, and (3) on prima facie tort. In light of the objections made, the latter issue is limited to substantial evidence of the Bank's knowledge and of causal relationship. Both of the substantial evidence issues with respect to the prima facie tort claim are subsumed within the treatment we accord the issues concerning the first two claims.

As used in Article Four of the Uniform Commercial Code, a "customer" is "any person having an account with a bank or for whom a bank had agreed to collect items." NMSA 1978, § 55-4-104(1)(e). A "person" may be an individual or any other legal or commercial entity. *See* §§ 55-1-201(28), (30). Under these definitions, the Bank has argued variously that the sole customer with reference to the account was Fred Heckman (the party who opened the account and was the sole signatory), or O-Bar-O Ranch, Inc. (a duly formed and existing New Mexico corporation whose tax identification number was listed on the signature card), or "O-Bar-O Property Development" (the name under which the account was opened). On appeal the Bank argues that the actual identity of the Bank's customer is not the relevant inquiry, and that what does matter is that Robert Lietzman was *not* a customer on that account.

The Bank relies in particular upon the resolution of a similar question involving the identity of a bank's customer in *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 418 P.2d 191 (1966). In *Loucks*, a partnership had a bank account in its own name, and the partners later brought suit under Section 55-4-402 for wrongful dishonor of a partnership check. This Court held that where the account was in the name of a partnership, the individual partners were not "customers" for purposes of Section 55-4-402, and for that reason the partners could not recover damages for any personal injuries they may have suffered. Rather, the partnership, a recognized legal entity that could sue in its own name, was determined to be the customer.[4] The *Loucks* decision has been criticized for what has been perceived as a narrow and technical rule—that an individual cannot be a "customer" of the bank with reference to an account opened in the name of a legal entity such as a partnership or corporation and not in his or her own name. *E.g.*, *Schoenfelder v. Arizona Bank*, 165 Ariz. 79, 796 P.2d 881 (1990) (en banc) (holding that in view of bank's awareness of purpose of account and signatory's beneficial interest in account, trial court correctly de-

3. The attorney representing the Bank on appeal, and on the Bank's motion for judgment notwithstanding the verdict or a new trial, is not the same attorney who represented the Bank at trial. Several issues that the Bank attempts to raise on appeal were not timely raised at trial and we deem them not preserved. We will not consider issues when the trial court had no opportunity to address alleged error before the case was submitted to the jury. Issues raised in the motion for judgment n.o.v. or the motion for a new trial were subject to the discretion of the court, and we find no abuse of that discretion. *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 29-30, 766 P.2d 280, 289-90 (1988), *cert. denied*, 490 U.S. 1109, 109 S.Ct. 3163, 104 L.Ed.2d 1026 (1989). For example, on appeal, the Bank argues that there was no evidence of a promise or of consideration to support the breach of contract claim. It also argues that the prima facie tort claim should not have been submitted to the jury because the case was submitted to the jury under other accepted tort categories and because the doctrine of prima facie tort should not be applied retroactively. However, since the Bank did not raise or preserve these issues in a timely fashion, we will not now consider them.

4. The partners could recover for any damage suffered by the partnership, such as damage to its credit, reputation and business standing.

termined that the plaintiff was more than simply a mandatory signatory on corporate account, but was a "customer" with standing to maintain action for improper payment of unauthorized check).

In the case at bar, unlike *Loucks,* the account is not in the name of a legal entity such as a corporation or partnership. At trial, a representative of the Bank was unable to conclude exactly what type of account it represented—whether it was a corporate, partnership, or an individual business account. He concluded it was a business account with a conflict of name. Because the account was not in the name of any legal entity, one that could sue or be sued in its own name, our decision in *Loucks* is not controlling. Where, as here, the name on the account is not a legal entity, a variety of factors must be examined to determine who is a customer on that account. These include not only the name on the account and the authorized signatories, but also the circumstances surrounding the opening of the account, what persons control the account, and the beneficial interest of persons so associated with the account.

We are influenced in this conclusion by the opinion in *First National Bank of Springdale v. Hobbs,* 248 Ark. 76, 450 S.W.2d 298 (1970). In that case, a corporation and its president brought suit for improper payment of checks drawn on an account opened in the name "Holiday Inn Operating Account." The account had been opened by Hobbs, the president of a corporation (S. & H., Inc.) that was the holder of a Holiday Inn motel franchise, and Starnes, who had signed a ten-year lease agreement to operate the motel. Hobbs, Starnes, and Hobbs's son-in-law were to be signatories on the account, and two signatures were to be required for all checks. Through bank error, Starnes's wife also signed the signature card and subsequently several checks were drawn on the account without the signature of either Hobbs or his son-in-law.

When Hobbs sued, alleging the checks were wrongfully paid, the bank claimed that neither he nor the corporation was its customer under definitions of the UCC because the account was not carried in the name of either. The court rejected this contention, noting that the president of the bank had recognized Hobbs's interest in the account. The banker said he had assumed that the account belonged to both Hobbs and Starnes. The court also determined that neither the account nor the funds therein belonged to Starnes. Viewing the circumstances surrounding the opening of the account and the bank's knowledge, the court found that Hobbs was just as much a customer of the bank within the meaning of the UCC as Starnes. The fact that Hobbs was a signatory was not a determinative factor.

Here, neither Robert nor Carolyn Lietzman was directly involved in opening the account and neither was an authorized signatory. The account was opened by Heckman and he was the only signatory listed. However, a representative of the Bank, Preston Isaacs, testified that he recognized a connection between the O–Bar–O Ranch and Robert Lietzman. When asked why he associated the O–Bar–O Ranch with Robert Lietzman, Isaacs testified " 'Cause he owned it." This was knowledge, or notice, of a possible beneficial interest by the Lietzmans and one circumstance among others concerning the O–Bar–O Property Development account that should have alerted the Bank that the Lietzmans may be customers in relation to the account.

Additionally, Isaacs spoke with Carolyn Lietzman when she called about the Property Development account. Isaacs pulled the signature cards to both the Property Development and the O–Bar–O Ranch accounts. He testified that he assumed the cards were related inasmuch as they both bore the name O–Bar–O. The O–Bar–O Ranch account was a business account that listed Robert Lietzman and his brother, P.F. Lietzman, as signatories. Isaacs testified that, because he knew that Robert Lietzman owned the ranch, it could be assumed that his wife had an interest in that

account. However, with respect to the O–Bar–O Property Development account he told Carolyn Lietzman that he could not freeze that account because only an authorized signatory on the account could order it frozen.

While susceptible to conflicting inferences, we think the evidence was sufficient to raise a factual question of whether Robert Lietzman was a "customer" of the bank with reference to the Property Development account. Significantly, the Bank was aware Robert Lietzman had a possible beneficial interest in the account. The Bank recognized that the appearance of "O–Bar–O" in the name of the account and Robert Lietzman's ownership of the ranch would suggest some relation between the account and Robert Lietzman. For this reason, Carolyn Lietzman's representation to Isaacs that the funds belonged to her and her deceased husband was a tenable claim. Under these circumstances we think the Bank acted at its peril in relying solely upon the information on the signature card. The facts known to the Bank did not define its "customer" in relation to the account, but those facts were sufficient to put the Bank on inquiry notice of the death of a customer and of his surviving wife's interest in the account. *See Landrum v. Security Nat'l Bank of Roswell,* 104 N.M. 55, 716 P.2d 246 (Ct.App.1985) (upon being notified of forged endorsement claims, bank could place a hold on depositor's checking account in order to make reasonable inquiry into claims), *cert. quashed,* 103 N.M. 798, 715 P.2d 71 (1986).

The jury also heard testimony on the question of the ownership of the funds. No issue in this regard has been raised on appeal, and we note only that Carolyn Lietzman testified that the funds had originated from a certificate of deposit in Robert Lietzman's name in a Singapore bank. There was, however, no evidence that Isaacs or the other representatives of the Bank were aware of this fact.[5]

We conclude that substantial evidence in the record supports the fact that Robert and Carolyn Lietzman were customers in relation to the Property Development account. As the case went to the jury, the Bank had staked its defense to all claims, in law or in fact, on the proposition that the Lietzmans were not customers in relation to the account, or that the Bank knew nothing of such relationship. For purposes of this appeal we must conclude in support of the judgment that the jury drew a contrary inference although they were not specifically directed to resolve the issue. Thus, under Subsection 55–4–405(1) the Bank was without authority to pay an item with knowledge of the death of its customer.[6] That Subsection states that the death of a customer does not revoke authority to

5. The Bank has never contended that the funds belonged to Heckman. Heckman testified that the funds belonged to O–Bar–O Ranch, Inc., and that it was O–Bar–O Ranch, Inc. who had hired him to pursue the real estate development project. Robert Lietzman was not an officer or shareholder in this corporation. The president of O–Bar–O Ranch, Inc. was Thon Voranata, a citizen of Thailand. Robert Lietzman deeded the entire O–Bar–O Ranch to this corporation in September of 1983. At that time Robert and Carolyn Lietzman were separated and were contemplating divorce. Carolyn Lietzman filed for divorce in January 1984 but states that she and her husband were reconciled shortly thereafter. In any case, the parties were still married at the time Robert Lietzman died in a helicopter crash in May 1985. The transfer of the O–Bar–O Ranch to the corporation was declared void by a federal court five years after Robert Lietzman's death because his wife had not joined in the transfer of community real property as required by NMSA 1978, Section 40–3–13(A).

6. The Bank argued that because neither Robert nor Carolyn Lietzman were customers of the Bank for purposes of the Property Development account, Carolyn Lietzman's claim was an "adverse claim" unrelated to Subsection 55–4–405(1) and one the "Bank could ignore with impunity" because NMSA 1978, Section 58–1–7 requires either indemnity or a court order before a bank need recognize an adverse claim. Since we deny the Bank's major premise that the Lietzmans were not customers, we do not reach this argument. Under the verdict, Carolyn Lietzman could not be characterized as an adverse claimant. Furthermore, Section 58–1–7 is not a complete defense even if Carolyn Lietzman could be characterized as an adverse claimant. Here, the Bank's liability was predicated on Subsection 55–4–405(1) for transferring the

pay an item until the bank knows of the death and has had an opportunity to act on it. With respect to Subsection 55–4–405(1), the negative implication in the last sentence of that Subsection is that the death of a customer revokes authority to pay an item drawn on that person's account after the bank knows of the fact of death.[7]

For the foregoing reasons we affirm the judgment of the district court.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

funds after knowledge of Robert Lietzman's death. Section 58–1–7 is not a defense to an "adverse claim" proved on its merits under Subsection 55–4–405(1). The Bank's recourse, when advised of Carolyn Lietzman's claim, was to place a hold on the account in order to make reasonable inquiry. This it could do without incurring liability to any creditor of the account. *See Landrum.* If Section 58–1–7 were not satisfied by an adverse claimant during the period of such a hold, the Bank could have chosen whether to recognize the applicability of Subsection 55–4–405(1). In choosing not to recognize the fact of a customer's death, however, a bank acts at its peril. When the death later is established as a fact to have been the death of its customer, the liability of a bank is defined by Subsection 55–4–405(1). That, in essence, is what happened here.

7. With knowledge of the death of a customer, under Subsection 55–4–405(2), a bank may not pay checks when ordered to stop payment by a person claiming an interest in the account. As counsel for the estate of Robert Lietzman conceded at oral argument, that Subsection is inapplicable to the facts of this case, as it applies to checks drawn on or prior to the date of death.

[redacted]

827 P.2d 1303

STATE of New Mexico, Plaintiff-Appellee,

v.

Geronimo MUNOZ, Defendant-Appellant.

No. 12652.

Court of Appeals of New Mexico.

Jan. 14, 1992.

Certiorari Denied Feb. 21, 1992.

Tom Udall, Atty. Gen., William McEuen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Robert J. Jacobs, Taos, for defendant-appellant.

OPINION

APODACA, Judge.

Defendant appeals from his convictions under three counts for separate criminal offenses. A jury found defendant guilty of murder in the second degree of J.A. Hatfield (Hatfield), attempted murder in the second degree of Lila Hatfield, and attempted murder in the first degree of Ralph Hernandez. He argues eleven issues in his brief-in-chief. Other issues raised in the docketing statement but not briefed are deemed abandoned. *See State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct. App.1985).

Only one of the issues raised by defendant merits publication, so only that part of the opinion discussing that issue will be formal and published. The issue meriting publication is whether the trial court erred in refusing defendant's requested jury instruction on the lesser-included-offense of voluntary manslaughter in connection with the death of Hatfield. We hold that defendant's testimony provided a factual basis for such an instruction and thus conclude that the trial court committed reversible error in denying defendant's requested instruction. The second-degree murder conviction under count 1 is therefore reversed

and the case is remanded for a new trial on that count. For the reasons stated in the unpublished portions of this opinion, we affirm the other two convictions with respect to all other issues raised by defendant.

BACKGROUND

During the late night or early morning of March 15–16, 1989, defendant went to the home of Hatfield and Lila Hatfield, his wife, where he shot and killed Hatfield. As defendant was leaving the Hatfield residence, he ran over Lila Hatfield with his pickup truck, severely injuring her. Defendant then shot Ralph Hernandez in both legs and left him in a secluded place. In addition to the criminal offenses for which he was convicted, defendant was charged with aggravated burglary for his entry into the Hatfield residence and aggravated assault for allegedly assaulting his wife, Donna Munoz, with a firearm. Additional facts and background are included in our discussion.

Defendant testified at trial, admitting that he committed the acts in question. However, his defense theory was that he was unable to form the specific intent required, resulting from certain events that occurred from March 13 through March 16. In support of this defense, he introduced the testimony of several expert witnesses who testified that, during the events, defendant was suffering from a brief reactive psychosis. The jury found defendant not guilty of the aggravated burglary and aggravated assault. Defendant was sentenced, and this appeal followed.

DISCUSSION

The critical difference between murder and voluntary manslaughter is the existence of legally sufficient provocation. SCRA 1986, 14–220. A homicide is murder if done without what the law considers to be sufficient provocation. However, if the homicide occurs as a result of what the law deems as sufficient provocation, the homicide is considered voluntary manslaughter. *Id.* A trial court must instruct the jury on voluntary manslaughter if the defense requests such an instruction and the instruction is warranted under the facts of the case. *State v. Reynolds*, 98 N.M. 527, 650 P.2d 811 (1982); *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979); *State v. Marquez*, 96 N.M. 746, 634 P.2d 1298 (Ct.App.1981).

SCRA 1986, 14–222, defines sufficient provocation as "any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions." This rule also provides that "[t]he provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition." *Id.* The required provocation is insufficient "if an ordinary person would have cooled off before acting." *Id.* Whether a particular set of circumstances is sufficient provocation is generally a question for the jury to decide. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982). Thus, our task as a reviewing court is to determine whether the jury could have determined that defendant's actions were the result of legally sufficient provocation based on the evidence presented. *See State v. Manus; Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976); *State v. Marquez.*

Defendant testified at length concerning the events of March 13 through 16. What follows is a summary of his testimony. Defendant and Donna Munoz were married in 1980. He was eighteen years old at the time; she was fifteen years old. She had run away from home a few months earlier. She told defendant that she was running away because Hatfield, who was her stepfather, had attempted to touch her sexually. Throughout the marriage, Donna Munoz continually maintained that Hatfield had only tried to touch her but had not succeeded.

During the evening hours of March 15, 1989, Donna Munoz told defendant that she wanted to talk to him. They left their son, Christopher, in the spare bedroom, watching television, and went into the living room. There, Donna Munoz spoke generally about her family and specifically about events that had occurred when she was growing up. Ultimately, she informed de-

fendant that, beginning when she was nine years old, Hatfield, as well as her uncle, Ralph Hernandez, and her brother, Fabian McClean, had sexually molested her. The acts of molestation occurred on many occasions, and included anal and vaginal intercourse, as well as oral sex, for which the men gave her money. She told defendant that she had informed other family members of these occurrences, including her mother. They had responded by telling her to be quiet about the molestations so that the family could stay together. As she revealed these events to defendant, Donna Munoz was screaming and crying hysterically.

Becoming extremely upset as he heard these disclosures, defendant picked up his rifle and went to his in-laws' house, located a few miles away. He testified that he went there because he wanted to talk to Hatfield. He took his rifle with him because he was afraid of Hatfield. He had been to the house before and knew that Hatfield kept guns there in the spare bedroom.

Upon arriving at the Hatfield residence, defendant entered the house uninvited, went into the bedroom, and awakened Hatfield and Lila Hatfield. He told them of his wife's revelations and that they had ruined his and his wife's lives. Hatfield denied everything, but Lila Hatfield admitted that her daughter had come to her for help and that she had refused her plea. At that point, Hatfield gave Lila Hatfield a "go-to-hell look" and said he wanted a cigarette. Defendant said no, that he wanted to talk. Hatfield stood up and walked toward defendant. Defendant loaded his rifle. Both men were yelling. Hatfield, who appeared to be very angry, stared into defendant's eyes, then stepped back and started walking out of the bedroom. Defendant testified that, as he was losing Hatfield in the dark, the gun went off.

Based on these facts, defendant requested an instruction on the lesser-included offense of voluntary manslaughter in connection with the resulting death of Hatfield. The trial court refused the instruction, holding that *State v. Manus* required that, to establish voluntary manslaughter, a defendant must show that he was provoked by the victim. The trial court stated that there was sufficient evidence by which a jury could find provocation. Nevertheless, it concluded that defendant was not entitled to the instruction because the provocation in this appeal came, not from the victim, but from the disclosures made by Donna Munoz to defendant. We disagree with the trial court's view of the law.

It is settled law that the victim must be the source of the provocation. *State v. Manus.* In applying this rule, however, it is important to distinguish between the actual provocation, which in this case consisted of Hatfield's sexual molestations of Donna Munoz, and the manner in which defendant learned of the provocation, which consisted of Donna Munoz's disclosures. To establish manslaughter, both of these must occur before the killing. As the facts of this appeal illustrate, the provocation and the disclosure of the events constituting the provocation may occur at different times. However, as our supreme court has observed, " 'a sudden disclosure of an event (the event being recognized by the law as adequate) may be the equivalent of the event presently occurring.' " *Sells v. State,* 98 N.M. at 788, 653 P.2d at 164 (quoting Charles E. Torcia, 2 *Wharton's Criminal Law* § 156 (14th ed. 1979)); *see also* F. Lee Bailey & Henry B. Rothblatt, 1 *Crimes of Violence: Homicide and Assault,* § 565 (1973); Wayne R. La Fave & Austin W. Scott, Jr., 2 *Substantive Criminal Law* § 7.10(b) (1986). Thus, we believe the trial court erred in determining that, as a matter of law, Hatfield had done nothing that was legally sufficient to provoke defendant.

The state does not argue that Hatfield's sexual abuse of Donna Munoz would not be a legally sufficient provocation, nor does it contend that the trial court correctly applied the holding of *Manus.* Instead, the state argues that defendant's testimony demonstrates that defendant killed Hatfield because he thought Hatfield was going to get a gun. Thus, the state maintains, defendant's own actions caused the true provocation—Hatfield's attempt to get a gun. We disagree.

We recognize that a defendant cannot pose a threat to the victim and then

rely on the victim's response as a legal provocation. *See, e.g., State v. Manus; State v. Marquez.* In the present case, however, defendant's provocation argument was based on Hatfield's alleged sexual mistreatment of defendant's wife, rather than on the possibility Hatfield was going to get a gun. We thus hold that defendant was entitled to have the jury instructed on voluntary manslaughter in connection with the death of Hatfield.

CONCLUSION

Based on our discussion and the unpublished portions of this opinion, we (1) reverse and remand for a new trial on count 1, involving the death of J.A. Hatfield; and (2) affirm defendant's convictions for the attempted second-degree murder of Lila Hatfield and the attempted first-degree murder of Ralph Hernandez.

IT IS SO ORDERED.

HARTZ and BLACK, JJ., concur.

827 P.2d 1306

Nancy CAILLOUETTE, Personal Representative of the Estate of Latha Caillouette, Jr., Deceased, Plaintiff–Appellant and Cross–Appellee,

v.

HERCULES, INC., a Delaware corporation, Tri–State Motor Transit Company, Inc., a Delaware corporation, Defendants,

and

Arthur Archibeque, Lieutenant in the New Mexico State Police and the New Mexico Department of Public Safety, Defendants–Appellees and Cross–Appellants.

No. 12464.

Court of Appeals of New Mexico.

Jan. 17, 1992.

Certiorari Denied Feb. 18, 1992.

OPINION

MINZNER, Judge.

Plaintiff appeals the directed verdict granted to Defendants Archibeque and the Department of Public Safety (Department) (collectively Defendants) in her action for wrongful death, and Defendants have cross-appealed the denial of motions for judgment on alternative grounds. Plaintiff asks us to reverse the trial court's decision that the New Mexico Tort Claims Act does not contain a relevant waiver of immunity. She relies on NMSA 1978, Sections 41–4–5, –6, and –12 (Repl.Pamp.1989). Issues raised in the docketing statement but not briefed are deemed abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App. 1985). Defendants ask us to hold that the trial court erred in denying the Department judgment on the alternative ground that it did not receive timely notice of Plaintiff's claim as required by NMSA 1978, Section 41–4–16 (Repl.Pamp.1989), and in denying Defendants judgment on the alternative grounds that there was no violation of any duty owed Plaintiff's decedent, and there was a lack of proximate cause. Because several relevant opinions were filed by both the supreme court and this court while this case was pending on appeal, we requested supplemental briefs and also heard oral argument. We now affirm on the ground that none of the three sections on which Plaintiff relies provides a waiver of immunity for the claims she has stated. We do not address the issues raised by the cross-appeal.

I.

BACKGROUND.

On May 29, 1987, a truck owned by Tri-State Motor Transit and hired by Hercules, Inc. to transport a load of solid propellant explosives Hercules manufactured, overturned thirty-seven miles north of Alamogordo, New Mexico, on U.S. Highway 54. As a result of the accident, the top of the trailer burst, and many cartons of explo-

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Jack T. Whorton, Mark Woodard Whorton, Whorton Law Offices, A Partnership, Alamogordo, for plaintiff-appellant and cross-appellee.

Thomas A. Sandenaw, Jr., Weinbrenner, Richards, Paulowsky, Sandenaw & Ramirez, P.A., Las Cruces, for defendants-appellees and cross-appellants.

sives broke, spilling explosive powder around the inside of the trailer. Someone reported the accident to Lt. Arthur Archibeque, a "state police emergency response officer" under the Emergency Management Act (EMA). *See* NMSA 1978, § 74–4B–5(B) (Repl.Pamp.1990). He went to the accident site. A dispatcher notified Mary Walz, the administrator of the state police emergency response center. *See* § 74–4B–5(C).

The statute requires that once notified the state police emergency center shall:

> (1) evaluate and determine the scope of the accident based on information provided by the first responder;
>
> (2) instruct the first responder on how to proceed at the accident scene;
>
> (3) immediately notify the appropriate responsible state agency and advise it of the necessary response;
>
> (4) notify the sheriff or chief of police in whose jurisdiction the accident occurred; and
>
> (5) coordinate field communications and summon additional resources requested by the emergency management team.

Id. The EMA also provides that:

> Nothing in the Emergency Management Act [this article] shall be construed to relieve hazardous materials owners, shippers or carriers of their responsibilities and liability in the event of an accident. Such persons shall assist the state as requested in responding to an accident and are responsible for restoring the scene of the accident to the satisfaction of the state.

NMSA 1978, § 74–4B–10 (Repl.Pamp.1990).

Walz did not testify at trial, but portions of her deposition were read into the record. In those portions she indicated that she believed Archibeque was competent to determine what needed to be done, and because he did not ask for specific directions, she did not give him any. She was not asked whom she notified after she learned of the accident. The record indicates that she and Archibeque communicated through the dispatcher.

Archibeque called a wrecking company and requested several wreckers, another semi-trailer and tractor, and a crew to help clean up the spill. The crew opened the damaged trailer, transferred the unbroken cartons of explosives to the replacement trailer, scooped up as much of the explosive powder as they could, and placed it back in the broken cartons. Archibeque apparently supervised this activity. At his direction, the damaged trailer containing the broken cartons and spilled powder was towed to a wrecker yard in Alamogordo. Archibeque then left the accident site.

Hercules sent a representative to the wrecker yard, who supervised the clean-up of the damaged trailer there. The broken cartons were reloaded into another vehicle without incident and transported back to Hercules' manufacturing plant.

The damaged trailer, still contaminated with powder residue, was moved under Tri–State's direction from the wrecker yard to H & R Automotive Company in Alamogordo a week later. A Tri–State employee supervised its repairs to the trailer. On June 6, 1987, Plaintiff's decedent, an H & R Automotive employee, was using a cutting torch on the roof of the trailer to repair it. The torch ignited the powder residue left in the trailer. Plaintiff's decedent received severe burns and died on June 14.

Plaintiff, as decedent's personal representative, filed a wrongful death action against Tri–State, Hercules, Archibeque, and the Department alleging negligence, nuisance, and strict liability. With respect to Defendants, Plaintiff's complaint alleges negligence at the scene and also after the trailer was moved to Alamogordo.

Plaintiff's complaint describes Archibeque as having:

> [3. I]nvestigated the accident, arranged or observed the clean up, viewed or supervised the reloading of the cargo onto

other vehicles. Thereafter, he negligently released the explosives, residue and vehicle back into the possession, actual or constructive, of the Defendant carrier and Defendant shipper, for whatever handling and disposition they chose to make of these hazardous and flammable military explosives. Thereafter, he failed to protect the public from this dangerous nuisance and negligently permitted and allowed this nuisance to be created and continued, contrary to the requirements of due care and the internal rules and regulations and good practice that governed his actions. The officer submitted a written incident report to his superiors in the New Mexico State Police in Alamogordo, and to the New Mexico Department of Public Safety, as to both his actions and omissions. This agency ignored the hazard, still present in Alamogordo, contrary to its own internal rules and regulations, good practice and due care. Ten days later, Plaintiff's decedent was grievously injured and later died, as a result of this negligence, unabated dangerous condition and nuisance. The Defendant, Archibeque, was notified, and the Department of Public Safety was notified of this death by the New Mexico State Fire Marshal's Office, whose jurisdiction and assistance should have been invoked, along with other State agencies, in the first instance by the Defendant, Archibeque, and the Department of Public Safety. These several acts and omissions of these Defendants were a proximate contributory cause of the injury and death of Plaintiff's decedent and the damages to his estate, and to his statutory beneficiaries.

4. This claim is stated under the Tort Claims Act against these Defendants, as, respectively, a law enforcement officer and employee of a law enforcement agency of the Department of Public Safety, his employer, under the doctrine of respondeat superior. Both officer and agency had actual notice of facts last, and next pleaded, comprising the claims against all the other Defendants.

Defendants moved for summary judgment. They argued that even if they were negligent, Plaintiff's decedent was not a foreseeable victim and, in the alternative, that his use of a cutting tool on the roof of the trailer was an independent intervening cause as a matter of law. The Department also moved for summary judgment on the ground that it had not received timely notice of the claim. The trial court denied both motions. Tri–State settled with Plaintiff prior to trial; she presented her case against Hercules and Defendants to the jury. At the close of her evidence, Defendants moved for a directed verdict on grounds offered in support of their motions for summary judgment and on the basis that the Tort Claims Act did not contain a relevant waiver of immunity. The court agreed that there was no relevant waiver of immunity and dismissed the claims made against Defendants. At the conclusion of all the evidence, the jury found Hercules negligent and awarded Plaintiff damages. By special verdict, the jury attributed three percent of fault to Archibeque and twenty percent of fault to the Department.

II.

DISCUSSION.

At oral argument, Plaintiff indicated that Archibeque should not have allowed the trailer to proceed to Alamogordo with broken cartons and spilled powder on board, but rather should have notified Hercules or Tri–State and required their assistance in cleaning up at the site. This seems to be a claim that Archibeque failed to exercise ordinary care in supervising clean-up at the site. Further, Plaintiff suggested at oral argument that Archibeque or Walz should have notified the Environmental Improvement Division (Division) and obtained its assistance. This seems to be a claim that there was a breach of a statutory duty, either at the site or later in Alamogordo. Finally, Plaintiff argued in her supplemental brief that Walz negligently supervised Archibeque. This theory is related to the

first, in that Plaintiff essentially argues that Walz's acts or omissions caused or contributed to Archibeque's negligence at the site.

Plaintiff primarily relies on Section 74-4B-5(1) to establish a deprivation of statutory right by a law enforcement officer resulting in injury, for which Section 41-4-12 waives immunity, and (2) as evidence of supervisory responsibilities for the operation or maintenance of a vehicle or machinery in order to argue that Defendants' acts are within the waiver of immunity provided by Section 41-4-5 or Section 41-4-6. *Cf. Romero v. State,* 112 N.M. 332, 815 P.2d 628 (1991) (New Mexico State Highway Department's supervisory responsibility may include supervising the county's daily maintenance of a roadway, thus bringing the department's acts under the waiver of immunity contemplated in NMSA 1978, Section 41-4-11(A) (Repl.Pamp.1989)). She also argues that NMSA 1978, Section 41-2-1 (Repl.Pamp.1989) (the Wrongful Death Act) and Article II, Section 4 of the New Mexico Constitution (guaranteeing the inherent rights of life, property and happiness) provide a basis for waiver of immunity in that violations of these provisions amount to a "deprivation of * * * rights * * * secured by the constitution and laws of * * * New Mexico" within the meaning of Section 41-4-12. She also argues that NMSA 1978, Section 29-1-1 (Repl.Pamp.1990) (declaring the duty of every peace officer to investigate all violations of criminal laws) and NMSA 1978, Section 29-2-18(C) (Repl.Pamp.1990) (charging state police with enforcement of all laws regulating the use of highways) provide a basis for waiver of immunity in that violations of these provisions amount to a deprivation of "rights * * * secured by * * * laws of * * * New Mexico" within the meaning of Section 41-4-12.

We do not believe the complaint states a claim for negligent supervision or that the evidence introduced at trial would support a conclusion that the complaint was amended by implication under SCRA 1986, 1-015(B) to include such a claim. However, in addressing Plaintiff's other theories, we also answer this one.

We now discuss the relevance of the three sections of the Tort Claims Act on which Plaintiff has relied. We begin with Section 41-4-12.

SECTION 41-4-12.

The Tort Claims Act provides, in Section 41-4-12, a waiver of immunity for certain conduct of law enforcement officers. The Tort Claims Act provides:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

Id.

Plaintiff's negligence theories arise out of the first portion of Section 41-4-12 and those cases interpreting it in which the appellate courts have recognized a waiver of immunity when negligent acts of a police officer have resulted in one of the specifically enumerated intentional torts listed. *See Methola v. County of Eddy,* 95 N.M. 329, 333, 622 P.2d 234, 238 (1980). She suggests that releasing the trailer in its damaged condition for travel to Alamogordo was the equivalent of a battery that resulted in death. The analogy is unpersuasive.

The harm immediately resulting in death was clearly an accident rather than a battery. Archibeque's decisions at the accident site do not support an inference that he intended "to engage in unlawful conduct

that invades the protected interests of others." *California First Bank v. State,* 111 N.M. 64, 74, 801 P.2d 646, 656 n. 6 (1990). Thus, there is no basis for treating his conduct as an intentional tort. *See id.* We conclude there is no specified tort within the meaning of the portion of Section 41–4–12 that was interpreted and applied in *Methola.*

While this court has recently held that Section 41–4–12 of the Tort Claims Act does not provide immunity to supervisory law enforcement officers who negligently train or supervise subordinates, *McDermitt v. Corrections Corp.,* 112 N.M. 247, 814 P.2d 115 (Ct.App.1991); *Ortiz v. New Mexico State Police,* 112 N.M. 249, 814 P.2d 117 (Ct.App.1991), we emphasized that the negligence complained of must cause a specified tort or violation of rights; immunity is not waived for negligence standing alone. Our supreme court applied the same analysis to Section 41–4–12 in *Bober v. New Mexico State Fair,* 111 N.M. 644, 808 P.2d 614 (1991). Justice Montgomery noted that while that court has held that Section 41–4–12 waived immunity for negligence of a law enforcement officer or agency that caused one of the listed torts, "no case has held that simple negligence in the performance of a law enforcement officer's duty amounts to commission of one of the torts listed in the section." *Id.* at 654, 808 P.2d at 624.

We conclude that Plaintiff's negligence theories based on *Methola* are not supported by our case law. Her claim is for personal injury resulting from negligence, and thus does not fall within the first portion of Section 41–4–12.

Plaintiff also argues that Defendants' acts fall under the waiver of immunity for injuries resulting from the "deprivation of any rights * * * secured by the constitution and laws of the United States or New Mexico" found in Section 41–4–12. This theory, based on a breach of statutory duty, arises out of the latter portion of Section 41–4–12 as construed in *California First Bank,* 111 N.M. at 73–75, 801 P.2d at 655–57 (discussing NMSA 1978, Section 29–1–1 (Repl.Pamp.1990) and concluding that the plaintiff in that case had alleged a cause of action based on violation of a right secured by the laws of New Mexico). Plaintiff contends that Defendants' failure to notify the Division deprived her decedent of a right to have certain laws enforced, a right secured by statute or constitutional provision. *See* NMSA 1978, §§ 29–1–1, 29–2–18 (Repl.Pamp.1990); *see also* N.M. Const., art. II, § 4.

Plaintiff's reliance on the wrongful death statute and the state constitution is misplaced. If we were to base a waiver of immunity on these provisions, the exceptions thus created would eliminate the principle of sovereign immunity. We do not think that can have been the legislature's intent in enacting Section 41–4–12. Plaintiff has not cited any specific law concerning the use of highways that was not enforced other than Section 74–4B–5. We will discuss Section 74–4B–5 in greater detail.

After reviewing the evidence on which Plaintiff relies, we cannot conclude that Archibeque or the center failed to enforce the EMA. Thus, we need not discuss the issue of whether Section 74–4B–5 secures a right or rights "for the violation of which Section 41–4–12 provides an independent waiver of immunity." *Cf. California First Bank v. State,* 111 N.M. at 73–74, 801 P.2d at 655–56 (issue "of whether Section 29–1–1 secures such a right is squarely presented"). We note, however, that the EMA states: "Nothing in the Emergency Management Act shall be construed as a waiver or alteration of the immunity from liability granted under the Tort Claims Act * * *." NMSA 1978, § 74–4B–4(C) (Repl.Pamp.1990).

Archibeque's only statutory obligation under the EMA was to notify the state police emergency response center, and it is undisputed that he did so. *See* § 74–4B–5(C). We assume but need not decide that he had a general supervisory role over the

accident site, and that if he breached that duty, it would have been for the jury to decide whether his actions or omissions were the proximate cause of the injuries suffered in Alamogordo. We do not think the evidence Plaintiff presented at trial would have supported a finding that Archibeque failed to perform a general supervisory role.

We also do not think that Plaintiff established that the state police emergency response center failed to comply with the EMA. The EMA states that the center must notify the appropriate responsible state agency. *See* § 74–4B–5(C)(3). On these facts, where the material spilled was flammable, the EMA indicates that either the Division or the state fire marshal's office would have been a "responsible state agency." *See* § 74–4B–5(D)(2), (3); *see also* NMSA 1978, § 74–4B–3(H), (I) (Repl.Pamp.1990). The same is true of the EMA as it read at the time of the accident. *See* 1986 N.M.Laws, ch. 62, § 3. Defendants have stated on appeal that the evidence showed that the marshal was notified. Plaintiff has not disputed this statement with proper references to the transcript, *see* SCRA 1986, 12–213(A)(2), (3) (Cum.Supp.1991); *State v. Reese*, 91 N.M. 76, 570 P.2d 614 (Ct.App.1977), and we assume its truth.

If we are correct in construing the EMA to have permitted the center to notify either the Division or the marshal, Plaintiff failed to prove the statutory violation on which she relied. Under these circumstances, the trial court did not err in directing a verdict for Defendants, because there was an insufficient showing that there had been a breach of the statutory duty on which this theory rests.

Even if we assume that the center should have notified the Division, however, we do not think the decision to direct a verdict for Defendants was error. We believe Plaintiff's case included insufficient evidence that the Division had not been notified, or that if notified, the Division would have done anything other than what was done. Walz was never asked whom she notified, and there was no evidence regarding what the Division would have done upon notification. Under these circumstances, we think the trial court properly directed a verdict for Defendants for lack of sufficient evidence of a causal connection between the Department's omission and the accident that occurred, as well as for lack of evidence that there had been a breach of statutory duty.

For these reasons, we conclude that Plaintiff did not succeed in producing sufficient evidence to support a conclusion that her claim lay within the waiver of immunity provided by Section 41–4–12. The trial court did not err in concluding that section was not applicable.

SECTIONS 41–4–5 AND –6.

The pertinent language of Section 41–4–5 waives immunity for the negligence of public employees "while acting within the scope of their duties in the operation or maintenance of any motor vehicle, aircraft or watercraft." Plaintiff appears to argue that in failing to ensure that the damaged trailer was disposed of properly, Archibeque negligently maintained a vehicle. However, the trailer was privately owned, and its owner authorized its repair and apparently selected the party to make the repairs. The activity on which Plaintiff's claim appears to depend is the trailer's removal from a public highway in a particular condition, rather than its subsequent repair. Plaintiff's claim is therefore more analogous to a claim of negligent inspection or supervision than a claim of negligent maintenance.

As we explained in *Armijo v. Department of Health & Environment*, 108 N.M. 616, 618, 775 P.2d 1333, 1335 (Ct.App.1989):

> [T]he term 'maintenance' does not permit us to recognize liability for all activities licensed or inspected by state agencies. 'The licensing scheme is too pervasive to extend such liability to the state. Impos-

ing such liability would circumvent the very grant of immunity provided by the Tort Claims Act, subject to the specific waivers of immunity.' [Citation omitted.]

Id. (quoting *Martinez v. Kaune Corp.*, 106 N.M. 489, 492, 745 P.2d 714, 717 (Ct.App. 1987)). We think that the use of the words "operation" and "maintenance" in Section 41–4–5 indicates an intent not to extend liability to all activities supervised or inspected by the state. *Cf. Armijo v. Department of Health & Env't* (Health and Environment Department's regulation of community mental health facility was not "operation" of the facility within meaning of NMSA 1978, Sections 41–4–9 and –10 (Repl.1986 & Cum.Supp.1988)).

Although the supreme court recently determined that the New Mexico State Highway Department's supervisory responsibility may include supervising a county's daily maintenance of a roadway, thus bringing the Department's acts under the waiver of immunity contemplated in Section 41–4–11(A), *see Romero v. State,* we do not believe that analysis is applicable to this case. At issue in *Romero* was the waiver of immunity for damages " 'caused by the negligence of public employees while acting within the scope of their duties in the maintenance * * * of any * * * highway [or] roadway.' " *Romero v. State,* 112 N.M. 291, 296, 814 P.2d 1019, 1024 (Ct.App. 1991) (quoting § 41–4–11(A)). The supreme court concluded that the Highway Department's own statutory responsibilities were within the meaning of "maintenance." The court stated that "the greater supervisory responsibilities contemplated by the 1986 law included more than issuing regulations. Those responsibilities could have included supervising the county's actual day-to-day maintenance of the roadway." *Romero v. State,* 112 N.M. at 334, 815 P.2d at 630. Here, as we interpret the statutes and regulations on which Plaintiff has relied, Archibeque had a general supervisory role, which did not include repairing the damaged trailer. His actions are not within the meaning of "maintenance" or "operation" of a vehicle as those terms are used in Section 41–4–5.

For similar reasons, the language of Section 41–4–6, which waives immunity from liability for "damages resulting from * * * the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any * * * machinery [or] equipment," also is not applicable. In addition, here, the machinery that caused the injuries resulting in death was privately owned and operated. *See generally Castillo v. County of Santa Fe,* 107 N.M. 204, 205, 755 P.2d 48, 49 (1988) (Section 41–4–6's waiver of immunity includes waiver for injuries arising from an unsafe, dangerous, or defective condition of property owned and operated by the government).

We finally note that there is no evidence in the record that Plaintiff relied on Section 41–4–6 at trial. It is not mentioned in the trial court's written order granting Defendants' motion for a directed verdict and was not discussed at the hearing on the motion. Under these circumstances, even if the issue had merit, it was not preserved for review on appeal. *See* SCRA 1986, 12–216.

III.

CONCLUSION.

We conclude that the trial court did not err in directing a verdict for Defendants. The trial court's order is affirmed. No costs are awarded.

IT IS SO ORDERED.

HARTZ and PICKARD, JJ., concur.

828 P.2d 412

Jack E. BROWN and Cyril Wagner, Jr., Plaintiffs–Appellants and Cross–Appellees,

v.

FINANCIAL SAVINGS, a Texas corporation, Defendant–Appellee and Cross–Appellant.

No. 20079.

Supreme Court of New Mexico.

April 3, 1992.

Kemp, Smith, Duncan & Hammond, P.C., John P. Eastham, William Panagakos, Albuquerque, for appellants.

Butt, Thornton & Baehr, P.C., Rodney L. Schlagel, Emily A. Franke, Albuquerque, Newsom, Terry & Newsom, R. Kirk Newsom, Dallas, Tex., for appellee.

OPINION

FROST, Justice.

The motion for rehearing having been filed, the motion is hereby denied and the opinion filed March 5, 1992 is hereby withdrawn and this opinion filed this date is substituted.

The issue presented in this contract case is whether the relevant promissory note, deed of trust, and guaranty authorized the borrower, prior to maturity of the note, to tender real estate securing the note instead of currency to extinguish the obligation. The district court, on motions for summary judgment by both parties, found in favor of Financial Savings (lender) and dismissed with prejudice the complaint filed by Jack E. Brown and Cyril Wagner, Jr. (borrower).[1] We affirm.

In December 1985, borrower and lender executed a five-year real estate lien promissory note for $4 million plus interest, a deed of trust, and a guaranty in which borrower only guaranteed payment of interest accruing on the note and certain costs, and lender agreed not to look to borrower for payment of the principal. The note generally provided for monthly interest-only payments during the five-year period. Upon maturity, all outstanding principal balance plus any unpaid interest was due. Lender expressly agreed in the deed of trust and note to look solely to the property for satisfaction of the principal

1. The maker of the note and grantor in the deed of trust was Wagner & Brown, a Texas general partnership, of which Jack E. Brown and Cyril Wagner, Jr. were partners.

debt rather than take a personal judgment against borrower.[2]

In October 1990, borrower transferred its interest in the property to Albuquerque Commons Partnership, of which borrower was the managing general partner. On November 16, 1990, Albuquerque Commons tendered a special warranty deed to the property, along with other pertinent documents, to a trustee for lender with $24,986.30 representing all interest due under the note through November 19, 1990. Lender rejected the tender. Several weeks later Albuquerque Commons tendered to lender a special warranty deed to the property, along with other relevant documents, and all interest due through the date of maturity of the note, December 23, 1990, which lender also rejected. Borrower immediately filed this suit seeking a declaratory judgment contending that the tender of the property "satisf[ied] in full the outstanding principal balance of the indebtedness, in the most direct and expedient way that they could," and that all obligations under the note, deed of trust, and guaranty were terminated.

The district court, finding no genuine issues of material fact (as admitted in each parties' motions), held as a matter of law that the note, deed of trust, and guaranty did not authorize the tender of real estate securing the note and accrued interest in satisfaction of the debt. *See* SCRA 1986, 1–056(C) (Cum.Supp.1991) (summary judgment shall be rendered if pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show no genuine issue of material fact and that movant is entitled to judgment as matter of law). In affirming the summary judgment, we note, as did the district court, that all documents are construed together in determining the rights and liabilities of the parties.[3] *Jim Walter Homes, Inc. v. Schuenemann,* 668 S.W.2d 324 (Tex.1984) (in construing contract to ascertain entire agreement between parties, separate documents executed at same time, for same purpose, and in course of same transaction, are construed together). Moreover, we agree with the court's finding that the note, deed of trust, and guaranty are clear and unambiguous, and must be enforced as written. *See Coker v. Coker,* 650 S.W.2d 391, 393 (Tex.1983) (written instrument that can be given certain or definite legal meaning or interpretation is not ambiguous and court will construe contract as matter of law). The language of the contract must be given its plain, grammatical meaning unless it appears that the intention of the parties would be defeated. *Reilly v. Rangers Management, Inc.,* 727 S.W.2d 527, 529 (Tex.1987).

Borrower claims the district court's decision to limit proper tender only to payment in currency is not grounded in the language of any of the documents, nor was such restriction contemplated by the parties when lender agreed to look solely to the property for satisfaction of the debt principal. Borrower contends that the note, deed of trust, and guaranty anticipate that the principal may be satisfied in one of two ways—either by tendering $4 million or by tendering the property. Citing

2. The relevant portions of the documents which reflect the agreement of the parties are as follows: The deed of trust provides:

> No deficiency or other personal judgment shall ever be awarded or taken against Grantor for the indebtedness represented hereby or any part thereof, except for interest on the Note and certain costs as provided in express Guaranty * * *. Beneficiary hereby agrees to look for satisfaction of all such indebtedness and obligations solely to the property now or hereafter mortgaged, pledged or otherwise expressly granted as security therefor.

The promissory note further provides:

> No deficiency or other personal judgment shall ever be awarded or taken against Maker * * * for the indebtedness represented hereby, or any part thereof, except the interest hereon and certain costs in relation thereto which are expressly guaranteed by Guaranty * * *. Payee hereby agrees to look for satisfaction of all such indebtedness and obligations solely to the property now or hereafter mortgaged, pledged or otherwise expressly granted as security therefor.

The guaranty states: "It is expressly understood and agreed that Guarantors shall not be liable, nor is Borrower personally liable, for payment of the principal of the Note * * *."

3. Texas law applies to this case pursuant to provisions in the note, the deed of trust, and the guaranty.

Arguelles v. Kaplan, 736 S.W.2d 782 (Tex. Ct.App.1987), borrower claims payment in a medium other than currency was a valid legal tender that satisfied the obligation under the note. In *Arguelles,* however, the court found that the parties agreed to accept a deed to land in lieu of payment in satisfaction of the debt.

Lender maintains the nonrecourse provisions do not authorize borrower to tender property to extinguish the obligation, but only limit the remedies lender can pursue against the defaulting borrower to recover the principal indebtedness due under the note, *i.e.,* the provisions are nonrecourse only as against borrower on the principal amount. Lender points out that it never sought to take a deficiency or personal judgment against borrower; rather borrower, prior to the maturity date, unilaterally attempted tender of the property securing the note plus accrued interest in satisfaction of the debt.

Under Texas law cited previously, the unambiguous nonrecourse provisions are to be enforced as written. Pursuant to the non-recourse clause in the note and deed of trust, borrower "incurred no personal liability for payment on the note * * * [and lender] agreed to look only to the property securing the note for satisfaction of the default under the note." *See Schultz v. Weaver,* 780 S.W.2d 323, 325 (Tex.Ct.App. 1989) (construing similarly-worded clause). While *Arguelles* states the general rule that "[a]bsent an agreement to the contrary, tender of payment in a medium other than provided in the note will not constitute valid legal tender," 736 S.W.2d at 784, the record before this court contains no evidence of an agreement to the contrary, nor does borrower direct us to evidence other than the language in the documents to support the contention.

A tender is an unconditional offer by a borrower to pay "in current coin of the realm" a sum not less than the amount due on a specific debt. *Fillion v. David Silvers Co.,* 709 S.W.2d 240, 246 (Tex.Ct.App. 1986). To require the maker of a promissory note, in the absence of a specific agreement otherwise, to pay the note in "money" is consistent with the demands of modern commercial practice.[4] To hold otherwise would introduce an unacceptable degree of uncertainty and confusion to lending transactions. Acceptance of borrower's argument would be to read terms out of the deed of trust regarding remedies available to lender upon default. Therefore, the tender of property by borrower was a tender in a different medium not agreed to by the parties, and, as such, improper to satisfy the obligation under the note. Accordingly, the district court correctly found as a matter of law: "The Note, Deed of Trust and Guaranty do not authorize the tender of the real estate and accrued interest in satisfaction of the debt under the Note and Guaranty."

Based upon the above, the judgment of the district court is affirmed. The result reached makes it unnecessary to address issues raised in the cross-appeal.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

4. Both Texas and New Mexico have adopted the Uniform Commercial Code, which defines "money" as "a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency." Tex.Bus. and Com. Code Ann. § 1.201(24) (West 1968) and NMSA 1978, § 55-1-201(24) (Cum.Supp.1991). Although New Mexico case law has not addressed the issue presented in this matter, given the same circumstances, we fail to see why the rationale expressed herein would not be applicable.

828 P.2d 416

KENNECOTT COPPER CORPORATION, Claimant–Appellant,

v.

Fabian CHAVEZ, Superintendent of Insurance, and the New Mexico Subsequent Injury Fund, Respondents–Appellees.

No. 12962.

Court of Appeals of New Mexico.

Jan. 14, 1992.

Certiorari Denied March 23, 1992.

Charles E. Stuckey, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for claimant-appellant.

Nathan H. Mann, Doris W. Eng, Gallagher, Casados & Mann, P.C., Albuquerque, for respondents-appellees.

OPINION

APODACA, Judge.

This appeal involves the denial by the Workers' Compensation Judge (judge) of a claim by Kennecott Copper Corporation (employer), a self-insured entity, against the New Mexico Subsequent Injury Fund and Fabian Chavez, Superintendent of Insurance (collectively referred to as the Fund), for reimbursement of workers' compensation benefits paid by employer to Domingo Misquez (worker). Employer raises three issues on appeal: the judge erred in (1) determining that worker's injury was a continuing injury, not a subsequent injury for which the Fund was liable; (2) determining when the statute of limitations for the filing of employer's claim began to run; and (3) refusing to admit as

evidence, or take judicial notice of, the findings from the underlying workers' compensation claim to determine the liability of the Fund. We hold that there is not substantial evidence to support the judge's finding that worker's injury was a continuing injury, and not a subsequent injury, and we also hold that employer's claim was not barred by the statute of limitations. We therefore reverse the judge's order dismissing employer's claim and remand for further proceedings to determine apportionment between employer and the Fund. In light of our disposition, we need not address the remaining issue.

BACKGROUND

Worker was employed as a tire repairman at one of employer's mines from 1951 until November 17, 1984. In October 1963, worker suffered an on-the-job injury that fractured the metatarsal bones in his left foot. He returned to work in December 1963. In June 1974, worker had the damaged bones in his foot fused to alleviate pain. He returned to work in September 1974 and was asymptomatic at that time.

After five years, worker's foot began to hurt again. In November 1983, he consulted the company's doctors about the pain in his foot. On December 2, 1983, worker's attorney wrote a letter to employer "to place Kennecott on notice of what appears to be a continuing accident with the aggravation of his condition." Worker saw Dr. Boggiano, who notified employer that worker was 20% impaired in his left foot because of the bone fusion and developing osteoarthritis. Employer approved Dr. Boggiano's bill for payment under its workers' compensation coverage. Additionally, employer paid worker workers' compensation benefits for the time that he missed in December 1983, noting the payment in its records as additional compensation for the original 1963 accident and not as compensation for a new accident. All checks for compensation and medical benefits note that payment was for the 1963 accident.

Worker continued to work until November 1984. On November 8, 1984, worker was warned by his supervisor for "loafing." In response, worker told his supervisor that his feet bothered him. Worker was subsequently seen by several doctors and did not work after November 17, 1984. After the disability manifested itself in November 1984, employer paid worker at the 1984 compensation rate, although the records reflected payments as additional compensation for the 1963 accident. Employer filed its claim for reimbursement from the Fund on November 16, 1988.

The workers' compensation judge who presided at the hearing on worker's claim for workers' compensation benefits against employer found that worker had suffered a compensable injury "in 1984 to his left foot, aggravating the pre-existing condition." At the later hearing to determine whether employer should be reimbursed by the Fund, which is the proceeding appealed from, the judge refused to admit or take judicial notice of the findings from the earlier proceeding. The doctors who had examined worker testified at the hearing on employer's claim against the Fund that worker's work aggravated his pre-existing condition and that there was no new trauma.

After trial, the judge made the following pertinent findings:

5. After the 1974 surgery, Mr. Misquez returned to work but never felt fine and his condition gradually got worse.
6. On December 02, 1983, Mr. Misquez, through his attorney, Anthony Avallone, wrote to Kennecott placing it "on notice of what appears to be a continuing accident with the aggravation of his condition."
7. On December 15, 1983, Mr. Misquez was seen again by Dr. Boggiano. Dr. Boggiano's notes state that he did well after surgery until 1981, and thereafter the pain began and gradually increased. Dr. Boggiano told Mr. Misquez not to operate the forklift or truck while on pain medication, not to lift, and to stay off his feet as much as possible. Dr. Boggiano would have told Mr. Misquez to change areas of work due to his foot problem, except for the fact

that Mr. Misquez had already announced his intention to Dr. Boggiano of retiring in the near future. Dr. Boggiano sent his complete report to Kennecott.

8. Dr. Ceralo was of the opinion that Mr. Misquez was permanently, partially disabled by 1983, and by partially disabled he meant affecting his ability to do his work as a tire repairman.
9. Domingo Misquez suffered no accidental injury or accident arising out of and in the course of this employment in 1984.
10. Kennecott Copper Corporation had actual knowledge of the pre-existing condition to the left foot and of a partial disability arising out of the subsequent injury by at least November 08, 1984.

The judge rejected Kennecott's requested findings that:

19. Mr. Misquez sustained a gradual and progressive injury to his left foot in November 1984, which aggravated the previous condition in his left foot resulting in a compensable injury [; and]
21. Mr. Misquez's disability is a natural and direct result of the accidents in October 1963 and November 1984, and this causal connection has been established as a medical probability by expert medical testimony.

The judge concluded that the Fund was not liable because there had been no subsequent injury and the statute of limitations had expired in any event.

DISCUSSION

Existence of a Subsequent Injury.

We review the judge's decision using the whole record standard of review adopted by our supreme court in *Duke City Lumber Co. v. New Mexico Environmental Improvement Board,* 101 N.M. 291, 681 P.2d 717 (1984). *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct.App.1988). Although "[a] reviewing court may not * * * substitute its judgment for that of the administrative agency," *id.* at 129, 767 P.2d at 368, and must view the evidence "in the light most favorable to the agency decision," *National Council on Compensation Insurance v. New Mexico State Corporation Commission,* 107 N.M. 278, 282, 756 P.2d 558, 562 (1988), whole record review requires the reviewing court to consider "all the evidence bearing on a finding or decision, favorable and unfavorable, in order to determine if there is substantial evidence to support the result." *Tallman,* 108 N.M. at 128, 767 P.2d at 367. The conclusion reached by the agency must be supported by "evidence that is credible ... and that is sufficient for a reasonable mind to accept as adequate." *National Council on Compensation Ins. v. New Mexico State Corporation Comm'n,* 107 N.M. at 282, 756 P.2d at 562. Applying this standard, we hold that the judge's determination that worker did not suffer a subsequent injury is not supported by substantial evidence.

It is well settled in New Mexico that a gradual and progressive injury caused by working conditions is compensable under our workers' compensation law. In *Cisneros v. Molycorp, Inc.,* 107 N.M. 788, 765 P.2d 761 (Ct.App.1988), this court held that a worker's gradual hearing loss due to conditions at the workplace was a compensable accidental injury. We stated that "[t]he accidental injury requirement is generally satisfied if either ' "the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties." ' " *Id.* at 791, 765 P.2d at 764. New Mexico has rejected the "specific time, place, and cause" rule. *Id.* at 792, 765 P.2d at 765.

Once a worker is physically impaired, injuries caused by working conditions that aggravate the impairment have been held to be compensable. In *Rader v. Don J. Cummings Co.,* 109 N.M. 219, 784 P.2d 38 (Ct.App.1989), the worker had a preexisting impairment of his lungs. At work, he breathed asbestos and other dust. *Rader* approved the trial court's finding that the dust caused " '*accidental injuries*' " to the worker's lungs that were a compensable injury under the Workmen's Compensa-

tion Act. *Id.* at 225–26, 784 P.2d at 44–45. The court in *Rader* therefore held that a subsequent injury had occurred and that apportionment between the employer and the Fund was proper.

In this appeal, the doctors testified generally that, although there was no new *specific* trauma, worker's duties as a tire repairman aggravated his foot problem because of the heavy lifting and extensive walking required by the work. It is unnecessary for a specific time, place, and cause of the injury to be determined; the effect of numerous, cumulative injuries is adequate to prove that there is a compensable injury. *Cisneros v. Molycorp, Inc.* Every time worker picked up a heavy tire, another small injury occurred to his foot. Thus, in light of the record as a whole, there is not substantial evidence to support the judge's finding and conclusion that there was no subsequent injury.

The Statute of Limitations.

The judge held that employer had actual notice of the disability by at least November 8, 1984, the date on which worker was warned by his supervisor for "loafing." The judge also concluded that employer's claim (filed on November 16, 1988) was consequently filed more than four years after the statute of limitations began to run and was thus barred. We disagree.

> The period of limitations:
>
> begins to run from the time the employer knew or should have known it had a claim against the Fund * * *. In such case, the determinative event is the date an employer is notified of the subsequent injury or, when the injury is latent, the date the employer is notified of the disability arising out of the subsequent injury.

Hernandez v. Levi Strauss, Inc., 107 N.M. 644, 647, 763 P.2d 78, 81 (Ct.App.1988). Additionally, an employer is not held to knowledge that it has a claim against the Fund until it knows that the disability is materially and substantially greater as provided in the Subsequent Injury Act. *Aragon v. Furr's Inc.*, 112 N.M. 396, 815 P.2d 1186 (Ct.App.1991). NMSA 1978, Section 52–2–14 (Repl.Pamp.1991), provides that the limitations period for filing claims against the Fund is only two years "after the employer receives notice of a compensation claim" or "has actual knowledge of a compensation claim." However, because this section applies only to causes of action accruing after its effective date of March 8, 1988, *see Consolidated Freightways, Inc. v. Subsequent Injury Fund*, 110 N.M. 201, 793 P.2d 1354 (Ct.App.1990), and employer's claim accrued before that date, the four-year limitations period provided for in NMSA 1978, Section 37–1–4, is the applicable statutory provision in this appeal. *See Kennecott Copper Corp. v. Chavez*, 109 N.M. 439, 786 P.2d 53 (Ct.App.1990); *Hernandez v. Levi Strauss, Inc.* We must thus determine whether employer filed its claim within four years of the time it had knowledge of a disability that was materially and substantially greater than it would have been without the prior injury.

The judge found that employer had actual knowledge of the potential claim by November 8, 1984, at the latest, apparently relying on the evidence that (1) worker's attorney sent a letter to employer in December 1983; (2) Dr. Boggiano saw worker in December 1983 and sent his medical report to employer; and (3) worker told his supervisor on November 8, 1984, that his feet hurt. For the reasons noted below, we determine that these incidents did not give employer the requisite knowledge of a potential claim against the Fund.

NMSA 1978, Section 52–2–9 (Repl. Pamp.1991), requires a worker to have incurred a "subsequent disability" before an employer has a claim for apportionment. Thus, the worker must actually be disabled, as that term is defined by our case law, before the employer has a claim against the Fund. A worker is not disabled until his ability to work is impaired. *See Romero v. General Electric Corp.*, 104 N.M. 652, 725 P.2d 1220 (Ct.App.1986). In this appeal, the only evidence that worker was unable to fully perform his duties before November 17, 1984, is the testimony that his supervisor reprimanded him for "loafing" on November 8, 1984. At that

time, worker told his supervisor that his foot was bothering him. The Fund, however, points to worker's visit to Dr. Boggiano in December 1983, Dr. Boggiano's report (sent to employer) stating that worker was 20% impaired, and the letter from worker's attorney, as evidence that employer had notice of any subsequent injury. However, this evidence merely reiterated what employer already knew—that worker was impaired. He was not yet disabled because, as far as employer knew at the time, worker continued to perform all of his duties at work. Worker also continued to perform his duties after November 8, 1984. Not until November 17, 1984, at the earliest, when worker stopped working and retired, was employer placed on notice that worker was actually disabled. Consequently, we hold that employer did not have actual notice of a potential claim against the Fund until November 17, 1984, at the earliest. Employer's claim was therefore filed within the four-year limitations period.

CONCLUSION

We reverse the judge's order dismissing employer's claim for reimbursement from the Fund and remand for further proceedings to determine apportionment of liability between employer and the Fund.

IT IS SO ORDERED.

PICKARD and FLORES, JJ., concur.

828 P.2d 420

Clarence L. GARCIA, Claimant-Appellee,

v.

HOMESTAKE MINING COMPANY, Respondent-Appellant.

No. 13006.

Court of Appeals of New Mexico.

Feb. 11, 1992.

Certiorari Denied March 23, 1992.

Filbert J. Montes, Filbert J. Montes, P.C., Albuquerque, for claimant-appellee.

David G. Reynolds, Crider, Calvert & Bingham, P.C., Albuquerque, for respondent-appellant.

Thomas D. Haines, Jr., Hinkle, Cox, Eaton, Coffield, & Hensley, Roswell, amicus curiae, for New Mexico Defense Lawyers Ass'n.

OPINION

FLORES, Judge.

Homestake Mining Co. (employer) appeals from the final order of the workers' compensation judge (WCJ) awarding Clarence L. Garcia (claimant) compensation benefits under the Workers' Compensation Act (Act). Employer raises the following issues on appeal: (1) whether there is substantial evidence to support the finding and conclusion of the WCJ that claimant was injured in an accident arising out of his employment; (2) whether there is substantial evidence to support the finding and conclusion of the WCJ that claimant's injury occurred in the course of his employment; and (3) whether the WCJ erred in failing to find that claimant's injury was willfully suffered. We affirm the final order of the WCJ.

BACKGROUND

Claimant was employed by employer as an underground miner since 1968. On May 15, 1989, claimant and a fellow employee were working in their assigned work areas within the mine. The two employees were in the process of slushing, which consists of using an electronic ore bucket to scrape ore into piles for later removal. During this process, they were prevented from continuing in the slushing activity by the presence of a boulder. In order to continue, they had to blast the boulder, so they set explosive charges, left the area, blasted, and returned. Various federal, state, and employer's regulations prohibit any work in an area after blasting, until barring down has occurred. The process of barring down involves using a scaling bar, a six-and-one-half-foot-long steel bar with a chisel end, to identify and remove loose or

unstable rocks on the sides and the ceiling of a tunnel before entering recently blasted areas. This is to prevent such rock from falling and causing injury to miners. Claimant had been apprised of regulations regarding barring down during safety training sessions. Claimant testified that he barred down after returning to the area. However, the WCJ determined that claimant failed to use a scaling bar upon his return, even though scaling bars were provided by employer for claimant's use. Claimant was injured after returning to the recently blasted work area when a large rock fell on his right foot.

Claimant timely filed his claim against employer on July 19, 1989, seeking temporary total disability benefits. The WCJ found and concluded that claimant's injury arose out of and in the course of employment. The WCJ found that claimant had failed to observe statutory regulations. The WCJ also found that claimant failed to use the safety device provided by employer. The safety device provided was a scaling bar. The WCJ further found that such failure resulted in claimant's injury. Accordingly, the WCJ reduced the compensation rate by ten percent for claimant's failure to use a safety device, pursuant to NMSA 1978, Section 52-1-10(A) (Repl. Pamp.1987).

DISCUSSION

Employer argues that claimant is precluded from receiving compensation because claimant's injury did not arise out of or in the course of his employment. Employer attacks the sufficiency of the evidence to support these findings.

On appeal from workers' compensation cases decided by the Workers' Compensation Division, we review the sufficiency of evidence to support conclusions according to the whole record review standard. *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct. App.1988). "Substantial evidence is such relevant evidence as 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). The reviewing court views the evidence in the light most favorable to the agency decision, but it may not view favorable evidence with total disregard to contravening evidence. *National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,* 107 N.M. 278, 756 P.2d 558 (1988).

In order for an injured employee to receive compensation under the Act, the employee must be performing a service arising out of and in the course of his employment at the time of the accident, and the injury must arise out of and in the course of his employment. NMSA 1978, § 52-1-9 (Repl.Pamp.1987). The principles "arising out of" and "in the course of his employment," within the meaning of the Act, must exist simultaneously at the time of the injury in order for compensation to be awarded. *Walker v. Woldridge,* 58 N.M. 183, 268 P.2d 579 (1954).

First, we address whether there is substantial evidence to support the finding and conclusion of the WCJ that claimant's injury arose out of his employment. The term "arising out of" refers to the cause of the injury and denotes a risk reasonably incident to the claimant's work. *Kloer v. Municipality of Las Vegas,* 106 N.M. 594, 746 P.2d 1126 (Ct.App.1987). Employer contends that claimant's accident was not reasonably incident to his work because claimant's employment did not subject him to the risk of falling rocks in an area which had not been barred down. We do not agree.

At trial, evidence was introduced that blasting and slushing are common causes of rock falls. Evidence was also introduced that rock falls are one of the leading causes of underground mining accidents. Additionally, evidence was introduced that rock falls occur during the slushing procedure, even after barring down. We believe that the question of whether the evidence denotes a risk reasonably incident to claimant's work is a question for the fact finder. Further, based on the whole record standard of review, there was sufficient evidence for the WCJ to find

that claimant's injury arose out of a risk incident to his employment.

Next, we address whether there is substantial evidence to support the finding and conclusion of the WCJ that claimant's injury occurred in the course of his employment. Initially, we note that the parties stipulated that the accident occurred in the course of claimant's employment with employer; however, it appears that the issue was tried by the consent of the parties. *See First Nat'l Bank in Albuquerque v. Rowe,* 52 N.M. 366, 199 P.2d 987 (1948) (a stipulation is waived by acquiescence where a party voluntarily joins in litigating an issue not pleaded).

This court has previously stated that "an injury occurs in the course of employment when it takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the duties of employment or doing something incidental to it." *Kloer,* 106 N.M. at 597, 746 P.2d at 1129.

There is evidence that claimant's injury occurred during his period of employment and at his assigned work area. There is also evidence that slushing and blasting are duties of a miner, and claimant was involved in performing such duties when the injury occurred. Considering the whole record, there was sufficient evidence for the WCJ to find that claimant's injury occurred in the course of his employment.

Notwithstanding the above and to emphasize that "willful conduct" will remove an injury from occurring "in the scope of employment," employer essentially argues that claimant's failure to follow regulations took claimant's injury outside the course of his employment. Employer argues that claimant, although required by federal, state, and employer regulations to bar down after blasting, failed to bar down and was not authorized to be engaged in activity in an area which had not been barred down after blasting. Employer further argues that claimant's failure to bar down amounted to willful conduct which, pursuant to NMSA 1978, Section 52-1-11 (Repl.Pamp.1987), bars recovery under the Act. In employer's view, a finding that claimant's failure to bar down was willful misconduct would prevent *any* recovery regardless of the applicability of Section 52-1-10(A), because that section provides that only "compensation otherwise payable * * * shall be reduced ten percent." Here, the WCJ rejected employer's proposed finding that claimant's injury was willfully suffered, thereby implicitly finding that claimant's injury was not willfully suffered. *See Jensen v. New Mexico State Police,* 109 N.M. 626, 788 P.2d 382 (Ct.App.1990). Because the WCJ did not find that claimant's injury was willfully suffered and that Section 52-1-10(A) nonetheless allowed recovery of benefits, this court need not address the issue of whether Section 52-1-10(A) controls over Section 52-1-11 and would allow an employee to recover benefits, albeit at a reduced rate, if the employee willfully, as opposed to negligently, failed to use a safety device. In this appeal, the issue is only whether there is substantial evidence to support the findings of the WCJ.

The claim that an employee willfully suffered an injury is a defense to compensability under the Workers' Compensation Act of New Mexico. Section 52-1-11 states: "[n]o compensation shall become due or payable from any employer under the terms hereof in event such injury was * * * wilfully suffered by [employee], or intentionally inflicted by [employee]." Employer also relies on NMSA 1978, Section 52-1-8(C) (Repl.Pamp.1987), which states that in actions to recover compensation for personal injuries sustained by an employee occurring in the line of duty, it is not a defense "that the injury * * * was caused, in whole or in part, by the want of ordinary care of the injured employee where such want of care was not willful."

In interpreting Section 59-10-5(C), the predecessor to Section 52-1-8(C), this court has defined "willful" as " 'the intentioned doing of a harmful act without just cause or excuse or an intentional act done in utter disregard for the consequences.' " *Gough v. Famariss Oil & Ref. Co.,* 83 N.M. 710, 714, 496 P.2d 1106, 1110 (Ct.App.1972) (cit-

ing *Potomac Ins. Co. v. Torres,* 75 N.M. 129, 401 P.2d 308 (1965)). In *Gough,* the claimant was employed as a truck driver and was assigned to transport 9000 gallons of gasoline. The claimant was injured in an accident after he allowed an unauthorized passenger, who had been drinking alcohol, to drive the truck down a road with numerous hairpin curves, under hazardous weather conditions. The claimant had been instructed numerous times by his employer not to carry passengers in his truck and not to allow any unauthorized person to drive the truck. This court found that the claimant's actions, which were harmful, intentional, without just cause or excuse, or done in utter disregard of the consequences, rose to the level of willful misconduct sufficient to bar compensation under the Act.

Employer cites *Lukesh v. Ortega,* 95 N.M. 444, 623 P.2d 564 (1980), to support his argument that claimant's injury was willful and thus did not occur within the course of employment. In *Lukesh,* the claimant was injured when he assisted in lifting heavy machinery. The claimant had been given explicit instructions that his job responsibilities did not include heavy lifting, specifically including machinery. The court held that the claimant's injury was not compensable because his voluntary acts, against the express instructions of his employer, were willful and constituted an act outside the course of his employment. However, *Lukesh* does not control here. *Lukesh* may be distinguished in that the lifting of heavy machinery was specifically not part of the claimant's job responsibility. Here, although there is evidence that miners were required to bar down after using explosives, there is also evidence that barring down is an ongoing procedure in a miner's work day. Employer's safety officer testified that each miner, on an individual basis, determines when to bar down and that miners have the training, experience, and authority to examine their work areas after blasting in order to determine whether conditions are safe to proceed with their work. Thus, we believe that this situation is more analogous to *Stebens v. K-Mart Corp.,* 99 N.M. 720, 663 P.2d 379 (Ct.App.1983), in which this court held that the employer's instructions to its security manager regarding physical confrontations with shoplifters left discretion to the employee as to how to handle such situations. The employee's injury after tackling a shoplifter was held to not be willful and employee was entitled to compensation.

This court has previously stated that while the violation of an instruction may bar compensation in some instances, it is not a per se bar to compensation. *Lukesh,* 95 N.M. at 445, 623 P.2d at 565. Commentators assert that the violation of an instruction or a regulation, without more, is not willful. In 99 C.J.S. *Workmen's Compensation* Section 260, at 901–02 (1958), it is stated:

> Under statutes expressly so providing, compensation is not allowed for injury caused by a willful violation of law by the employee, and it is generally held that the willful or deliberate and intentional violation of a statute or public regulation designed for the protection of the employee is willful * * * misconduct, precluding recovery, under statutes barring compensation in case of willful misconduct * * *. However, not every violation of a statute, ordinance, or public regulation precludes the employee from recovery, but whether or not it does is dependent on the circumstances, that is, on the nature of the misconduct and the character of the statute or regulation violated. A mere violation alone, with nothing more, is not willful. (Footnotes omitted)

Additionally, in discussing why the defense of willfulness has not succeeded in a variety of situations, 1A A. Larson, *Workmen's Compensation Law* Section 32.20, at 6–47 to 6–50 (1990), states: "In most instances, the ground of rejection of the defense was the absence of 'wilfulness.' Usually the act, although prohibited, was instinctive or thoughtless, rather than intentional and deliberate ... [i]n some cases, the action, while in a sense deliberate, was attributable to bad judgment rather than wilful misbehavior." Therefore, it is possible for an employee, who was in-

jured as a result of the violation of an instruction or a law, to have acted without willfulness so as to bar compensation for his injury under the Act.

Employer has raised the defense of willfulness and has the burden of proving that claimant's injury was willfully suffered. *See Baca v. Bueno Foods,* 108 N.M. 98, 766 P.2d 1332 (Ct.App.1988) (one who seeks relief under a statute has the burden of proving he or she comes within its terms). However, employer did not meet this burden. Employer's requested finding that claimant's injury was willfully suffered was refused by the WCJ. Although the WCJ did not make an express finding that claimant's injury was not willful, "[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 is a finding against that party." *Jensen,* 109 N.M. at 630, 788 P.2d at 386. Based on the whole record standard of review, we agree that there was sufficient evidence in the record for the WCJ to refuse to find that claimant's injury was willfully suffered.

CONCLUSION

For the foregoing reasons, we affirm the final order of the WCJ. No costs are awarded.

IT IS SO ORDERED.

APODACA and CHAVEZ, JJ., concur.

828 P.2d 425

Georgianne CONANT, Plaintiff-Appellee,

v.

Abran RODRIGUEZ, d/b/a Abe Rodriguez and Associates, Defendant-Appellant.

No. 11851.

Court of Appeals of New Mexico.

Feb. 12, 1992.

Michael J. Golden, Moore & Golden, P.A., Santa Fe, for plaintiff-appellee.

Ronald Boyd, Santa Fe, for defendant-appellant.

OPINION

HARTZ, Judge.

Abran Rodriguez, d/b/a Abe Rodriguez and Associates, appeals a judgment entered against him for compensatory and punitive damages in a non-jury trial. Plaintiff, Georgianne Conant, alleged misconduct with respect to a polygraph examination that her employer, Katherine Katona, ordered her to take. Leo Gurule, working under the auspices of Abe Rodriguez and Associates, conducted the examination. Gurule reported to Katona that Conant failed the examination and that she untruthfully answered questions concerning an alleged theft of money from the business. Katona then fired Conant. Shortly after she was dismissed, Conant met with Rodriguez to discuss the examination conducted by Gurule. At the meeting Rodriguez told Conant that the test performed by Gurule was invalid and inconclusive and that Conant should not have been fired based upon the examination. The district court found that Conant requested Rodriguez to inform Katona of his conclusions but Rodriguez failed and refused to do so. The district court awarded Conant $5,000 in compensatory damages and $50,000 in punitive damages, apportioning the damages 50% against Rodriguez, 25% against Gurule, and 25% against Katona. Based on its finding that Gurule was an employee of Rodriguez, the district court held Rodriguez liable for Gurule's percentage of the damages under the doctrine of respondeat superior.

On appeal Rodriguez contends that (1) Gurule was not Rodriguez's employee, (2) there was no basis for awarding punitive damages against Rodriguez, (3) there was insufficient evidence that Rodriguez was negligent or breached a duty owed to Conant, (4) Conant's claim was barred by a release that she signed, (5) if Rodriguez

was negligent, the negligence did not cause Conant to suffer damages, (6) the award of punitive damages was excessive, (7) Rodriguez is not responsible under respondeat superior for the punitive damages awarded against Gurule, and (8) there was insufficient evidence that Gurule acted in a manner justifying punitive damages. We agree with Rodriguez's seventh contention, which makes it unnecessary for us to address the eighth contention. In all other respects we affirm the judgment below.

I. GURULE'S STATUS AS AN EMPLOYEE

Rodriguez described his relationship with Gurule in a deposition and at trial. Rodriguez was the sole owner of Abe Rodriguez and Associates. He had a Santa Fe office where Gurule conducted polygraph examinations under the auspices of Abe Rodriguez and Associates. Rodriguez gave Gurule his first experience on the job and spoke with him daily to check on his work. Rodriguez furnished Gurule with intake documents, including a form that recited that the examination was to be given "by a representative of Abe Rodriguez & Associates" and that purported to release Abe Rodriguez and Associates from all claims of damages. Gurule paid Rodriguez 40% of the revenue he received from examinations he conducted.

The Conant episode was consistent with this relationship between Gurule and Rodriguez. Conant executed the release form that named Abe Rodriguez and Associates. After Rodriguez learned of the examination of Conant, he summoned Gurule to his Albuquerque office. Rodriguez felt some responsibility for the examination performed by Gurule. He reprimanded Gurule for the language he used to instruct Conant about the examination and told him that he should have stopped the examination because of the way in which it was conducted. Gurule agreed with the reprimand.

Although the method of payment to Gurule may suggest an independent-contractor relationship, that method is not unlike the payment of commissions to employees in various occupations. The evidence of Rodriguez's supervision and control of Gurule's work was sufficient to sustain the district court's finding that Gurule was Rodriguez's employee. *See Salter v. Jameson,* 105 N.M. 711, 713, 736 P.2d 989, 991 (Ct.App.1987).

II. SUFFICIENCY OF EVIDENCE TO JUSTIFY PUNITIVE DAMAGES

Rodriguez contends that there was not sufficient evidence to establish his liability for punitive damages. We disagree. The district court found that Rodriguez acted "intentionally and or recklessly without regard for the rights and welfare of [Conant]." The evidence was sufficient to enable the district court to find that Rodriguez knew that the polygraph examination conducted by Gurule was defective, that he knew that Conant was fired as a result of the polygraph examination, and that nevertheless he did not honor Conant's requests to contact Katona and advise her of the error. This failure by Rodriguez to correct the error in the report on the polygraph examination bespeaks a callous disregard, a wanton indifference, to the rights and interests of Conant. *See Ruiz v. Southern Pac. Transp. Co.,* 97 N.M. 194, 202, 638 P.2d 406, 414 (Ct.App.1981) (disregard of known safety measures can show wanton and reckless negligence); SCRA 1986, 13–1827 (defining wanton conduct). Given the district court's determination that Gurule was an employee of Rodriguez, there can be no doubt of the duty of Rodriguez to inform Katona of the error. *See Vigil v. Rice,* 74 N.M. 693, 698–99, 397 P.2d 719, 722–23 (1964) (once doctor learned that his office had submitted erroneous libelous report, he had affirmative duty to correct it). Thus, punitive damages against Rodriguez were properly awarded to punish his reckless indifference. *See Construction Contracting & Management v. McConnell,* 112 N.M. 371, 375, 815 P.2d 1161, 1165 (1991) (standard for imposing punitive damages); *Gonzales v. Sansoy,* 103 N.M. 127, 130, 703 P.2d 904, 907 (Ct.App.1984) (punitive award may be warranted when negligence is aggravated by a mental state such as reckless indifference).

Our disposition of this issue also disposes of the contention that there was insufficient evidence that Rodriguez was negligent or breached a duty owed by him to Conant.

III. RELEASE

Rodriguez contends that Conant's claim is barred by a release she signed that relieved Abe Rodriguez and Associates "from any claims of damages, including but not limited to false arrest, false imprisonment, civil rights, libel, slander, invasion of privacy or negligence[.]" Conant responds that the release is unenforceable because it is against public policy, *see Leibowitz v. H.A. Winston Co.*, 342 Pa.Super. 456, 493 A.2d 111 (1985), and because she was compelled to sign the release, *see Lynch v. Santa Fe Nat'l Bank*, 97 N.M. 554, 627 P.2d 1247 (Ct.App.1981).

We need not reach the issue of whether the release is valid with respect to Conant's claims of negligence. The release is certainly invalid to the extent that it purports to release Rodriguez of liability for willful or reckless misconduct. *See* Restatement (Second) Contracts § 195(1) (1981); *cf. Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 119, 353 P.2d 62, 69–70 (1960). As already noted, the district court found that Rodriguez had engaged in such misconduct. Because the finding of such misconduct suffices to sustain the award of compensatory damages and the award (to the extent that we affirm it) of punitive damages, it is unnecessary to determine whether the release would foreclose a claim that was based solely on simple negligence.

IV. COMPENSATORY DAMAGES

Rodriguez contends that there was insufficient evidence that his acts or omissions damaged Conant. He points out that any wrongdoing by him occurred after Katona terminated Conant and argues that there was no evidence that Katona would have considered rehiring Conant if Rodriguez had informed Katona that the polygraph examination was invalid. The evidence at trial, however, would support the conclusion that the sole basis for Conant's termination was the report on the polygraph examination. Conant had worked for Katona for over six years, during which time Katona had periodically complained about cash shortages. Although she had some complaints about Katona, Conant testified that she loved to work at the store. A reasonable inference to be drawn from the evidence is that if Katona had been informed of the erroneous report concerning the polygraph test, Conant would have been reinstated and would have suffered only nominal damages. Thus, the district court could properly assess 50% of the compensatory damage award against Rodriguez for his wanton failure to notify Katona of the invalidity of the polygraph examination.

Moreover, it is appropriate to hold that Rodriguez's refusal to retract made him liable for all consequential damages caused by Gurule's negligence. By failing to notify Katona of the error in Gurule's examination, Rodriguez protected his interest in his share of Gurule's fee, which he might have needed to refund if Katona learned of the error and demanded her money back. "[H]aving received the benefits of [Gurule's examination, Rodriguez] cannot now reject the burdens incident thereto." *Grandi v. LeSage*, 74 N.M. 799, 811, 399 P.2d 285, 293 (1965). Rodriguez's refusal to contact Katona constituted a ratification of Gurule's negligence for which Rodriguez is liable. *See id.; Tribune Ass'n v. Follwell*, 107 F. 646, 654 (2d Cir. 1901). Because Rodriguez's ratification of Gurule's negligence was in wanton disregard of Conant's interest, he cannot rely on the release signed by Conant even if Gurule's error was only simple negligence. *See* Restatement (Second) of Contracts § 195(1).

V. ALLEGED EXCESSIVENESS OF PUNITIVE DAMAGE AWARD

Rodriguez contends that the $25,000 award of punitive damages against him was excessive, apparently on the ground that the award of punitive damages was disproportionate to the $5,000 award of

compensatory damages. This claim is foreclosed by our supreme court's recent decision in *Green Tree Acceptance, Inc. v. Layton,* 108 N.M. 171, 769 P.2d 84 (1989), in which the court affirmed an award of $10,000 in punitive damages when the compensatory damage award was only $33.75.

One may also read Rodriguez's argument as stating that the award of punitive damages was inappropriate because of the absence of any inquiry into his income or net worth. *See Adams v. Murakami,* 54 Cal.3d 105, 813 P.2d 1348, 284 Cal.Rptr. 318 (1991) (en banc). We do not consider this contention, however, because Rodriguez has not established that he preserved the issue for review by presenting it to the district court.

VI. LIABILITY OF RODRIGUEZ FOR PUNITIVE DAMAGE AWARD AGAINST GURULE

Rodriguez contends that he should not be liable under the doctrine of respondeat superior for the $12,500 award of punitive damages against Gurule. We agree.

It is important to distinguish between two questions: (1) can the court impose a punitive damage award against the master arising from misconduct by a servant? and (2) can the court require the master to pay a punitive damage award against the servant? The answer to the first question is "yes"; the answer to the second is "no."

Our supreme court answered the first question when it held "that a master or employer is liable for punitive damages for the tortious act of an employee acting within the scope of his employment *and* where the employer in some way participated in, authorized or ratified the tortious conduct of the employee." *Newberry v. Allied Stores, Inc.,* 108 N.M. 424, 431, 773 P.2d 1231, 1238 (1989); *see* Restatement (Second) of Torts § 909 (1979). In other words, punitive damages may be awarded against an employer who participated in, authorized, or ratified misconduct of an employee.

That is not, however, the ground upon which the district court ordered Rodriguez to pay $12,500 in punitive damages beyond the $25,000 awarded directly against Rodriguez himself. What the district court did was require the master, Rodriguez, to serve as an alternative source of payment of a punitive damage award against the servant, Gurule. After ordering that Gurule pay $12,500 in punitive damages, it held Rodriguez liable for the award against Gurule under the doctrine of respondeat superior, meaning that Conant could collect all or a portion of the $12,500 from Rodriguez rather than pursuing Gurule. This was improper.

The authority for imposing liability on a master because of a servant's misconduct does not imply that the master is responsible for paying a punitive damage award imposed upon the servant whose conduct provides the predicate for the punitive damage award against the master. *See Gallegos v. Citizens Ins. Agency,* 108 N.M. 722, 728, 779 P.2d 99, 105 (1989) (when punitive damages are awarded against multiple defendants, they must be separately determined as to each). The purpose of punitive damages is to punish the wrongdoer and to deter the wrongdoer and others in a similar position from such misconduct in the future. *See Construction Contracting & Management v. McConnell,* 112 N.M. at 375, 815 P.2d at 1165; Restatement (Second) of Torts § 908(1) (1979). We must presume that the punitive damage award against the master is adequate to punish the master and to deter other masters from similar lapses. To impose an additional liability upon the master for the punitive damage award against the servant would be to impose a penalty without any proper purpose, because the additional liability is beyond what is necessary to accomplish the punitive and deterrent purposes of a punitive damage award against the master.

The illogic of requiring the master to pay the amount of punitive damages awarded against the servant is highlighted when one considers the manner in which the amount of punitive damages is determined. Two factors in assessing damages are the character of the wrongful act and the wealth of

the person against whom punitive damages are awarded. *See* Restatement (Second) of Torts § 908(2). Thus, in assessing an award against the master, it is appropriate to consider that the culpability of the master may be less than that of the servant whose act provided the predicate for liability. *See Montoya v. Moore,* 77 N.M. 326, 330–31, 422 P.2d 363, 365–66 (1967) (ordering remittitur of punitive damage award against insurance company when there was no evidence of malice, violence, or criminal conduct by the company although adjuster apparently committed fraud). Similarly, a punitive damage award against a master may be very different from the award against the servant because of a difference in the income and assets of the two. It may even be possible that at the time of trial the wealth of the servant is substantially greater than that of the master. In such a circumstance, an appropriate punitive damage award against the servant may be substantially greater than an appropriate award against the master, in which case it would make no sense to impose upon the master any liability for the punitive damage award against the servant.

Because the judgment of the district court required Rodriguez to pay both a punitive damage award against him of $25,000 and a punitive damage award against Gurule of $12,500, we reverse the second component of Rodriguez's liability for punitive damages and affirm the judgment for punitive damages against him only to the extent of $25,000.

VII. CONCLUSION

For the foregoing reasons we affirm the judgment against Rodriguez for $3,750 in compensatory damages and $25,000 in punitive damages.

IT IS SO ORDERED.

BIVINS and PICKARD, JJ., concur.

828 P.2d 952

CRAWFORD CHEVROLET, INC., a New Mexico corporation, Plaintiff-Appellee,

v.

The NATIONAL HOLE-IN-ONE ASSOCIATION, a Texas insurer, Defendant-Appellant.

No. 19954.

Supreme Court of New Mexico.

April 1, 1992.

Campbell, Carr, Berge & Sheridan, Annie Laurie Coogan, Santa Fe, for defendant-appellant.

Rubin, Katz & Alley, Owen Rouse, III, Santa Fe, for plaintiff-appellee.

OPINION

MONTGOMERY, Justice.

On July 9, 1990, the City of Santa Fe and Quail Run Association, Inc., sponsored a pro-am golf tournament at the Quail Run Golf Course in Santa Fe. Plaintiff Crawford Chevrolet, Inc. ("Crawford"), a Santa Fe automobile dealership, agreed to provide a new vehicle to any participant who scored a hole-in-one on a certain hole during the tournament. Crawford obtained insurance through defendant National Hole-in-One Association ("Hole-in-One"), a company that insures golf tournament sponsors, such as Crawford, against the risk that a player will score a hole-in-one and the sponsor will have to deliver the prize.

The application for insurance required Crawford to designate certain "Target Hole Data": the target hole (for which Crawford would award a prize to any player scoring a hole-in-one on that hole), the yardage to the target hole green, and the

number of "shots" to be taken on the target hole. Accordingly, Crawford filled in the following information: Hole: "#9," yardage: 165, and shots: 65. Crawford listed the value of the prize vehicle as $19,736.00.

The back of the application contained a provision requiring Crawford to notify Hole-in-One prior to the tournament of any change in the number of shots. It stated:

> NUMBER OF SHOTS
>
> Each category of shots specified on this Certificate permit[s] a 10% variance, plus or minus (+ or −), without a change in the certificate fee. Shot variance greater than 10% must be reported to NHIO prior to tournament. Certificate fee adjustment will be billed after the tournament. IMPORTANT: The prize value will be prorated downward if a Hole-in-One occurs and the number of shots has been understated by more than the allowed 10% variance. (Example: Number of shots insured divided by number of shots taken times the prize value = Amount Paid.)

After Crawford completed the application, Hole-in-One sent Crawford a "Certificate Of Participation," along with a letter dated July 6, 1990, reminding Crawford to inform Hole-in-One before the tournament of "any variance in the number of players." Accordingly, on the following day Crawford faxed a letter to Hole-in-One, informing it that the number of players would be 60 rather than 65.

Sixty players participated in the tournament on July 9. The course was a nine-hole course, which was played twice, for a game of eighteen holes. Don Zamora, a professional golfer from Albuquerque, scored a hole-in-one on physical hole #9, but on his second time around the course—*i.e.*, on the eighteenth hole in the tournament. Crawford delivered the prize vehicle to Zamora and made a claim to Hole-in-One for coverage.

Hole-in-One denied coverage on the ground that the hole-in-one occurred on hole #18, which was not the target hole designated in the insurance application. It claimed that the contract only provided coverage for a hole-in-one scored on physical hole #9 when that hole was being played the first time around the nine-hole course; it did not provide coverage for a hole-in-one scored the second time around on hole #9.

Crawford brought an action against Hole-in-One on September 11, 1990, alleging breach of contract. It argued that the meaning of "hole #9" was ambiguous and should therefore be construed in favor of the insured so as to provide coverage. Both parties filed motions for summary judgment. The trial court ruled in favor of Crawford, awarding it $19,796.00 in damages and costs.[1]

On appeal, Hole-in-One argues that the contract is unambiguous. It contends that there is clearly no coverage because the hole-in-one occurred on the eighteenth hole, while the contract only insures against a hole-in-one on the ninth hole. In the alternative, Hole-in-One argues that, if we find coverage here, we should reduce the damages awarded by the trial court because Crawford understated in its application the number of shots actually taken on the target hole.

This case, while raising a seemingly straightforward issue of contract interpretation, has been surprisingly difficult to resolve. The issue has provoked controversy between golfers and nongolfers, both in the general public and on this Court. However, after thoroughly reviewing the record, we believe that the contract provides coverage under the facts in this case.

■ In determining whether an ambiguity exists in an insurance contract, we con-

1. The parties' contract required them to submit any dispute to binding arbitration in Texas. Pursuant to this requirement, Hole-in-One initially moved to stay the lawsuit pending arbitration. However, the parties subsequently agreed to submit motions for summary judgment and allow the court to decide the case if there were no genuine issues of material fact. If the court were to determine that there was a factual issue, the parties agreed that they would then submit the case to arbitration. The court approved this agreement and, in ruling in favor of Crawford, found no genuine issue of material fact.

sider the policy as a whole. *See Ivy Nelson Grain Co. v. Commercial Union Ins. Co.*, 80 N.M. 224, 226, 453 P.2d 587, 589 (1969). We begin by reviewing the "Target Hole Data" on the application. Hole-in-One argues that these data—consisting of the designated target hole, the yardage on the target hole green, and the number of "shots"—clearly show that the contract, considered as a whole, only provides coverage for a hole-in-one scored on hole #9 on a player's first time around the course. Its strongest point is that Crawford only specified 60 shots on the application. Arguably, if Crawford had intended to purchase coverage for a hole-in-one scored on the first *or* second round of the course, it would have specified 120 shots (60 golfers each playing the ninth hole twice). Hole-in-One also relies on a warranty provision on the back of the application, which states: "TARGET HOLE—Only one predesignated hole may be used on the target hole green. Nine (9) hole courses must specify which hole(s) will be eligible during the official insured round. Insurance does not apply unless prize is offered on the *EXACT* target hole as specified in this certificate."

On the other hand, Crawford argues that the contract is ambiguous because "hole #9" is subject to at least three different interpretations: physical hole #9, on either the first or second round of the course; physical hole #9, but only the first time around the course; and the ninth hole played, regardless of whether it is physical hole #9. (The players in this tournament started at different holes.) According to Crawford, because the contract is ambiguous, it should be construed in favor of the insured so as to provide coverage for Zamora's hole-in-one.

We agree with Crawford that the contract is ambiguous, but for a different reason. We believe that the term "shots" is ambiguous because it could mean either the number of *attempts* to score a hole-in-one on physical hole #9 (in this tournament, 120) or the number of *golfers* playing physical hole #9 (in this tournament, 60). If "shots" has the latter meaning, the contract would insure against Zamora's hole-in-one because coverage would not be restricted to a hole-in-one scored on the players' first round on the nine-hole course.

The existence of this ambiguity does not result in an automatic decision in favor of the insured. The rule of construction that an ambiguity in an insurance contract should be construed against the insurance company which drafted the form, *see King v. Travelers Ins. Co.*, 84 N.M. 550, 555, 505 P.2d 1226, 1231 (1973), is just that—a rule of construction that courts may use in interpreting policy language. It does not preclude a court from examining the facts of a case to determine what the parties intended the contractual language to mean.[2] *See* 2 George J. Couch, *Couch Cyclopedia of Insurance Law* § 15:74, at 357 (2d ed. rev. vol. 1984) ("The rule, moreover, that an insurance policy will be strictly construed against the insurer does not apply when the barrier against parol evidence has been removed by an ambiguity in the contract, and the parties thereto, by their acts, have placed a construction on the contract showing what was in fact intended.").

Unfortunately, "shots" is not defined in the application, and the parties have not directed our attention to any possibly applicable definition of "shots" in the Rules of Golf promulgated by the United States Golf Association. Nevertheless, the record indicates that the parties intended "number of shots" to mean "number of players." The "Certificate of Participation," issued to Crawford by Hole-in-One, lists the Target Hole Data supplied by Crawford. One line of the Certificate states: "CATEGORY OF SHOTS: 48 AMATEURS, 12 CLUB PROS." A layman reading this line could easily understand

2. We might have favored a ruling that, because the contract is ambiguous, the trial court should have remanded the matter to the arbitrators for a factual determination, based on extrinsic evidence, of the parties' intent. However, counsel for Hole-in-One conceded at oral argument that she had abandoned this position, and the parties agreed that the issue should be resolved by this Court as a matter of law.

that the number of "shots" means the number of "players." This understanding is reinforced by the application, which lists the number of players as 52 amateurs, 1 club pro, and 12 tour pros, for a total of 65 (later amended to 48 amateurs and 12 tour pros). The same figure of 65 then appears as the number of "shots" under the Target Hole Data. The application never informs the applicant that, in an eighteen-hole game played on a nine-hole course, the number of shots is twice the number of players if the applicant intends to insure the physical hole on both the first and second rounds of play.

We also rely on the July 6 letter from Hole-in-One to Crawford, in which Hole-in-One referred to the number of shots as the number of players. As indicated previously, Hole-in-One in that letter reminded Crawford of the provision on the back of the application, quoted above, requiring Crawford to notify Hole-in-One before the tournament of any *shot variance* greater than ten percent. Hole-in-One wrote: "See 'premium adjustment conditions', shown on back side of certificate, for any variance in number of *players.*" (Emphasis added.) This letter reinforces the conclusion that the parties intended "number of shots" to mean "number of players." [3]

In the world of golf, perhaps the term "shots" has a universally accepted meaning: the number of attempts to achieve a hole-in-one on a particular hole. However, among nongolfers, including some but not all of the members of the panel deciding this case, the meaning of "shots" is far from self-evident. And, in any event, the question is not what a knowledgeable golfer would understand the term to mean, but the meaning that a layman—by which we mean neither a golfer, nor a lawyer, nor an insurance underwriter, but an ordinary (reasonable) person, such as a new or used car dealer—would ascribe to it. *See Ivy Nelson,* 80 N.M. at 225, 453 P.2d at 588 ("[T]he words in a contract of insurance are given their ordinary meaning, and, where there is ambiguity, the test is not what the insurer intended its words to mean, but what a reasonable person in the position of the insured would understand them to mean."). Accordingly, because we find the parties intended that "number of shots" meant "number of players," we interpret the contract as providing insurance against the risk that any of the 60 players might score a hole-in-one on hole #9, either on his or her first or second time around the nine-hole course.

The warranty provision on the back of the application relating to the target hole on a nine-hole course, quoted above, does not cause us to change this interpretation. We believe that the provision is itself ambiguous. Arguably, it applies only to an eighteen-hole tournament in which there are two different physical holes on any particular green in a nine-hole course—*i.e.,* when, on the second time around a nine-hole course, a golfer plays to a different physical hole on a given green. The Rules of Golf clearly contemplate such a situation by authorizing a committee to designate two holes on each green of a nine-hole course, one for use in play of the first nine holes and the other for use in play of the second nine. *See* Decisions on the Rules of Golf 16/7 (1991) ("Two Holes on Each Green of Nine–Hole Course").[4]

Thus, we hold that the contract between Hole-in-One and Crawford provides coverage for Zamora's hole-in-one scored on physical hole #9 while he was playing his second round on the nine-hole course.

3. We realize that Hole-in-One may not have subjectively intended the number of shots to equal the number of players. However, "[t]he controlling intent of a party is his expressed assent and not his secret or undisclosed intent." *Southern Union Exploration Co. v. Wynn Exploration Co.,* 95 N.M. 594, 597, 624 P.2d 536, 539 (Ct.App.), *cert. denied,* 95 N.M. 593, 624 P.2d 535 (1981), *cert. denied,* 455 U.S. 920, 102 S.Ct. 1276, 71 L.Ed.2d 461 (1982). *See also* 2 Couch, *supra,* § 15:11, at 154 (intent to be given effect in construing insurance contracts is not secret, unexpressed intention of one or all parties, but intention which finds expression in the language used).

4. Counsel for Hole-in-One conceded at oral argument that this provision introduced some ambiguity into the contract. However, she argued that other provisions of the contract dispelled this ambiguity.

Our conclusion that the parties intended "number of shots" to mean "number of players" allows us to quickly dispose of Hole-in-One's alternative argument that we should reduce the trial court's award of damages because Crawford understated the number of shots. Because "number of shots" meant "number of players," Crawford did not understate the number of shots taken on hole #9. Crawford informed Hole-in-One that 60 players would participate in the tournament, and that number never changed. Thus, there was no "shot variance" and no basis for reducing the trial court's damage award.

We reject Crawford's request in its answer brief for attorney's fees under NMSA 1978, Section 39-2-1 (Repl.Pamp. 1991), which permits the trial court to award reasonable attorney's fees to an insured who prevails against the insurer on a claim for first-party coverage if the court finds that the insurer "acted unreasonably in failing to pay the claim." Crawford did not make this request in the trial court, and we will not consider it now on Hole-in-One's appeal. *See Wolfley v. Real Estate Comm'n,* 100 N.M. 187, 189, 668 P.2d 303, 305 (1983) (matters will not be considered when raised for the first time on appeal).

The judgment is affirmed.

IT IS SO ORDERED.

BACA, J., concurs.

RANSOM, C.J., specially concurs.

RANSOM, Chief Justice (specially concurring).

I have found it difficult to see any ambiguity in the risk underwritten by Hole-in-One, namely, sixty shots on the ninth hole as carded by each player. Mr. Zamora carded his hole-in-one as the eighteenth hole while playing number nine the second time. However, I am persuaded that, as nongolfers and ordinary persons, my colleagues on this panel, along with the trial judge, reasonably could ascribe to and resolve ambiguity in the meaning of "shots" and "holes." I, therefore, reluctantly concur.

828 P.2d 958

STATE of New Mexico,
Plaintiff-Appellee,

v.

William SCOTT, Defendant-Appellant.

No. 12097.

Court of Appeals of New Mexico.

June 27, 1991.

Certiorari Quashed as Improvidently Granted, Feb. 18, 1992.

Tom Udall, Atty. Gen., Charles H. Rennick, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Hugh W. Dangler, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

APODACA, Judge.

Defendant appeals his jury convictions under one count of criminal sexual contact of a minor (CSCM), in violation of NMSA 1978, Section 30–9–13(B) (Repl.Pamp.1984), and one count of criminal sexual penetration with great mental anguish, in violation of NMSA 1978, Section 30–9–11(A)(2) (Repl.Repl.1984). The facts forming the basis for the criminal charges involving the sexual penetration of defendant's granddaughter are discussed within our respective analysis of each issue. Defendant raises five issues on appeal: (1) the trial court erred in admitting evidence of prior sexual misconduct by defendant against the victim; (2) the trial court erred in restricting admission of evidence to show the victim's previous and allegedly false allegations of rape and sexual misconduct; (3) the trial court committed cumulative error with respect to issues one and two; (4) trial counsel's failure to call certain witnesses constituted ineffective assistance of counsel; and (5) Section 30–9–13(B) is unconstitutional for overbreadth. Other issues listed in the docketing statement but not briefed are deemed abandoned. *See State v. Aragon,* 109 N.M. 632, 788 P.2d 932 (Ct.App.1990). We are not persuaded by defendant's arguments with respect to all issues and thus affirm the convictions.

EVIDENCE OF DEFENDANT'S PRIOR SEXUAL MISCONDUCT AGAINST VICTIM

Defendant claims that the trial court abused its discretion in admitting evidence of defendant's prior sexual misconduct against the victim. Generally, the determination of the relevance of evidence, and whether its probative value is substantially outweighed by its prejudicial effect, is within the trial court's discretion. *See State v. Lopez,* 105 N.M. 538, 734 P.2d 778 (Ct.App.1986), *cert. denied,* 479 U.S. 1092, 107 S.Ct. 1305, 94 L.Ed.2d 160 (1987); *State v. Minns,* 80 N.M. 269, 454 P.2d 355 (Ct.App.1969). Absent a clear abuse of discretion, we will not disturb the trial court's ruling.

Defendant specifically argues that evidence of his past sexual misconduct against the victim was too remote for its probative value to outweigh its prejudicial impact. The state counters, however, that defendant did not argue "remoteness" at the pretrial hearing and otherwise failed to preserve it, thus precluding appellate review of this issue. At the pretrial hearing, the prosecutor argued for admission of the contested evidence and stated that "[t]he real question * * * is where to draw the line in terms of what is and what isn't remote * * *." In response, defendant contended that the testimony was too vague because there were no particulars as to time, place, and location, and too prejudicial to have any probative value. We hold that defendant's objections adequately preserved the issue of remoteness, since they were made in response to the prosecutor's argument that the evidence was not too remote. *See State v. Shade,* 104 N.M. 710, 724, 726 P.2d 864, 878 (Ct.App.1986).

The trial court admitted the history of defendant's past sexual misconduct against the victim through her testimony. The victim testified that the molestation began in Arizona, where defendant began touching her breasts and vagina when she was six or seven years old. At age eight, the victim moved to Germany for three years with her mother and stepfather. There was no contact between the victim and defendant during that time. When the victim was eleven years old, the family moved to Hamilton, Texas, where defendant began to penetrate her for the first time. After a year, the victim and her family moved to Killeen, Texas. Defendant would visit and penetrate the victim whenever possible. Defendant and his wife then moved to Taos, New Mexico. When victim was thirteen years old, she moved to Taos to help care for her

grandmother, defendant's wife. In Taos, the victim was penetrated by defendant again. In March of 1988, the victim and her mother moved to Taos to live with defendant and his wife. Defendant continued to penetrate her and touch her breasts. In July of 1988, the victim, her mother, defendant and his wife, moved to Questa, New Mexico, where the criminal sexual penetration incidents alleged in the indictment occurred.

In *State v. Minns,* we addressed the issue of whether evidence of a defendant's past sexual misconduct against a complaining witness was admissible. The defendant in *Minns* was convicted of having indecently fondled a girl under the age of sixteen. Evidence was presented that the defendant, more than three years before the incident in question, had committed similar acts of sexual misconduct against the complaining witness. The defendant argued that the testimony was inadmissible because the alleged past acts were so remote in time so as to be deprived of relevancy. This court, however, permitted admission of the evidence of the past similar acts, basing its holding on the general rule that "[s]uch evidence, if not too remote, is admissible as showing a lewd and lascivious disposition of defendant toward the prosecuting witness and as corroborating evidence." *Id.* at 272, 454 P.2d at 358.

In this appeal, evidence of defendant's past sexual misconduct dated back ten years. Consequently, defendant argues that the facts of this appeal are distinguishable from *Minns,* in which the past acts dated back only three years. We are not persuaded, however, that a time span of ten years necessarily makes admission of the past acts too remote to be probative. Instead, we find ample case law to support the admission of such evidence. *See Whiteman v. State,* 343 So.2d 1340 (Fla. Dist.Ct.App.1977) (evidence introduced that defendant had intercourse with complaining witness eight years previous to charged crime); *Staggers v. State,* 120 Ga.App. 875, 172 S.E.2d 462 (1969) (testimony of victim's sister regarding defendant's past sexual misconduct twelve years previous to incident at issue relevant to show defendant's plan to use his daughters to satisfy his lust); *State v. Maestas,* 224 N.W.2d 248 (Iowa 1974) (victim's older sister permitted to testify regarding defendant's alleged prior sexual misconduct that took place ten years prior to incident at issue).

Time is but one factor to consider when determining the issue of whether evidence is too remote. For example, in *Minns,* we considered not only the proximity of the past incidents in relation to the occurrences at issue, but also the number of incidents that had taken place and the nature of such incidents. Thus, the question of remoteness is not dictated solely by the mere lapse of time. The question of remoteness necessarily depends on a number of considerations. *See United States v. Smith,* 432 F.2d 1109 (7th Cir.1970), *cert. denied,* 401 U.S. 911, 91 S.Ct. 875, 27 L.Ed.2d 810 (1971); *State v. Huntington,* 248 Iowa 430, 80 N.W.2d 744 (1957). The trial court's admission of the testimony at issue was buttressed by the similarity of the past incidents to that of the charged occurrences. *See Whiteman v. State.* Remoteness, however, in the context of this case, goes to the weight, not the admissibility, of the evidence. *See Austin v. State,* 262 Ind. 529, 319 N.E.2d 130, *cert. denied,* 421 U.S. 1012, 95 S.Ct. 2417, 44 L.Ed.2d 680 (1975).

We conclude that the trial court could have properly found that the probative value of evidence of defendant's past sexual misconduct was not substantially outweighed by the danger of unfair prejudice. *See* SCRA 1986, 11–403. Evidence of defendant's past sexual misconduct, similar in nature to the crime of which defendant was indicted, is illustrative of a lewd and lascivious disposition of defendant toward the victim. *See State v. Minns.* Based on *Minns,* we uphold the trial court's admission of this evidence and conclude that the trial court did not abuse its discretion.

Defendant also contends that the pre-Germany evidence of sexual misconduct should not have been admitted for two reasons. Defendant first argues that the evidence of alleged prior sexual misconduct

was not sufficiently similar to that which occurred after the victim returned from Germany. We disagree. Although the pre-Germany conduct did not involve penetration, it did involve impermissible sexual contact against a minor. Consequently, the pre-Germany offenses were not of such a different nature so as to eliminate any logical connection with the post-Germany contacts. *See State v. Thorne,* 43 Wash.2d 47, 260 P.2d 331 (1953) (in the trial of cases involving intercourse between the sexes, it is permissible to show prior acts of a defendant's sexual misconduct against the complaining witness).

Defendant next argues that the pre-Germany conduct was not properly admitted because the three-year stay in Germany constituted a substantial break between the first alleged contact and the later acts. The three-year period, however, was beyond defendant's control and he resumed his pattern of abuse when circumstances again allowed it. We are unconvinced that the three-year break did not comport with the continuing nature of defendant's sexual misconduct against the victim.

Lastly, defendant argues that the trial court's "blanket ruling" admitting all prior sexual contact between defendant and the victim was error because the trial court failed to consider the incidents separately and make independent rulings on each incident. The record reflects, however, that the trial court heard evidence on each alleged incident of past sexual misconduct at the pre-trial hearings. Additionally, defendant never requested that the trial court make an independent ruling for each alleged incident on an individual basis. Thus, defendant cannot properly raise this issue for the first time on appeal. *See State v. Smith,* 88 N.M. 541, 543 P.2d 834 (Ct.App.1975).

PRIOR ALLEGATIONS BY VICTIM OF RAPE AND SEXUAL MISCONDUCT

Defendant argues that the trial court erred in denying defendant's request to call the victim's stepfather and defendant's wife to testify about the victim's prior allegations of sexual misconduct against the stepfather. Through the testimony of the stepfather and defendant's wife, defendant intended to introduce evidence that the victim had previously falsely accused the stepfather of sexual misconduct.

This issue was considered in two pre-trial hearings and one hearing during trial, where defendant presented evidence that the victim had previously made false allegations of sexual misconduct against other individuals. Defendant contended that such allegations were admissible for the purpose of impeaching the victim, by attacking her credibility. The trial court agreed, but permitted limited cross-examination regarding only information substantiated by available written reports. The trial court reasoned that permitting defendant's proposed witnesses to testify would essentially result in a dispute whether the other alleged incidents actually occurred. On this basis, defendant was only permitted to cross-examine and impeach the victim using the available reports concerning the prior allegations. Extrinsic evidence through other witnesses was not permitted by the trial court. The victim admitted on cross-examination that she had accused her grandmother and her boyfriend of rape. She denied having made an accusation against her stepfather. Defendant contends he should have been permitted to call defendant's wife and the victim's stepfather to testify about the victim's prior allegations, which he contends were false.

NMSA 1978, Section 30–9–16 (Repl. Pamp.1984) (the Rape Shield Law), provides:

> [E]vidence of the victim's past sexual conduct, opinion evidence thereof or reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds, that evidence of the victim's past sexual conduct is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

The issue raised by defendant (whether evidence that a victim in the past had falsely accused others of rape is admissible in a

prosecution for a sexual offense) was addressed in *Manlove v. Sullivan,* 108 N.M. 471, 775 P.2d 237 (1989), and *State v. Johnson,* 102 N.M. 110, 692 P.2d 35 (Ct.App. 1984).

In *Johnson,* this court held that Section 30–9–16 was not limited to sex by consent. As such, we concluded that Section 30–9–16 applied to all sexual conduct and that a prior rape was sexual conduct within the meaning of Section 30–9–16. *Johnson* nevertheless observed that evidence of a prior allegation of rape was admissible if it was relevant and material, and if its prejudicial nature did not outweigh its probative value. *Id.* at 117, 692 P.2d at 42.

In *Manlove,* our supreme court overruled *Johnson* in part, holding that a victim's prior allegations of rape were not closely enough related to sexual conduct to merit protection by the Rape Shield Law. *Manlove* did not hold, however, that such evidence was automatically admissible. As did this court in *Johnson,* our supreme court in *Manlove* concluded that the trial court is afforded discretion on the question of whether to admit or exclude evidence of the victim's prior allegations of rape.

Essentially, both *Manlove* and *Johnson* allow cross-examination of a complaining witness on prior false complaints for purposes of impeachment, but also represent that the trial court's discretion to exclude such evidence must be weighed against a defendant's right to cross-examine and impeach witnesses adequately. *Johnson,* 102 N.M. at 119, 692 P.2d at 44. Additionally, SCRA 1986, 11–413 allows admission of a victim's past sexual conduct to the extent that such evidence is material and relevant and its inflammatory or prejudicial nature does not outweigh its probative value.

Although *Manlove* and *Johnson* permit admission of evidence of prior false allegations, subject to the trial court's discretion, the *method of proof* (the form the evidence must take to be admissible) nonetheless is not unlimited. Evidence of the victim's prior false allegations constitutes extrinsic evidence. Although the credibility of a witness may be attacked by any party, attempts to do so by evidence of specific instances of conduct are strictly limited by our evidentiary rules. *See State v. Vigil,* 103 N.M. 583, 711 P.2d 28 (Ct.App. 1985).

SCRA 1986, 11–608(B) provides that a defendant may, on cross-examination, inquire about specific instances of conduct (in this appeal, victim's prior allegations of sexual misconduct against persons other than defendant) if, in the trial court's discretion, such evidence is probative of untruthfulness. *See State v. Ross,* 88 N.M. 1, 536 P.2d 265 (Ct.App.1975); *State v. Madrid,* 83 N.M. 603, 495 P.2d 383 (Ct.App. 1972). Rule 11–608(B), however, prohibits the use of extrinsic evidence for the purpose of attacking a witness's credibility.

In *State v. McKinzie,* 72 N.M. 23, 380 P.2d 177 (1963), our supreme court held that a witness may not be impeached concerning specific acts of misconduct by the testimony of other witnesses, but only by cross-examination of that witness. The general rule is that, on collateral matters, a cross-examiner is bound and limited by whatever answer is elicited from the witness. *See State v. Vigil; State v. Hargrove,* 81 N.M. 145, 464 P.2d 564 (Ct.App. 1970) (a denial is binding on the cross-examiner and extraneous evidence is inadmissible to contradict such denial).

Thus, the trial court correctly followed our rules of evidence in prohibiting the stepfather to testify concerning the alleged false accusation by the victim. Additionally, defendant did not even establish that there was admissible evidence that the victim had made an accusation against the stepfather. Defendant made no proffer that the stepfather, or anyone else, had personal knowledge of such an accusation. We therefore reject defendant's claim of error in the trial court's ruling concerning the stepfather's testimony.

CUMULATIVE ERROR

Defendant contends that the trial court's rulings concerning issues one and two served to deny defendant a fair trial and constituted cumulative error. The cu-

mulative error doctrine has no application if no errors were committed and if defendant received a fair trial. *See State v. Lopez.* Since we have concluded there was no error, there is no basis for defendant's claim of cumulative error. *See State v. Larson,* 107 N.M. 85, 752 P.2d 1101 (Ct. App.1988).

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied effective assistance of counsel because his trial counsel did not call witnesses to support the trial testimony of defendant's wife. Defendant contends that trial counsel was aware, or should have been aware, of witnesses who would have supported his wife's testimony. Defendant claims that the jury essentially had to weigh his wife's credibility against that of the victim and the victim's mother. He also argues that, had trial counsel called other witnesses, the jury would not have had to judge defendant's entire defense on the credibility of defendant's wife.

The standard for ineffective assistance of counsel is whether defense counsel exercised the skill of a reasonably competent attorney. *State v. Taylor,* 107 N.M. 66, 752 P.2d 781 (1988), *overruled on other grounds by Gallegos v. Citizens Ins. Agency,* 108 N.M. 722, 779 P.2d 99 (1989); *State v. Orona,* 97 N.M. 232, 638 P.2d 1077 (1982). The burden of proof to establish ineffective assistance of counsel is on a defendant, who must establish that counsel was incompetent and that defendant was prejudiced as a result. *State v. Talley,* 103 N.M. 33, 702 P.2d 353 (Ct.App.1985).

In considering a claim of ineffective assistance of counsel, the entire proceeding must be considered as a whole. *Id.; State v. French,* 92 N.M. 94, 582 P.2d 1307 (Ct.App.1978). "The benchmark for judging any claim of ineffectiveness must be 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." *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). A defendant must show essentially that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. *See, State v. Taylor.*

We now examine the particular facts of this appeal to determine whether defendant was denied effective assistance of counsel. At trial, conflicting testimony was introduced regarding the victim's whereabouts on August 6 and 7, 1988, a Saturday and a Sunday, the days on which the alleged offenses occurred. Defendant and his wife had bought a new home. The victim and her mother testified that, on the weekend of August 6 and 7, the victim, her mother and siblings, and defendant and his wife were all present at the new home. The indictment charged that, on or about August 6 and 7, defendant engaged in sexual misconduct with the victim. The victim and her mother testified that on Saturday and Sunday, defendant and the victim had left the premises to gather rocks and pick up cans. It was during this time that the alleged incidents occurred.

Contrary to the testimony of the victim and her mother, defendant's wife testified that the family had not yet moved into the new home. She claimed instead that the family was only preparing to move during the weekend of August 6 and 7. Defendant's trial counsel introduced a rent check written by defendant's wife to corroborate her testimony that the family had not yet moved to the new home. Defendant's wife contended that, on Saturday, August 6, she and the victim together were packing at the old residence while the other family members moved their belongings to the new home. Defendant's wife stated that on Sunday, August 7, the entire family went to the new home to install a waterbed. According to defendant's wife, the victim was never alone with defendant during that weekend. Through the testimony of defendant's wife, defendant's trial counsel sought to prove that the victim was never alone with defendant on August 6 and 7, thus precluding the opportunity for any sexual misconduct. The jury's convic-

tion apparently indicated that it did not believe the testimony of defendant's wife.

To support his argument that his trial counsel should have called other witnesses, defendant claims he informed counsel of such witnesses. Any off-the-record statement by defendant to his trial counsel, however, cannot be considered by this court. *See State v. Lord,* 91 N.M. 353, 573 P.2d 1208 (Ct.App.1977).

In support of his ineffective assistance of counsel claim, defendant also points to his trial counsel's direct examination of defendant's wife. Defendant's wife testified that from August 6 to 13, the family was only in the process of moving to the new home, because there was a repairman and a helper installing carpet during that time. She testified that the carpet was not completely installed until August 10 and that she was positive they did not move into the new home until after that date. Even if we were to assume the correctness of that statement, however, it does not necessarily follow that defendant and the victim were not at the new house on August 6 and 7. Thus, we conclude that defendant's trial counsel's failure to call the potential witnesses to corroborate defendant's wife did not constitute ineffective assistance of counsel.

Additionally, even if the wife's testimony was accurate in its account of the activities on August 6 and 7, trial counsel's failure to call the carpet installer did not constitute ineffective assistance of counsel. Counsel cross-examined the victim on her vague recollection of the events, presented conflicting testimony of defendant's wife, and introduced a bank check that supported wife's testimony. Obviously, trial counsel could have concluded that this evidence was sufficient to discredit the victim's testimony. In this context, whether or not to call another witness then became a matter of strategy and trial tactics. Trial counsel is afforded wide latitude in the representation of his client. *See State v. Dean,* 105 N.M. 5, 727 P.2d 944 (Ct.App.1986); *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).

In connection with an ineffective assistance of counsel claim, on review, we must affirm defendant's conviction unless the record reveals a very real possibility of a miscarriage of justice. *See State v. Chacon,* 80 N.M. 799, 461 P.2d 932 (Ct.App. 1969). Our review of the entire record in this appeal does not persuade us that counsel's failure to call other witnesses to support wife's testimony prejudiced defendant's defense. Absent proof that trial counsel's representation fell below that of a reasonably competent attorney, or that, but for counsel's failure to call such witnesses, the result would have been different, we cannot conclude that defendant did not receive a fair trial. *See State v. Taylor.*

Before consideration of the merits of this appeal, we previously denied defendant's motion to remand for an evidentiary hearing with respect to the content and effect of other witnesses' testimony on this issue. However, defendant's brief has not presented a substantial claim of ineffectiveness. We thus decline to review or reconsider defendant's motion as requested. *See State v. Powers,* 111 N.M. 10, 800 P.2d 1067 (Ct.App.1990) (a remand for an evidentiary hearing would circumvent the express wording of SCRA 1986, 5–802).

OVERBREADTH

Defendant contends that Section 30–9–13(B) is unconstitutionally overbroad. The general rule governing standing in connection with this argument provides that a person to whom a statute may be constitutionally applied cannot challenge the statute on the basis that the statute may conceivably be applied unconstitutionally to others not before the court. *See Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). But even if we addressed this issue, we are compelled to follow the holding of *State v. Pierce,* 110 N.M. 76, 792 P.2d 408 (1990), where our supreme court held Section 39–9–13(B) was neither unconstitutionally vague nor overbroad.

CONCLUSION

This court has *sua sponte* considered whether *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991) requires reversal. *Osborne* held that "unlawfulness" is an essential element of the offense of CSCM and the jury must be instructed on that element. The court noted, however, that, "[a]s with other instructions addressing the statutory element of unlawfulness discussed above, the element of unlawfulness in the CSCM statute may be addressed by description of the manner in which the act was perpetrated." *Id.,* 808 P.2d at 630. That was done in this case. The court instructed the jury, as elements of the CSCM charge, concerning the requirements that "the defendant threatened to hurt [the victim]" and "[the victim] believed that the defendant would carry out the threat." Since the jury apparently was satisfied that the state proved those elements, the jury necessarily found that defendant acted "unlawfully."

In summary, having determined that the trial court did not abuse its discretion in admitting evidence of defendant's prior sexual misconduct against the victim or in restricting impeachment of the victim's testimony by disallowing extrinsic evidence in the form of witness testimony, we affirm the trial court on those two issues. We also hold that, because there was no error, there was no cumulative error. Lastly, we decide against defendant's arguments in connection with his ineffective assistance of counsel claim and the statutory overbreadth claim. We therefore affirm defendant's convictions.

IT IS SO ORDERED.

ALARID, C.J., and HARTZ, J., concur.

828 P.2d 966

Alfred R. WALCK, Petitioner–Appellee,

v.

CITY OF ALBUQUERQUE, et al., Respondents–Appellants.

No. 11736.

Court of Appeals of New Mexico.

Jan. 17, 1992.

Ira Bolnick, Fitzpatrick & Bolnick, Albuquerque, for petitioner-appellee.

David S. Campbell, City Atty., Jeffrey J. Dempsey, John H. Lewis, Asst. City Attys. Albuquerque, for respondents-appellants.

OPINION

FLORES, Judge.

Respondents, City of Albuquerque (City) and the City of Albuquerque Personnel Board (personnel board), appeal the district court's reversal of the personnel board's decision to uphold the termination of Petitioner Alfred R. Walck (Walck), an officer of the Albuquerque Police Department (APD). We address two contentions: (1) that the personnel board's conclusion that Walck engaged in conduct unbecoming an officer is supported by substantial evidence; and (2) that the personnel board's conclusion that Walck engaged in untruthfulness is supported by substantial evidence. We affirm the district court.

FACTS

On January 20, 1986, at 5:30 a.m., Walck, an off-duty APD officer, drove his personal vehicle to a Rio Rancho home owned by Dennis South (South). Walck observed his wife, Belinda Walck, opening the garage door and preparing to drive to work in her vehicle. Walck testified that he drove his vehicle into the driveway behind his wife's vehicle and, not anticipating how fast he was driving, struck his wife's vehicle in the rear with his own vehicle. As he was shifting into park to exit the vehicle, Walck testified he shifted into reverse and as he shifted back into drive, he struck his wife's vehicle again. Walck testified he finally shifted into park, placed his gun on his belt and waited for the police to arrive. When two Rio Rancho public safety officers arrived, Walck identified himself as an APD officer and handed over his gun to the officers. The Rio Rancho officers then took statements from the parties. South filed a criminal complaint against Walck with the Rio Rancho Police Department as well as a complaint with APD.

Mrs. Walck testified that her husband intentionally struck her vehicle several times, causing her car to move forward and damage some of South's appliances which were located in the garage. Mrs. Walck further testified that her husband kicked her once in the groin area and called her names. Walck denied intentionally striking his wife's vehicle or kicking her.

On April 8, 1986, following an internal affairs investigation, Walck's employment was terminated for violation of two Standard Operating Procedures of the APD, specifically Section 1–19–2, conduct unbecoming an officer, and Section 1–19–31, failure to answer truthfully. Walck filed a grievance contesting his termination with the personnel board. Following a hearing, the personnel board upheld Walck's termination. Walck appealed to the district court. The district court partially remanded the case to the personnel board to determine whether a member of the board should have recused himself from hearing the grievance and participating in the personnel board's first decision. After a rehearing, the personnel board determined that the member should have recused himself. The district court then remanded the case to hear two witnesses the board had previously refused to hear and to determine whether Section 1–19–31 applied to

the investigation of Walck. On the second remand, the board again upheld the termination of Walck. On motion to reopen and writ of certiorari, the district court reversed the decision of the personnel board with directions to reinstate Walck with full retroactive back pay and benefits to April 8, 1986. Respondents appeal.

STANDARD OF REVIEW

Appellate review of an administrative agency decision 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." *In re Mountain Bell,* 109 N.M. 504, 505, 787 P.2d 423, 424 (1990). In order to make this determination, we employ the whole record standard of review. *See id.*

CITY ORDINANCE

A city employee may be terminated for just cause pursuant to Section 2–9–24A of the Albuquerque Merit System Ordinance, which states that "[t]he Chief Administrative Officer or a department head may * * * dismiss any employee * * * for any justifiable cause * * *." Respondents argue that they had just cause to terminate Walck's employment as an officer of the APD for violation of the two Standard Operating Procedures, namely, Section 1–19–2, conduct unbecoming an officer and Section 1–19–31, failure to answer truthfully. We will address each alleged violation separately.

CONDUCT UNBECOMING AN OFFICER

Walck was terminated for violation of Standard Operating Procedure Section 1–19–2 which provides that all police officers "[s]hall conduct themselves both on and off duty in such a manner as to reflect most favorable [sic] on the Department. Conduct unbecoming an officer or employee shall include that which brings the Department into disrepute or impairs the operation or efficiency of the Department." The district court held that the personnel board's conclusion that Walck's conduct was unbecoming an officer was incorrect as a matter of law and was unsupported by substantial evidence. The district court concluded that although conduct unbecoming an officer may occur on or off-duty, it must relate to the reputation, efficiency or operations of the police department, and Walck's conduct did not so relate to the department. In addition, the district court held that the personnel board's conclusion that Walck's conduct reflected unfavorably on the police department was incorrect as a matter of law and there was no evidence in the record that the department was or reasonably could have been brought into disrepute.

Respondents argue that the undisputed facts that Walck trespassed onto private property and struck his wife's vehicle with his own vehicle should be sufficient to constitute conduct unbecoming an officer, as a matter of law. Respondents rely, in part, on two Pennsylvania cases to support their argument that Walck's conduct constituted conduct unbecoming an officer. In *Faust v. Police Civil Service Commission,* 22 Pa.Cmwlth. 123, 347 A.2d 765 (1975), the court upheld a police officer's termination for committing adultery while off-duty which the court held constituted immorality and conduct unbecoming an officer pursuant to Section 1190(4) of The Borough Code, 53 P.S. Section 46190(4). The code states that "[n]o person employed in any police or fire force of any borough shall be suspended, removed or reduced in rank except for * * * [i]nefficiency, neglect, intemperance, immorality, disobedience of orders, or conduct unbecoming an officer." Although the code does not define conduct unbecoming an officer, the court relied on prior interpretation of the wording of the statute and stated that conduct unbecoming an officer included any conduct which adversely affected the morale or efficiency of the bureau or "any conduct which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." *Id.* 347 A.2d at 768. In addition, the court stated that police officers are held to a higher standard than other citizens, including other public employees, because of the compel-

ling interest in sustaining public respect for police officers, and may be fired for off-duty conduct that, although not criminal, offends publicly accepted standards of decency.

Respondents also rely on *Fabio v. Civil Service Commission,* 489 Pa. 309, 414 A.2d 82 (1980), where the court upheld a police officer's termination for adultery, which constituted conduct unbecoming an officer pursuant to Article I, Section 1.75 of the Philadelphia Police Duty Manual. Section 1.75 defines conduct unbecoming a police officer as "repeated violations of departmental rules and regulations, or any other course of conduct indicating that a member has little or no regard for his responsibility as a member of the Police Department." *Id.* 414 A.2d at 87. The court relied on prior interpretation of conduct unbecoming an officer which included "any conduct which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." *Id.* 414 A.2d at 86.

These Pennsylvania cases, as well as other cases outside of our jurisdiction relied upon by respondents, uphold the termination of police officers for conduct unbecoming an officer pursuant to regulations or statutes. However, the language of those regulations and statutes are distinguishable from Section 1–19–2. Section 1–19–2 defines conduct unbecoming an officer to include conduct which actually brings the department into disrepute or which impairs the operation or efficiency of the department. Although some jurisdictions have defined conduct unbecoming an officer to include conduct which *tends* to destroy public respect or *tends* to bring the department into disrepute, the personnel board did not rely on such a construction in this case. The board stated "[Walck's] conduct on January 20, 1986, reflected unfavorably on the Albuquerque Police Department." We will not address whether Section 1–19–2 can be interpreted as encompassing conduct which *tends* to bring the department into disrepute when that interpretation has not been relied upon by the personnel board.

There is not substantial evidence in the record to support a finding that Walck's conduct actually reflected unfavorably on the department. Therefore, we agree with the district court's conclusion that the administrative board's termination of Walck was unsupported by substantial evidence and incorrect as a matter of law.

Respondents further argue that the personnel board's finding that Walck pleaded no contest to the charge of criminal damage to property in district court supports the proposition that the officer was terminated for just cause. However, the district court found that there was not substantial evidence in the record to support the board's finding that Walck pleaded no contest to these charges in district court. Upon our review of the record, we do not believe there is substantial evidence to support the board's finding that Walck pleaded no contest and, therefore, we do not address whether a no contest plea would support a termination for just cause.

UNTRUTHFULNESS

Walck was also terminated for violation of APD Standard Operating Procedure Section 1–19–31. Section 1–19–31 states that all police officers "[s]hall truthfully answer all questions specifically directed and narrowly related to the scope of employment and operations of the Department which may be asked of them."

Sergeant Weiland (Weiland) of APD Internal Affairs testified that he investigated the complaint filed with APD by South against Walck and that he interviewed Walck, Mrs. Walck, South, Mrs. South, and two Rio Rancho public safety officers in connection with the January 20, 1986 incident. Based on his investigation, Weiland identified possible charges of conduct unbecoming an officer and failure to answer truthfully. The district court found that questions asked, and conclusions reached, by internal affairs were not specifically directed and narrowly related to the scope of employment and operations of the department. The district court held that the personnel board improperly considered and applied Section 1–19–31; that there was

insufficient evidence to conclude that Walck had violated Section 1–19–31; and that the personnel board's conclusion that Walck had violated Section 1–19–31 was incorrect as a matter of law.

We agree that Walck's termination cannot be sustained on the basis of Section 1–19–31. Our reason is that the personnel board failed to comply with the district court's directive to determine whether that section applies to this case. A summary of the pertinent parts of the record is necessary to explain our result.

The first decision of the personnel board was dated August 4, 1986. One conclusion in that decision was: "Officer Walck did not respond to questions regarding the incident investigation with the high degree of integrity and honesty required of APD officers." The only finding in that decision that related to Walck's responses to the incident investigation is a finding that Weiland concluded that Walck had been untruthful. The board's second decision was issued on August 5, 1987. That decision related only to whether a member of the board should have recused himself at the first hearing.

On December 4, 1987, the district court reversed the personnel board's order upholding Walck's termination and remanded the case to the board for a new hearing on all issues. In the opinion explaining its reversal, the court wrote:

> [A]ll that the Personnel Board found was that [Walck] confronted his ex-wife; drove his car behind his ex-wife's car and struck it; told Rio Rancho Security Officers that he had finally caught his wife sleeping around; and surrendered his service revolver to the officers * * *. Significantly, there are no findings that [Walck] kicked his ex-wife intentionally, struck her car, or brandished his revolver * * *.
>
> The Court's decision on matters discussed above necessarily undermines the Board's conclusion that [Walck] did not answer questions regarding the incident in an honest manner. On remand, the Board is directed to specifically review the ap[p]licability of Section 1–19–31 of APD Standard Operating Procedures which states that an officer '[s]hall truthfully answer all questions *specifically directed and narrowly related to the scope of employment and operations of the Department* * * *' (emphasis added), and to specifically review whether the regulation applies to the incident involved herein as a matter of law."

After rehearing the matter on June 30, 1988, the board issued its decision on September 29, 1988. Although the introduction to the decision notes that the court had directed the board "to determine whether or not Section 1–9–31 * * * is applicable to this case as a matter of law," none of the findings address the issue and the only conclusions that could be pertinent are:

1. Findings of Fact as determined on August 5, 1987, are upheld.

* * * * * *

3. No new facts were presented to the City Personnel Board to deviate from its earlier conclusions as submitted on August 5, 1987.

The August 5, 1987, decision, however, related only to the disqualification of a member of the board; it said nothing concerning the conduct of Walck. Moreover, even if we assume that the references to August 5, 1987, were intended to refer to the earlier decision of August 4, 1986, the district court's 1987 opinion had informed the board that its earlier findings would not sustain a conclusion that Walck failed to honestly answer questions regarding the incident. In this circumstance, the board's failure to modify or expand upon its 1986 findings must be interpreted as a concurrence with the district court's opinion that Section 1–19–31 did not apply to Walck's conduct. Therefore, we cannot sustain Walck's termination pursuant to Section 1–19–31.

CONCLUSION

The judgment of the district court is affirmed.

IT IS SO ORDERED.

HARTZ and CHAVEZ, JJ., concur.

828 P.2d 971

STATE of New Mexico, Plaintiff-Appellee,

v.

Paul HUBBARD, Defendant-Appellant.

No. 12650.

Court of Appeals of New Mexico.

Jan. 31, 1992.

Certiorari Denied March 10, 1992.

Tom Udall, Atty. Gen., Patricia Gandert, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Amme M. Hogan, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

PICKARD, Judge.

Defendant appeals his conviction for trafficking cocaine and the enhancement of his sentence as a habitual offender. Defendant raises the following issues on appeal: (1) whether there was insufficient evidence to convict him for trafficking cocaine, and (2) whether the trial court erred in enhancing his sentence under both the

Controlled Substances Act (CSA) and the general habitual-offender statute. We affirm.

FACTS

Police officers arrived at defendant's residence to search it pursuant to a valid search warrant. The officers ordered defendant to empty his pockets. From his right front pocket, defendant removed a clear plastic bag that contained approximately eighteen grams of cocaine. Officers recovered other items from the residence during their search, including a set of scales, a mirror with a straw, approximately $419 in cash consisting of bills in small denominations, and a slip of paper containing several names. As a result of the evidence obtained in the search, defendant was arrested and charged with possession of cocaine with intent to distribute pursuant to NMSA 1978, Section 30–31–20 (Repl.Pamp.1989).

Defendant was tried before the court without a jury. Detective Fred Hill, a narcotics officer employed by the Roswell Police Department, was the state's chief witness. Detective Hill testified that the amount of cocaine found on defendant's person, eighteen grams, was not an amount of drugs that a casual or regular user would have readily available. In response to a question from the court, Detective Hill testified that it was unreasonable for a cocaine addict to possess eighteen grams of cocaine. Detective Hill further stated that heavy cocaine users support their habits by drug dealing, burglarizing, and shoplifting. Detective Hill testified that, in his experience as a police officer, the small denominations of the bills seized at defendant's residence indicated that the cash would be used to make change for narcotics sales or that defendant had made drug sales.

On cross-examination, Detective Hill stated that the officers conducting the search at defendant's residence did not find any materials to package cocaine, such as plastic bags or "bindles," and that no substance usually used to cut cocaine was found. Detective Hill also stated that, although he has seen all types of scales used by drug dealers, the scale found at defendant's residence "would not impress other drug dealers."

Defendant testified on his own behalf. He admitted that he was a cocaine addict and that his habit involved ingesting as much of the drug as possible without stopping. Defendant's sister, Sandra Smith, testified that at the time of her brother's arrest he was sick and addicted to cocaine. According to Ms. Smith, defendant's attempts to conquer his cocaine addiction faltered after his daughter's accidental death in 1989. The court found defendant guilty of trafficking cocaine.

Following defendant's conviction, the state filed a supplemental criminal information alleging that defendant was a habitual criminal offender and requesting that defendant's sentence be enhanced under both NMSA 1978, Section 31–18–17 (Repl.Pamp. 1990), the general habitual-offender statute, and Section 30–31–20, the CSA. Defendant admitted to having two prior felony convictions. Defendant's first conviction was in 1981, for felony possession of marijuana. However, defendant's second felony conviction was actually two convictions for separate crimes committed in 1988. Specifically, in 1988, defendant was convicted for trafficking cocaine and for possessing marijuana with intent to distribute. The two convictions resulted from an arrest in which defendant possessed both types of controlled substances.

As a result of defendant's prior conviction for trafficking cocaine, the trial court sentenced defendant as a first degree felon under the enhancement provisions of Section 30–31–20(B)(2). In addition, the trial court enhanced defendant's sentence by four years under Section 31–18–17(C), due to defendant's two prior felony convictions involving marijuana.

SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was only sufficient evidence to convict him of possession of cocaine, and insufficient evidence to support a conviction for trafficking. In analyzing the sufficiency of the evidence issues, the inquiry is whether substantial evidence exists of either a direct or circumstantial nature to support a verdict

of guilty beyond a reasonable doubt with respect to each essential element of a crime charged. *State v. Duran,* 107 N.M. 603, 762 P.2d 890 (1988). Substantial evidence is defined as that evidence which is acceptable to a reasonable mind as adequate support for a conclusion. *State v. Sparks,* 102 N.M. 317, 694 P.2d 1382 (Ct.App.1985). In reviewing a judgment of conviction, we view the evidence in the light most favorable to the verdict, resolving all conflicts therein and indulging all reasonable inferences therefrom in the light most favorable to the judgment. *State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978). We do not reweigh the evidence and may not substitute our judgment for that of the fact finder. *Id.*

Defendant argues that the state failed to prove that he intended to transfer the cocaine to another. Intent to distribute may be inferred when the amount of controlled substance possessed is inconsistent with personal use. *State v. Curry,* 107 N.M. 133, 753 P.2d 1321 (Ct.App.1988). Intent may be proved by inference from surrounding facts and circumstances, such as quantity and manner of packaging of the controlled substance. *State v. Muniz,* 110 N.M. 799, 800 P.2d 734 (Ct.App.1990).

Viewing the evidence in the light most favorable to the verdict, we hold that there was sufficient evidence to support defendant's conviction for trafficking by possession with intent to distribute cocaine. Detective Hill's testimony constitutes evidence from which a reasonable mind could infer that defendant intended to transfer cocaine to another. *See State v. Muniz; State v. Sparks.*

Defendant argues that, because Detective Hill's testimony was evasive and vague at times, the trial court erred in relying on it to prove defendant's guilt. It is for the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony. *See State v. Polsky,* 82 N.M. 393, 482 P.2d 257 (Ct.App. 1971), *cert. denied,* 404 U.S. 1015, 92 S.Ct. 688, 30 L.Ed.2d 662 (1972).

Defendant argues at length that it is what the police did not find at his residence that proves his innocence on the trafficking charge. Defendant contends that, because police did not find items that he could use to package cocaine for sale, or did not find any substance with which he could dilute cocaine, there was insufficient evidence to convict him of trafficking. Defendant misconstrues the function of appellate review by this court. Our role is only to determine whether substantial evidence exists to support the conviction and not whether evidence exists to support an opposite result. *See State v. Anderson,* 107 N.M. 165, 754 P.2d 542 (Ct.App.1988). Defendant's contention, relying on *Herron v. State,* 111 N.M. 357, 805 P.2d 624 (1991), that the evidence here is equally consistent with two hypotheses and therefore tends to prove neither, is answered by *State v. Madrid,* 83 N.M. 603, 495 P.2d 383 (Ct.App. 1972). The finder of fact having resolved the credibility and weight of the evidence, he necessarily found the hypothesis of guilt more reasonable than the hypothesis of innocence. *See id.*

In his reply brief, defendant cites our recent decision in *State v. Becerra,* 112 N.M. 604, 817 P.2d 1246 (Ct.App.1991), to support his proposition that the state presented insufficient evidence to support a finding that the amount of drugs found on defendant's person was inconsistent with personal use. Defendant's reliance on *Becerra* is misplaced. In *Becerra,* the state presented no testimony that the amount of cocaine possessed by the defendant was inconsistent with personal use. We therefore concluded in *Becerra* that the state had failed to prove the intent-to-transfer element. *See State v. Muniz.*

The present case is distinct from *Becerra.* As stated above, Detective Hill testified to numerous facts to support an inference that defendant intended to transfer the drug to others. Contrary to defendant's assertions that the detective did not give a basis for his opinion, Detective Hill testified that his conclusions concerning the items found at defendant's residence and the amount of drugs found on defendant's person were based on his profession-

al experience as a narcotics officer. Thus, the facts upon which reversal was based in *Becerra* do not exist in the present case.

Defendant's final argument on the sufficiency issue is that this court should adopt a specific test, either indicating what amount of drugs must be found in order to charge an accused with the crime of trafficking, or listing what factors are relevant to the determination. However, contrary to defendant's assertions, we believe present New Mexico cases adequately provide a test for what constitutes an "intent to transfer" drugs according to New Mexico law. While we are cognizant of defendant's concern that small amounts of drugs are sometimes the basis for trafficking prosecutions, we believe that the "surrounding circumstances" test protects against the concern articulated by defendant. If the amount of an illegal drug found in an accused's possession is not by itself sufficient to prove inconsistency with personal use, *see, e.g., State v. Donaldson,* 100 N.M. 111, 666 P.2d 1258 (Ct.App.1983) (twenty-two pounds of cocaine), then the state must present testimony that the amount of drugs in the accused's possession is inconsistent with personal use or that the other items found in possession of the accused, such as drug paraphernalia or significant sums of cash, show that the accused intends to transfer drugs. *See State v. Becerra; see also State v. Bejar,* 101 N.M. 190, 679 P.2d 1288 (Ct.App.1984) (even though defendant possessed very small amount of heroin, other evidence seized was sufficient to support possession with intent to distribute conviction).

ENHANCEMENT OF DEFENDANT'S SENTENCE

The parties do not dispute that it was proper for the trial court to utilize defendant's 1981 conviction for the purpose of enhancing his sentence under the general habitual-offender statute. Defendant does argue, however, that it was inappropriate for the trial court to use both 1988 convictions, one to enhance his sentence under the general habitual-offender statute and the other to enhance his sentence under the CSA. Defendant argues that enhancement under the CSA is more specific than enhancement under the general habitual-offender statute and, therefore, defendant's sentence may be enhanced only under the CSA. Defendant contends that the trial court's enhancement of his sentence is in violation of the principles articulated in *State v. Linam,* 93 N.M. 307, 600 P.2d 253, *cert. denied,* 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979), and *State v. Haddenham,* 110 N.M. 149, 793 P.2d 279 (Ct.App. 1990). For the reasons discussed below, we reject defendant's arguments and affirm the trial court's enhancement of defendant's sentence.

The present case is distinct from *Haddenham* in that the state did not seek "double use" of any of defendant's prior convictions. Defendant in the present case was convicted of three felonies prior to the trafficking conviction that is the subject of this appeal. Pursuant to the CSA, the trial court utilized one of defendant's 1988 convictions, the one for trafficking, to enhance defendant's 1990 trafficking conviction to a first degree felony. *See* § 30–31–20(B)(2). The trial court then utilized the other 1988 conviction, for possession of marijuana with intent to distribute, and his 1981 conviction, for felony possession of marijuana, to enhance defendant's sentence by four years under the general habitual-offender statute. *See* § 31–18–17(C). Thus, in the present case, there was no "double use" of the same crime to enhance defendant's sentence as discussed in *Haddenham.* Because the trial court did not use any conviction twice to enhance defendant's sentence, the trial court was not required to enhance defendant's sentence under the more specific enhancement provision contained in the CSA. *See State v. Haddenham.* Additionally, some of the cases on which defendant relies, *e.g., State v. Lujan,* 76 N.M. 111, 412 P.2d 405 (1966), were decided prior to the time the general habitual-offender statute was amended to provide for enhancement of sentences for felonies "whether within the Criminal Code or the Controlled Substances Act or not." Section 31–18–17(C).

We find the present case more analogous to *State v. Calvillo,* 112 N.M. 140, 812 P.2d 794 (Ct.App.1991). In *Calvillo,* the defendant was previously convicted of burglary and battery on a peace officer in 1986. The crimes occurred on different dates but were disposed of in the same judgment and sentence. The defendant was then convicted in 1990 for being a felon in possession of a firearm. We determined in *Calvillo* that nothing prohibited the state from using one prior felony to enhance under the felon-in-possession statute and using the other felony to enhance under the general habitual-offender statute, even though the felonies were obtained in the same judgment and sentence.

The present case warrants no different result. We recognize that the defendant's two prior crimes in *Calvillo* were committed on two different dates and were clearly separate occurrences. In contrast, the two 1988 crimes of which defendant was convicted in the present case resulted from the same arrest. However, even though the 1988 crimes were committed at the same time, each was a separate and distinct crime with different elements. *See State v. Smith,* 94 N.M. 379, 610 P.2d 1208 (1980) (defendant could be separately convicted and sentenced for four counts of possession with intent to distribute four drugs that were all possessed at the same time). Thus, while *Calvillo* is different from the present case on this point, it does not support reversal. Moreover, in addition to deterring criminal recidivism generally, the CSA enhancement provision serves to deter the trafficking of controlled substances by previously convicted drug traffickers. Thus, similar to *Calvillo,* both of defendant's 1988 convictions are held *in terrorem* over him for the separate and distinct purposes of generally deterring his criminal recidivism, and keeping convicted traffickers from selling controlled substances again.

We are unaware of any legislative intent indicating otherwise. Specifically, we are not persuaded by defendant's argument that the requirement of conviction/commission sequence was violated in this case. *See State v. Linam; see also* § 31-18-17(C) (prior convictions need to be part of separate transaction or occurrence). For the purpose of the four-year, general habitual-offender act enhancement, the 1989 crime on which conviction in this case was based occurred after the 1988 conviction, the crime of which in turn was committed after the 1981 conviction.

In short, each enhancement was supported by the statutory authority on which the state relied, and we find nothing precluding either enhancement in our law. Accordingly, defendant's judgment and sentence are affirmed.

IT IS SO ORDERED.

APODACA and BLACK, JJ., concur.

828 P.2d 975

Mark BLACKER, Plaintiff-Appellee,

v.

U-HAUL COMPANY OF NEW MEXICO, INC., a New Mexico corporation, Defendant-Appellant.

No. 12563.

Court of Appeals of New Mexico.

Jan. 8, 1992.

Certiorari Denied March 10, 1992.

Steven M. Williams, Miller, Stratvert, Torgerson & Schlenker, P.A., Albuquerque, for defendant-appellant.

Jeffrey L. Baker, Paul M. Schneider, Jeffrey L. Baker & Associates, Albuquerque, for plaintiff-appellee.

OPINION

APODACA, Judge.

U–Haul Company of New Mexico (defendant) appeals a judgment after a jury verdict in favor of Mark Blacker (plaintiff) for damages incurred as a result of personal injuries sustained in a motor vehicle accident. Defendant raises three issues on appeal: whether the trial court (1) denied defendant a fair trial in not granting a continuance to allow defendant to depose certain witnesses; (2) abused its discretion in refusing to admit plaintiff's workers' compensation complaint into evidence; and (3) erred in giving a non-Uniform Jury Instruction. We hold that: (1) defendant was not denied a fair trial by the trial court's refusal to grant a continuance; (2) the trial court properly exercised its discretion in refusing to admit plaintiff's workers' compensation complaint; and (3) defendant failed to preserve its claim of error with respect to the giving of the instruction. We therefore affirm the trial court's judgment.

FACTS

At trial, plaintiff claimed that he had a closed-head injury that caused, among other problems, memory and cognitive difficulties, psychiatric problems, and lost earnings. In plaintiff's responses to defendant's pre-trial interrogatories, he disclosed that he had previously injured his back while working for a plumber and had filed a workers' compensation claim for the injury. He stated that he had been treated by Edward Childers, D.O., and Dr. Barry Marron, an orthopedist. He also disclosed that about eighteen years before trial, he had nearly drowned and, for a short time afterward, had experienced stuttering and cognitive problems. Three days before trial, defendant obtained a copy of a deposition given in plaintiff's workers' compensation case, which indicated that at that time, plaintiff had been treated by or referred to three other doctors, Drs. Katz, Diskant, and Schneider.

At trial, defendant requested a continuance to depose Dr. Katz, a psychologist. The trial court denied the continuance, instead suggesting that defendant could depose Dr. Katz during trial. Defendant did not take the deposition during trial and did not inform the trial court that it had been unable to do so.

Defendant also offered as a trial exhibit a copy of plaintiff's workers' compensation complaint, which alleged total permanent disability, to impeach plaintiff's testimony that he had no physical or psychiatric disability before the accident and generally to impeach plaintiff's credibility, to the extent plaintiff claimed all of his disability was due to this accident. The trial court denied admission of this exhibit.

The trial court gave a non-Uniform Jury Instruction drawn from our supreme court's discussion in *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 791 P.2d 452 (1990), a decision that had appeared in the Bar Bulletin the week before. The instruction stated:

> U–Haul has the burden of proving by substantial evidence that Mark Blacker's damages will be alleviated by future employment opportunities.

The defense objected to the giving of this instruction on the basis that it was misleading to the jury and that defense counsel had not had an opportunity to analyze the case or the instruction. The trial court also gave an instruction based on SCRA 1986, UJI Civil 13–1811 (Repl.Pamp.1991), which states:

> In fixing the amount of money which will reasonably and fairly compensate plaintiff, you are to consider that an injured person must exercise ordinary care to minimize or lessen [his] [her] damages. Damages caused by [his] [her] failure to exercise such care cannot be recovered.

Defendant did not object to the giving of this instruction.

DENIAL OF DEFENDANT'S CONTINUANCE REQUEST

Relying on the Rules of Civil Procedure and *Camp v. Bernalillo County Medical Center*, 96 N.M. 611, 633 P.2d 719 (Ct.App.1981), defendant argues that it is entitled to the opportunity "to depose every witness fully and exhaustively on all issues made by the pleadings" and "to prepare for and conduct its defense free of eleventh hour surprises." It further argues that the trial court was required to grant a continuance, and that its refusal to do so materially prejudiced defendant by forcing it "to trial by ambush." We disagree.

We review the granting or denial of a motion for continuance for a clear abuse of discretion. *Bombach v. Battershell*, 105 N.M. 625, 735 P.2d 1131 (1987). Failure to comply with discovery rules "does not automatically require a continuance." *Sanchez v. National Elec. Supply Co.*, 105 N.M. 97, 99, 728 P.2d 1366, 1368 (Ct.App.1986). The error must be prejudicial. *Id.*

Defendant does not point to a particular Rule of Civil Procedure to support its argument. The cases it relies on, *Camp v. Bernalillo County Medical Center* and *Sandoval v. Martinez*, 109 N.M. 5, 780 P.2d 1152 (Ct.App.1989), are inapposite. In *Camp*, the plaintiff was permitted to amend his complaint to include new allegations and had a previously undisclosed witness testify on ultimate issues of fact. The trial court's refusal to grant a continuance to allow defendants to prepare for this new testimony was held to be an abuse of discretion. *Camp v. Bernalillo Medical Center.* In this appeal, on the other hand, plaintiff did not propose any new theories of recovery at a late date, nor did plaintiff call any unexpected witnesses at trial. Defendant had ample opportunity to prepare to meet plaintiff's arguments. Thus, *Camp* is not controlling.

Sandoval involved the appropriateness of dismissal as a sanction for a plaintiff who willfully lied in her answers to interrogatories. Defendant does not allege that plaintiff deliberately failed to disclose the names of physicians who may or may not have treated plaintiff for his previous injury; defendant acknowledges that any failure to disclose the names was inadvertent. Thus, *Sandoval* too is inapplicable to this appeal.

For the reasons that follow, we hold that the trial court's remedy was within its discretion. *See Crockett v. Encino Gardens Care Center, Inc.*, 83 N.M. 410, 492 P.2d 1273 (Ct.App.1971) (trial court did not abuse its discretion in denying motion to vacate setting of trial when it granted defendant leave to take witness's deposition

during or after trial). A review of the record does not demonstrate that defendant was prejudiced. Defendant did not show at trial, or on appeal, that Dr. Katz definitely treated plaintiff after the industrial injury; defendant simply claimed it had found a "reference" to Dr. Katz in an old deposition. Defendant had known of the earlier industrial accident and of plaintiff's primary treating physicians for some time; thus, it had full opportunity to investigate the effects of that accident and failed to do so. *See Sanchez v. National Elec. Supply Co.* (plaintiff not prejudiced by admission of doctor's report at trial where plaintiff had known of the examination for five months and had made no effort to obtain the report). "[G]eneralized allegations of prejudice are not sufficient to establish an abuse of discretion on the part of the trial court." *Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.,* 99 N.M. 95, 104, 654 P.2d 548, 557 (1982). Defendant has failed to demonstrate specifically how Dr. Katz's testimony would have assisted it. *See State v. Manus,* 93 N.M. 95, 597 P.2d 280 (1979) (defendant must show that failure to disclose witness was prejudicial).

We note that defendant could have taken numerous steps to expedite its attempts to obtain information from Dr. Katz. It could have subpoenaed the doctor and made more attempts, rather than a single phone call, to contact him. Most importantly, when defendant encountered difficulties in arranging a deposition as supported by the trial court, defendant should have informed the court so that an alternative remedy could have been considered. It appears to us that more should be required of trial counsel under facts such as presented here. *Cf. State v. Shafer,* 102 N.M. 629, 698 P.2d 902 (Ct.App.1985) (defense counsel cannot claim error where it appears he voluntarily abandoned further cross-examination). One single request for a continuance, without any follow-up or at least alerting the trial court of the need for additional time, was not sufficient under the circumstances of this case.

REFUSAL TO ADMIT PLAINTIFF'S WORKERS' COMPENSATION COMPLAINT AS AN EXHIBIT

The trial court excluded the workers' compensation complaint because it had questions about its relevance. Because the complaint in the workers' compensation case could be deemed an admission, and arguably relevant to the issue of how much of plaintiff's injuries were due to the motor vehicle accident, we shall assume, without deciding, that it was in fact relevant. However, we believe the trial court's ruling, in the context in which it was made, was unclear and the court's questions about relevance, when taken in context, therefore raised issues under SCRA 1986, 11–403. *Cf. Albertson v. State,* 89 N.M. 499, 554 P.2d 661 (1976) (objection to relevancy of misdemeanor convictions implicitly asserts policy behind excluding such evidence under SCRA 1986, 11–609); *see State v. Day,* 91 N.M. 570, 577 P.2d 878 (Ct.App. 1978) (except where another rule of evidence specifically applies, all evidence is subject to Rule 11–403 balancing). We believe the trial court properly exercised its discretion in excluding the evidence because of the danger of misleading the jury and confusing the issues.

The complaint would likely have confused the jury because of the meaning of total disability under our workers' compensation law, which focuses on a claimant's ability to do his previous job. *See* NMSA 1978, § 52–1–24 (Repl.Pamp.1991). That definition is much narrower than the basis for the damages plaintiff was alleging at trial in this appeal, which damages were premised not only on inability to work but also on inability to drive, read, and remember. Thus, an earlier claim of "total disability," without adequate discussion of the limited nature of what that claim involved, would likely have confused the jury without adding to its understanding of the injuries plaintiff suffered in the earlier accident. In addition, plaintiff's attorney stated that he always drafted complaints for total disability when his clients were not getting as much as they were entitled to. Because the complaint, if admitted, would have been subject to explanation and rebut-

tal, *Albright v. Albright,* 21 N.M. 606, 157 P. 662 (1916), the court could well have believed admission of the complaint would have unduly protracted the trial without good reason. We thus hold that the trial court did not abuse its discretion in refusing to admit plaintiff's workers' compensation complaint into evidence.

USE OF A NON-UNIFORM JURY INSTRUCTION BASED ON *McGINNIS*

Defendant argues that the trial court erred by giving two jury instructions that directly contradicted each other: UJI 13-1811 and an instruction based on the case of *McGinnis.* Defendant further claims that the trial court violated SCRA 1986, 1-051(D), by failing to make findings that using the non-Uniform Jury Instruction was necessary.

Although defendant objected to the use of the *McGinnis* instruction at trial, the above-noted contentions now made on appeal were not made to the trial court. Rather, defendant objected at trial on the grounds that *McGinnis* had been recently decided (and thus should not apply) and that the instruction might be misleading. At no time did defendant point out to the trial court that the instruction contradicted another instruction, nor did defendant request that the trial court make specific findings under Rule 1-051(D). Thus, we hold that defendant failed to preserve its claim of error to the instructions. *See Andrus v. Gas Co. of New Mexico,* 110 N.M. 593, 798 P.2d 194 (Ct.App.1990) (objection made at trial must be specific enough to alert district court to contention made on appeal). Defendant's assertion of this error in its motion for a new trial is of no consequence. *See City of Albuquerque v. Ackerman,* 82 N.M. 360, 364, 482 P.2d 63, 67 (1971) ("The raising of errors in respect to instructions for the first time by motion for new trial is not timely.").

However, even if defendant had preserved the issue, the claims nonetheless fail. The *McGinnis* instruction referred to defendant's burden of proving that plaintiff's damages would be relieved by future employment opportunities; UJI 13-1811, on the other hand, referred to plaintiff's duty to mitigate damages by using ordinary care and his inability to recover damages caused by plaintiff's failure to mitigate. Defendant does not explain how these instructions were contradictory; we can only assume that defendant argues both instructions refer to contradictory burdens of proof. If so, defendant is incorrect. The *McGinnis* instruction placed the burden of proof on defendant to show that plaintiff would have future employment opportunities. UJI 13-1811 did not contradict this because it only instructed the jury that plaintiff had a *duty* to mitigate; however, the burden of proving *failure* to mitigate was on the defendant. *See Hansen v. Skate Ranch, Inc.,* 97 N.M. 486, 641 P.2d 517 (Ct.App.1982). The instructions were therefore complementary. The giving of complementary instructions is not an abuse of discretion. *See Behrmann v. Phototron Corp.,* 110 N.M. 323, 795 P.2d 1015 (1990).

Defendant's contention that the trial court violated Rule 1-051(D) by failing to make a finding that UJI 13-1811 was erroneous or improper before giving the non-UJI instruction also fails. Rule 1-051(D) states:

> Whenever New Mexico Uniform Jury Instructions Civil contains an instruction applicable in the case and the trial court determines that the jury should be instructed on the subject, the UJI Civil shall be used unless under the facts or circumstances of the particular case the published UJI Civil is erroneous or otherwise improper, and the trial court so finds and states of record its reasons.

The plain meaning of Rule 1-051(D) is that it applies when the trial court determines that a particular Uniform Jury Instruction is erroneous or improper. That is not the situation of this appeal. Defendant does not argue that the trial court refused to give an applicable instruction; defendant's argument is that the court gave contradictory instructions. The trial court obviously found UJI 13-1811 was proper because it used it. Additionally, as discussed above, the supplemental instruction was also proper. *Cf. State v. Torres,* 99 N.M. 345, 657

P.2d 1194 (Ct.App.1983) (supplemental instruction was erroneous). Thus, Rule 1-051(D), under the particular circumstances here, was inapplicable to the trial court's action.

CONCLUSION

In summary, having considered defendant's arguments unpersuasive on all issues, we affirm the trial court's judgment.

IT IS SO ORDERED.

MINZNER and PICKARD, JJ., concur.

828 P.2d 980

STATE of New Mexico, Plaintiff-Appellee,

v.

James Charles GIBSON, Defendant-Appellant.

No. 12472.

Court of Appeals of New Mexico.

Feb. 10, 1992.

Certiorari Denied Feb. 17, 1992.

Tom Udall, Atty. Gen., Margaret McLean, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Robert J. Jacobs, Taos, for defendant-appellant.

OPINION

HARTZ, Judge.

After his first trial ended in a mistrial, Defendant was retried and convicted of several offenses arising out of an escape by five inmates from a state correctional facility. On appeal he raises numerous issues relating to his conviction and sentence. We affirm.

I. EVIDENTIARY SUPPORT FOR THE CONVICTIONS

A. *Summary of the Evidence*

On January 7, 1985, Robert Davis, Anthony Gutierrez, Roy Schrivner, Arthur Facteau, and Mark St. Clair escaped from

the Central New Mexico Correctional Facility in Los Lunas.

Prison guard Gerald Merrill testified that he was on duty at the prison warehouse at the time of the escape. Schrivner was working at the warehouse. Merrill allowed Davis into the warehouse when Davis stated that he had some legal papers for Schrivner. Merrill heard a truck outside the warehouse, by a bay door. He opened the bay door and allowed the truck to back up to the warehouse platform. The truck was a U–Haul rental driven by Patrick Perez. Perez told Merrill that he was there to pick up some old tires. Merrill told Perez that there were no tires in the warehouse and they were probably in another building. While Merrill went to make a call to determine where the tires were, Perez asked to use the bathroom. Schrivner took him there. When Perez left the bathroom, Merrill escorted him back to the truck and Perez drove off. Schrivner then went to the bathroom and Merrill returned to his office. He came out of his office when St. Clair, who had been at the warehouse for a short time earlier in the day, knocked on the door. St. Clair and Schrivner told Merrill that there was freon leaking in the walk-in cooler. When Merrill entered the cooler he encountered Davis, who pointed a gun at him. Merrill was handcuffed and locked in the cooler for about three hours before he was discovered by prison authorities. He was in shock and in fear of his life, having no doubt that the gun would have been used if necessary.

Gutierrez testified for the State as follows: Defendant met with Davis and him at the prison at least three times to plan the escape. At the first meeting they discussed getting a gun, a U–Haul truck (as an escape vehicle), and a getaway car. Defendant said that he would help provide everything. At the second meeting Defendant said that he needed money to buy a gun and rent the vehicles. Gutierrez had his girlfriend give Defendant $300. Defendant was to meet a friend of Gutierrez to purchase the gun. At the third meeting Defendant told Gutierrez and Davis that he had obtained the guns and everything was ready. The escape was originally set for January 1, but the date had to be changed when Defendant told them that the driver of the escape vehicle had backed out. When the escape took place, Perez, who was disguised by orange hair and a bandaged nose, drove the U–Haul truck and brought a gun. Defendant and Perez had both told Gutierrez that Defendant taught Perez to drive. Gutierrez and the other escapees got into the truck and hid behind a false wall. Defendant, Davis, and Gutierrez had come up with the idea for a false wall, which Defendant had constructed. About ten or fifteen minutes after the truck left the prison, everyone got out and entered a station wagon driven by Defendant. They drove to a house in Albuquerque that had been rented in Perez' name. Defendant left after about thirty minutes. Defendant provided the escapees with bullets, clothes, food, money, an ID machine, a police scanner, a telescope, and binoculars.

Cyndee Plehn testified that she was working in traffic control at the main gate of the prison at the time of the escape. On the morning of the escape she stopped Perez when he drove up in a U–Haul truck. He produced a work order to pick up a hydraulic jack. He gave his destination as the prison sally port. His hair was dyed orange and he had a gauze bandage over his nose. Despite the disguise, she recognized Perez because he was a former inmate.

Isleta Police Officer Bernie Trujillo testified that on the morning of January 7, 1985, he responded to a call reporting an abandoned U–Haul truck on Highway 85. The door was open and there was a key in the ignition. There was a strong odor of paint in the back of the truck.

Testimony of Gail Stokely at Defendant's first trial was admitted after the court determined that she was unavailable for the second trial. She worked for the U–Haul store where the truck had been rented. She examined the abandoned truck and noted a false wall inside. The truck had been rented on January 6. She identified Defendant as someone she had seen in the store on one or two occasions.

State Police Officer Tommy Otero was assigned to investigate the escape. He testified that after Plehn identified Perez as the driver of the U–Haul, he examined the prison logbooks and determined that Perez had visited Davis on January 3. The log provided the license number of the vehicle Perez was driving. The vehicle was registered to Ugly Duckling Car Rental, whose records provided the address of Defendant and Perez. Otero participated in a search of their apartment. The paint used inside the U–Haul appeared to be the same as that found on paint rollers discarded in front of the apartment. He interviewed employees at the U–Haul store where the escape vehicle was rented. The rental agreement was dated January 6. The name on the agreement was "Sam Peterson." The description the employees gave of Peterson matched the physical characteristics of Perez. A California driver's license bearing the name "Sam Peterson" (but without a photograph) was later found in the possession of escapees St. Clair and Schrivner.

State Police Officer Michael Francis testified that he found paint rollers, paint brushes, and a paint pan outside of Defendant's apartment. After obtaining a search warrant, he entered the apartment and found utility bills in the name of Perez, ammunition, a list of radio codes used by the police, a photograph of Defendant and Davis together in the prison visiting room, several items addressed to Davis, and several items addressed to Davis and Facteau. He also found a checklist of twenty-one items. Several of the entries appeared to refer to the escape, such as "$$ before xmas"; "Pat–glsses-(expendibility?)"; "pln z (go over); green light be 4 xmas"; "Reconnoiter Prk & othr swtch plce"; and "Servomation [the food service for the prison]." He believed that a rough sketch drawn on the list was a plan for the false wall in the U–Haul. He reviewed the log for the prison sally port and found that on January 7, 1985, it contained the name "Sam Peterson." Defendant called Francis in late January 1985. Defendant said that it was not in his interest to return to New Mexico as he feared for his life. Defendant offered to help find the remaining escapees if he was granted immunity. Francis told Defendant that he could not make a deal, and Defendant said that he would not come back.

Joanne Duran testified that she was a former girlfriend of Defendant and had lived with him in his apartment until November 1984, after Perez moved in. Perez was very submissive and would do what Defendant told him. Defendant told her that he had taught Perez how to drive. Defendant introduced her to Davis, who often called Defendant from prison. Defendant visited Davis in prison on January 2, 1985. Before the escape, Defendant had asked her if she would act as a lookout. She refused. He called her the morning of January 7, the day of the escape, to say goodbye and that he was going to San Diego. He called her again that evening to ask her to watch the news to see if anything unusual had happened. Later in January Defendant called her from Mexico. She visited him there several times, first in mid-February. He was using the name "Jaime Rivera." He told her that he had left his parents' home in San Diego and gone to Mexico when he saw police officers near the home. Sometime after the escape Defendant began to ask her to marry him, telling her that if she did, she would not have to testify against him. Defendant told her that he had dyed Perez' hair orange. The handwriting on the checklist found by Officer Francis was Defendant's. Defendant had a police scanner in his apartment. On cross-examination she testified that she and Defendant had painted her house white, using a paint pan and rollers, and had rented a U–Haul truck to move their belongings.

Lucille Urioste testified that she met Defendant through Duran. Duran asked her if she would allow Defendant to use her credit card to rent a car. In November or December of 1984 she went with Defendant to Ugly Duckling Car Rental. Defendant used her credit card to rent an older model station wagon.

Erma Ruiz and her sister, Rebecca, testified that they were neighbors of Defendant

and Perez, who visited their apartment occasionally. Erma Ruiz testified that in December 1984 she gave Defendant a ride to a U–Haul rental store. She dropped him off and drove away. Defendant and Perez appeared to be good friends. Perez looked up to Defendant, who dominated him.

Everett LeMaster, superintendent of correctional security, testified that Perez had visited Davis at the prison. He knew Perez from when Perez was an inmate. Ex-felons are permitted to visit inmates at the prison. He knew Defendant and had seen him visiting Davis a few days before the escape. He had inspected the U–Haul truck after the escape and noted a false wall painted white in the truck's cargo area.

Bryan Culp, who worked at the prison at the time of the escape, testified that the visitor's log indicated that Defendant had visited Davis on January 2 and Perez had visited Davis on January 3. The license plate numbers on the log showed that both drove the same vehicle. The plate number belonged to the vehicle that had been rented by Defendant.

Defendant called four witnesses. The first witness, Cory Fine, was qualified as an expert in policies and procedures of New Mexico correctional institutions. He testified about the procedures used to prohibit the introduction of contraband, such as searching packages of visitors. He also stated that inmates are not allowed to take photographs in the visiting room.

Roy Anuskewicz, an Albuquerque attorney, testified that he had known Defendant for twelve to thirteen years. During the period from 1981 to 1984 Defendant stopped by his office regularly to borrow books and ask questions. He believed that Defendant was working as a paralegal at the time. Defendant was currently working as a law clerk.

Glen Williamson, a former attorney of Defendant, testified that he had interviewed Joanne Duran in preparation for trial. At that time Duran indicated to him that she had no information about Defendant's planning or carrying out the escape and that she had never seen a firearm in his apartment.

Defendant's mother testified that he spent some time with her in San Diego in January 1985 before he went to Mexico. She was quite frightened when police officers surrounded her home, looking for Defendant.

B. *Sufficiency of the Evidence*

Defendant contends that the district court erred in denying his motions for directed verdict with respect to the charges of furnishing articles for prisoner's escape, NMSA 1978, § 30–22–12 (Repl.Pamp.1984), assault by a prisoner, NMSA 1978, § 30–22–17 (Repl.Pamp.1984), aggravated assault upon a peace officer, NMSA 1978, § 30–22–22 (Repl.Pamp.1984), and false imprisonment, NMSA 1978, § 30–4–3 (Repl. Pamp.1984).

With respect to the charge of furnishing articles for escape, Defendant argues that there was insufficient evidence that Defendant furnished a gun to the inmates. This contention has no merit. There was evidence that (1) Defendant planned the escape with Gutierrez, Davis, and Perez; (2) Defendant agreed to provide a gun for the escape and said that he had obtained the gun; (3) Perez delivered the gun to the escapees by leaving it in the warehouse bathroom; and (4) after the escape Defendant provided bullets for the gun. The jury could properly draw the inference that Defendant supplied the gun.

With respect to the other offenses, Defendant does not deny that the offenses occurred but contends that there was insufficient evidence to establish that Defendant was an accessory to them. He cites *State v. Ochoa,* 41 N.M. 589, 599, 72 P.2d 609, 615 (1937) for the proposition that aiders and abettors "must share the criminal intent of the principal." We agree that *Ochoa* controls. Indeed, the district court instructed the jury that to find Defendant guilty as an accessory, the State must prove that "defendant intended that the crime be committed." We disagree, however, with the contention that the evidence did not support the jury's finding. This

was not a spontaneous escape. The evidence concerning the planning, such as the testimony by Gutierrez, and the description of how Defendant and his cohorts effected the escape established that the procedure for the escape was carefully orchestrated. The jury could readily infer that Defendant planned, anticipated, and intended the assault and false imprisonment. Although Defendant notes that one element of the offense of assault on a peace officer is knowledge of the identity of the officer, *see Reese v. State,* 106 N.M. 505, 745 P.2d 1153 (1987), Defendant need not have known the peace officer's name. He need only have known that the victim would be a peace officer. Thus, it was not necessary that Defendant anticipate that Merrill would be the officer at the warehouse, but only that the person in charge of the warehouse would be a peace officer. The jury could properly make that finding.

C. *Merger*

Defendant argues that the charge of assault by a prisoner should merge for sentencing purposes with the charge of false imprisonment and the charge of assisting escape should merge with the charge of furnishing articles for escape. He relies on *State v. DeMary,* 99 N.M. 177, 655 P.2d 1021 (1982), for the proposition that he cannot be sentenced on two offenses if under the facts of the case he could not have committed one offense without also committing the other.

Defendant's first merger claim appears to be based on a misconception of the assault charge against him. One means of committing the offense of assault by a prisoner is by confining or restraining an officer of a penal institution with intent to use such person as a hostage. § 30–22–17(C). That alternative means of committing the offense may encompass false imprisonment as a lesser included offense. The district court, however, did not instruct the jury on that alternative. The instruction informed the jury that to find Defendant guilty of accessory to assault by a prisoner, it had to find that Defendant "aided and abetted Robert Davis in threatening Gerald Merrill with a firearm."

With this clarification, we can readily dispose of the first merger claim. We do not follow *DeMary* because it is not the governing law. Our supreme court has set forth the proper analysis for questions of merger in its recent decision in *Swafford v. State,* 112 N.M. 3, 810 P.2d 1223 (1991). Under that decision, merger is inappropriate here for two reasons. First, the criminal statute prohibiting assault and the criminal statute prohibiting false imprisonment advance two distinct social norms. *See id.* at 14, 810 P.2d at 1234; *State v. Bachicha,* 111 N.M. 601, 606–08, 808 P.2d 51, 56–58 (Ct.App.1991) (Hartz, J., specially concurring). Second, the facts supporting the assault charge and the facts supporting the false imprisonment charge are not identical. Even absent the assault, the offense of false imprisonment was accomplished by locking Merrill in the cooler. *See Swafford,* 112 N.M. at 13–14, 810 P.2d at 1233–34; *Bachicha* (separate facts support convictions for assault and false imprisonment).

For his second merger argument, Defendant contends that the charges of assisting escape and furnishing articles for escape must merge because "[t]he only evidence at trial was that Defendant furnished transportation to the inmates," and he "could not have committed furnishing articles without also committing assisting escape." We disagree. We need not determine whether the two criminal statutes (assisting escape and furnishing articles for escape) advance distinct social norms, because even if they do, merger is not required when the facts supporting the convictions are not identical. *See Swafford.* The jury could have found Defendant's participation to be much greater than just furnishing a vehicle. In fact, the jury could properly have found that Defendant's participation in the escape extended significantly beyond furnishing tangible objects to effect the escape and included such activities as helping to plan the escape, teaching Perez to drive, and driving the getaway station wagon himself. In these circumstances, the charges did not merge.

II. LEGALITY OF THE SEARCH

Defendant challenges the search of his apartment pursuant to a warrant. He complains that the warrant was not supported by probable cause and that the search exceeded the scope of the warrant.

On the issue of probable cause, Defendant claims that the affidavit failed to establish the veracity of the informants and that the factual assertions in the affidavit suggest only guilt by association. Defendant does not specify the portions of the affidavit that should not be considered because they are statements by informants of unproved credibility, except to mention information that came from Defendant's neighbors. One neighbor with whom the affiant spoke was Rebecca Ruiz, who stated that she had seen Defendant with a U-Haul truck and that on the date of the escape Defendant had asked her to return a hammer that she had borrowed. The other neighbors are not identified by name, but by address. The affidavit states that the neighbors identified Defendant and Perez as residents of the apartment to be searched. The credibility of the neighbors need not be established by additional information, because they are citizen-informers, who are presumed to be reliable. The nature of the statements made and the circumstances in which they were given suffice to establish credibility for the purpose of determining probable cause. *See State v. Hernandez,* 111 N.M. 226, 804 P.2d 417 (Ct.App.1990); *State v. Therrien,* 110 N.M. 261, 263-64, 794 P.2d 735, 737-38 (Ct.App. 1990). As for the other sources whose identities are not provided in the affidavit, the nature of the information provided (such as the means of the escape) strongly suggests that the sources were law enforcement and prison officials, who are also presumed to be reliable. 2 Wayne R. LaFave, *Search & Seizure* § 3-5(a) (2d ed. 1987). The affidavit could (and should) have been drafted with greater precision. But reading the affidavit in a "commonsense, non-technical manner," *State v. Wisdom,* 110 N.M. 772, 777, 800 P.2d 206, 211 (Ct.App.1990), the reliability of the sources is sufficiently established.

The information provided by the various sources noted in the affidavit established much more than simply guilt by association: one resident of the apartment was the driver of the U-Haul truck in which the inmates escaped; the other resident had been seen with a U-Haul truck; the residents of the apartment had each visited escapee Davis less than a week before the escape; after the truck was abandoned by the escapees, it was found to contain a hammer similar in description to the one Ms. Ruiz had just returned to a resident of the apartment; and in a trash can outside the apartment were found (a) nails and screws that could have been used to install a false white wall built into the U-Haul and (b) a paint tray and roller with white paint on them. This evidence connecting Defendant, his roommate, and their apartment to the escape established probable cause to search the apartment for further evidence relating to the escape.

As for the contention that the search exceeded the scope of the warrant, the warrant authorized a search for the property described in the affidavit. The described property included "writings and instrumentalities concerning the escape." The seized document that Defendant challenges is the checklist about which Officer Francis testified. Entries on the checklist sufficiently tied it to the escape to justify its seizure. The officers did not exceed the scope of the warrant.

III. ALLEGED ERRORS IN THE CONDUCT OF THE TRIAL

A. *Alleged Comment by Judge*

During the testimony of Gutierrez a power outage caused the lights to go off in the courtroom. Because of the outage the tape recorder did not record what, if anything, the judge said. Defendant alleges that the judge asked Gutierrez "if this was another escape." This issue is not before us for review, because there is no record of the alleged comment and Defendant did not raise the issue in the district court. *See State v. Martin,* 101 N.M. 595, 603, 686 P.2d 937, 945 (1984) (matters not

of record cannot be reviewed on appeal); SCRA 1986, 12–216(A) (question on appeal must have been preserved below). In any event, the comment would not entitle Defendant to a new trial. There was no dispute that Gutierrez had escaped from prison. The comment did not reflect adversely on Defendant.

B. *Husband–Wife Privilege*

Defendant contends that the district court abused its discretion in refusing to allow Glen Williamson (a prior attorney of Defendant) to testify concerning the husband-wife privilege. Joanne Duran had testified that Defendant had asked her to marry him so that she could not testify against him. Defendant proffered Williamson's testimony to explain that the privilege would not have applied in such circumstances. We sustain the district court's ruling on two grounds. First, such an explanation of the privilege may well have confused rather than enlightened the jury. The issue was whether Defendant thought that the marriage could prevent her from testifying, not whether Defendant's view of the law was correct. The district court acted within its discretion in excluding the testimony on that ground. *See* SCRA 1986, 11–403. In addition, testimony from Defendant's former attorney would not have been the appropriate manner of presenting the law to the jury. Rather, Defendant should have requested the court to instruct the jury regarding the privilege. *See Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 508–10 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). The district court did not abuse its discretion in refusing to permit Williamson to testify regarding the privilege.

C. *Cross–Examination of Gutierrez*

Defendant contends that he was deprived of an opportunity to cross-examine Gutierrez adequately concerning Gutierrez' plea agreement with the State. The plea agreement was disclosed at trial: Gutierrez was not charged as an habitual offender; he was sentenced to a term of four-and-a-half years for escape, instead of a possible nine; and he was placed in semi-protective custody. The district court sustained objections to questions on cross-examination that asked whether it was true that (1) unlike other escapees he had not been charged with false imprisonment or aggravated assault, and (2) his girlfriend was never charged with a crime even though she picked him up after the escape. The court ruled that the questions were irrelevant, because there was no evidence that failure to bring the charges was part of the plea bargain. Although we may have permitted such cross-examination, we defer to the trial judge with respect to control over cross-examination; we reverse only for an abuse of discretion. *See* SCRA 1986, 11–611; *State v. Davis*, 92 N.M. 563, 572, 591 P.2d 1160, 1169 (Ct.App.1979). We find no abuse of discretion in the district court's ruling.

D. *Evidence of Defendant's Post–Escape Activity*

Defendant complains of the admission of testimony by Joanne Duran concerning his activities after the escape. She testified that when the police came to his parents' home in California, Defendant hid and fled across the border to Mexico. She also testified that he used the alias "Jaime Rivera" while he was in Mexico. We find no error. The evidence was clearly admissible to show consciousness of guilt. *See State v. Trujillo*, 95 N.M. 535, 541–42, 624 P.2d 44, 50–51 (1981).

E. *Comment on Defendant's Parole Status*

At the time of the escape, Defendant was on parole. Although his parole officer had granted him permission to be in California for a brief period extending until a few days after the escape, he was generally restricted to New Mexico. Defendant's parole status was relevant to the charges against him in that Defendant's violation of the conditions of parole by traveling to California (and then Mexico) was probative of consciousness of guilt. *See id.* The jury could properly conclude that only the strongest of motives would

have induced Defendant to risk re-incarceration by breaching the conditions of his parole. Nevertheless, it was apparently agreed by the parties or ordered by the court that there be no mention during trial of Defendant's parole status.

Parole was mentioned, however, in the testimony of Everett LeMaster, superintendent of correctional security. LeMaster testified that Perez, whom he had known as an inmate, had visited Davis at the prison. He also testified that he knew Defendant and identified him in the courtroom. The following exchange then occurred:

> Q. (Prosecutor): Do you know if James Gibson, the Defendant, visited Bob Davis in 1984–85?
>
> A. (LeMaster): Yes, sir. I seen him in the institution, after he was on parole.

After a pause, defense counsel asked to approach the bench. The judge began the bench conference by noting the reference to parole and asking if defense counsel was going to object. Defense counsel moved for a mistrial. The judge denied the motion, saying that the jury did not hear the reference to parole and the prosecution had not intended to elicit it. The next day defense counsel renewed the mistrial motion, submitting an affidavit by Defendant's wife that she had heard the parole comment while sitting in the gallery at a distance from the witness of about three times the distance between the witness and the jury. The judge denied the motion, saying that the witness's comment would not justify a mistrial even if the jury heard it. The judge offered to give a cautionary instruction, but defense counsel declined the offer.

Of course, if the jury did not hear the reference to parole, there would be no reason for a mistrial. Although we have listened to the tape recording of LeMaster's testimony, we are not confident that we can make an independent determination of whether the word "parole" was sufficiently loud and distinct for the jury to hear. Therefore, we defer to the district court's observation concerning whether the reference to parole was heard by the jury.

Even if the jury clearly heard the word "parole," we are not persuaded that failure to declare a mistrial was an abuse of discretion. To be sure, evidence of a defendant's prior criminal conduct can be highly prejudicial; if such evidence is not admissible for a specific purpose permitted by the rules of evidence, *see* SCRA 1986, 11–404(B), –608(B) & –609, admission of the evidence can require reversal of a conviction. *See State v. Saavedra,* 103 N.M. 282, 705 P.2d 1133 (1985). Here, however, there were mitigating factors. The reference to parole was not emphasized by the witness or the prosecution. In addition, the improperly prejudicial impact on the jury from Defendant's prior conviction may well have been marginal because of the tarnish to Defendant's image created by the repeated testimony establishing his close relationship with convicted felons, especially Perez and Davis. *See United States v. Burnett,* 582 F.2d 436, 439 (8th Cir.1976). We also note that the court's offer to give a cautionary instruction was declined by defense counsel. Failure to accept the court's offer of a cautionary instruction may in itself justify a refusal to grant a mistrial; a well-constructed instruction can dissipate the prejudice, particularly when the improper remark was somewhat ambiguous and not emphasized by the witness or counsel. *See State v. Nichols,* 104 N.M. 74, 75, 717 P.2d 50, 51 (1986); *United States v. Doby,* 598 F.2d 1137, 1142 (8th Cir.1979) (" 'The jury should not infer from anything that occurred during the proceedings that the defendant had any prior experience with the law.' "). *Cf. Callaway v. State,* 109 N.M. 416, 417, 785 P.2d 1035, 1036, *cert. denied,* 496 U.S. 912, 110 S.Ct. 2603, 110 L.Ed.2d 283 (1990) (after witness made unsolicited improper remark, court should have given admonition to jury rather than declare mistrial).

Finally, "[a] non-constitutional error is harmless unless it had a 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect." *United States v. Rivera,* 900 F.2d 1462, 1469 (10th Cir.1990) (quoting *Kotteakos v. United States,* 328 U.S. 750, 765, 66

S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946)). The considerations discussed above, together with the strength of the evidence against Defendant, convince us that any error deriving from LeMaster's reference to parole was harmless. *See United States v. Doby; United States v. Burnett; United States v. Hernandez-Miranda,* 601 F.2d 1104 (9th Cir.1979).

IV. MOTIONS TO DISMISS

Defendant moved to dismiss the charges against him on the grounds that (1) the circumstances of his apprehension in Mexico deprived New Mexico courts of jurisdiction over him, and (2) pre-indictment delay violated his constitutional rights to speedy trial and due process. The district court conducted two hearings on the motion.

A. *Personal Jurisdiction*

Defendant contends that mistreatment of him while he was in custody in Mexico deprives New Mexico of authority to prosecute him. He cites several cases in support, but in only one, *United States v. Toscanino,* 500 F.2d 267 (2d Cir.1974), did the court hold that a jurisdiction could be deprived of the right to prosecute the defendant because of improprieties in the transfer of the defendant to the jurisdiction. Other courts have questioned *Toscanino,* noting that the United States Supreme Court has repeatedly refused to suppress the person of the defendant as the fruit of an unlawful arrest. *See United States v. Pelaez,* 930 F.2d 520, 525 (6th Cir.1991).

In any event, *Toscanino* is clearly distinguishable. In that case the defendant had been kidnapped from a foreign country, with no attempt to comply with extradition treaties. The removal of the defendant from the foreign country was itself in violation of law. Here, in contrast, the United States authorities attempted to comply with our extradition treaty with Mexico, and Defendant has failed to point to any specific violation of that treaty. The misconduct upon which Defendant relies is alleged brutality by Mexican authorities while he was in their custody awaiting extradition. The alleged brutality, however, was extrinsic to Defendant's arrest and extradition, and the district court was entitled (1) to disbelieve most of the allegations of brutality and (2) to find that United States officials played no role in any misconduct that did occur. *See Toscanino,* 500 F.2d at 281 (violation of defendant's rights must be "by or at the direction of United States officials").

We reject Defendant's claim that New Mexico was deprived of authority to prosecute Defendant because of what occurred in Mexico.

B. *Speedy Trial and Due Process*

On appeal Defendant contends that delays in the proceedings against him violated his right to a speedy trial and his right to due process of law. In the district court he predicated these contentions solely on pre-indictment delay. Because the State therefore had no occasion to make a record relating to delays occurring after Defendant's indictment, we restrict our analysis to the pre-indictment period. We first address the speedy trial claim.

In *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the United States Supreme Court established the framework for evaluating a claim of denial of the right to a speedy trial. *Barker* instructs us to weigh four factors: (1) length of delay, (2) prejudice to the defendant caused by the delay, (3) reason for the delay, and (4) assertion of the right to a speedy trial. *Id.* at 530, 92 S.Ct. at 2192. *Accord Salandre v. State,* 111 N.M. 422, 425, 806 P.2d 562, 565 (1991). Although the delay between the alleged offense and Defendant's trial was very long and Defendant was in prison for a lengthy period prior to trial, the balance weighs in favor of the State because of the reasons for the delay and Defendant's failure to seek a speedy trial prior to the indictment.

1. Length of Delay

The escape occurred on January 7, 1985. Two weeks later the State filed an arrest warrant charging Defendant with assisting escape and harboring a felon. In July 1985

a federal warrant was issued charging Defendant with unlawful flight to avoid prosecution. Defendant was arrested on the federal warrant in Mexico on October 17, 1986. He was then extradited to California, where he was incarcerated until he was returned to New Mexico on February 3, 1988. He was indicted on February 12, 1988, tried for the first time in August 1989, and retried on March 26, 1990.

The first question to arise is when Defendant's right to a speedy trial attached. The possibilities include (1) January 1985, the date of filing the first formal charge by the State—the arrest warrant; (2) October 17, 1986, the date of Defendant's arrest in Mexico on the federal charge; and (3) February 3, 1988, the date on which Defendant was first held in custody on the New Mexico charges. *See generally* 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 18.1(c) (1984). We assume, without deciding, that the right attached in January 1985. The delay until the trial at which Defendant was convicted encompasses more than five years. A five-year delay is presumptively prejudicial and therefore requires examination of the three other factors. *See Salandre,* 111 N.M. at 428, 806 P.2d at 568.

2. Prejudice

Defendant was deprived of his liberty for almost sixteen months immediately prior to his indictment. He may, however, have faced that same period of incarceration as a consequence of his violation of the conditions of his parole. Also, there is no substantial claim of other prejudice to Defendant. Defendant's perfunctory assertion that he suffered concern and anxiety as a result of the delay does not establish that he suffered "undue anxiety and concern." *Id.* at 430, 806 P.2d at 570. Nor has he shown how his defense was adversely affected by the delay. Without any further elaboration, Defendant's brief-in-chief refers to Defendant's assertions that he could not properly and effectively investigate the facts of his case, could not travel to California and Mexico to interview witnesses, tried unsuccessfully to contact an investigator in California who had helpful evidence, was without funds to hire an investigator, was unable to obtain previously available evidence, and knew neighbors in Mexico who could be witnesses regarding the events of his abduction in Mexico (which presumably would be relevant to the personal-jurisdiction issue discussed above). Defendant also relies on a presumption of prejudice. *See Salandre.* The weight of the presumption, however, depends on the circumstances of the specific case. *Id.* at 429, 806 P.2d at 569. Here, the failure of Defendant to even suggest the nature of the evidence or testimony that would be helpful to his defense, the evidence that Defendant learned of the charges against him shortly after the escape, and the nature of the proof of the charges against him all support the district court's finding that Defendant had not suffered prejudice to the preparation of his defense.

3. Reason for the Delay

Defendant points out that there was no particular reason offered for why the State could not have indicted Defendant long before February 1988. But the constitutional right at issue is a right to a speedy *trial,* not a speedy *indictment.* The delay in the indictment is relevant here only insofar as that delay caused a delay in Defendant's trial. We note that Defendant was indicted less than ten days after he was returned to New Mexico in February 1988. Defendant does not explain how any substantial delay to his trial was caused by failure to indict him prior to his return to New Mexico.

We thus focus on the reasons for the delay in returning Defendant to New Mexico. The delay from January 1985 until his arrest in Mexico on October 17, 1986, resulted from Defendant's departure from New Mexico to California and Mexico. Once in California custody in late 1986, Defendant initially fought his return to New Mexico for trial. At a municipal court proceeding on November 13, 1986, he objected to extradition and sought to be released on a writ of habeas corpus. Defendant exhausted all attempts at this remedy by the end of 1986. The delay thereafter

apparently resulted from the desire of an attorney in California to have Defendant available to testify in a California trial.

4. Assertion of the Right

As opposed to demanding a speedy trial, Defendant endeavored to delay his trial. At the time of the escape on January 7, 1985, Defendant's parole officer had granted him permission to travel to California through January 10. The district court could properly infer that Defendant had fled New Mexico specifically to avoid trial for his involvement in the escape. This flight and Defendant's petition for release from custody in California clearly establish his attitude through 1986. From the record below, the district court could also have properly concluded that Defendant wished to remain in California custody after the denial of his petition for a writ of habeas corpus.

In addition, the district court could properly find that Defendant never requested a trial prior to his indictment in New Mexico. At the second hearing on Defendant's motion to dismiss, Defendant presented evidence that he had arranged for his mother to mail a letter to the New Mexico district attorney requesting a trial. The district court, however, stated that the letter was merely "a sham." We note that Defendant admitted that he was represented by counsel during his entire stay in California; he therefore could easily have made a demand for trial through more formal channels than his mother.

5. Weighing the Factors

Although there was a lengthy delay, Defendant's conduct indicates that the delay did not displease him. As noted in *Barker*, 407 U.S. at 521, 92 S.Ct. at 2187: "[D]eprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic." Defendant did not seek a speedier resolution of the charges against him, the delay did not prejudice his defense, and we cannot attribute any of the delay to misconduct, intentional or otherwise, by the State. We conclude that Defendant was not denied his right to a speedy trial by pre-indictment delay.

6. Due Process

We can now summarily dispose of Defendant's due process claim. To prevail on a claim that delay in the proceedings violated Defendant's right to due process, Defendant must prove prejudice and an intentional delay by the State to gain a tactical advantage." *Gonzales v. State*, 111 N.M. 363, 365, 805 P.2d 630, 632 (1991). "[T]he presence of prejudice is dependent upon the adverse effect delay has had on the merits of the defendant's case in light of all the circumstances." *Id.* The prejudice must be both "actual" and "substantial." To be "actual" prejudice, the prejudice must be established with some definiteness; proof cannot be mere conjecture or speculation. *See id.* To be "substantial," the prejudice must be more than nominal—it must have impacted the defense. *See id.*

As indicated by our discussion of Defendant's speedy trial claim, Defendant has failed to establish the requisite intent by the State and the requisite actual and substantial prejudice. Therefore, we reject Defendant's claim that his right to due process was violated by the delay in this case.

V. HABITUAL OFFENDER SENTENCING

Defendant claims that there was insufficient proof that he was the same person convicted of the felonies used to enhance his sentence. Although Defendant points to a discrepancy with respect to social security numbers, the evidence was sufficient to support the district court's determination. As for Defendant's claim that inadmissible hearsay was received in evidence at the habitual offender proceeding, we reject the contention because Defendant has failed to specify what the inadmissible evidence was. *See State v. Hernandez*, 104 N.M. 268, 274, 720 P.2d 303, 309 (Ct.App.1986) (contention on appeal is deemed abandoned if appellant fails to explain the claim).

VI. CUMULATIVE ERROR

Defendant also claims cumulative error. Having found only one error, which was harmless, we hold that the doctrine of cumulative error has no application. *See State v. Taylor,* 104 N.M. 88, 96, 717 P.2d 64, 72 (Ct.App.1986); *United States v. Rivera,* 900 F.2d at 1469–72.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

In support of his contention that he was denied effective assistance of counsel at trial, Defendant refers to the amendment to his docketing statement. This is not an acceptable briefing practice. *See State v. Aragon,* 109 N.M. 632, 634, 788 P.2d 932, 934 (Ct.App.1990). To the extent that Defendant relies on the amendment to the docketing statement, this claim is therefore deemed abandoned. *Id.* We have reviewed Defendant's contentions and find no support for the claim of ineffective assistance.

VIII. CONCLUSION

For the above reasons we affirm Defendant's convictions and sentences.

IT IS SO ORDERED.

MINZNER and FLORES, JJ., concur.

829 P.2d 7

NEW MEXICO STATE RACING COMMISSION, Defendant-Appellant,

v.

Jesse Lee YOAKUM, Plaintiff-Appellee.

No. 12556.

Court of Appeals of New Mexico.

Dec. 31, 1991.

Certiorari Denied March 2, 1992.

Tom Udall, Atty. Gen. and Charles W. Kolberg, Asst. Atty. Gen., Santa Fe, for defendant-appellant.

Charles E. Hawthorne, Hawthorne & Hawthorne, P.A., Ruidoso, for plaintiff-appellee.

OPINION

BIVINS, Judge.

On a writ of certiorari to review the Respondent New Mexico State Racing Commission's (SRC) Ruling 571 suspending Petitioner Jesse Lee Yoakum's (trainer) license to participate in horse racing in New Mexico for five years, the District Court of Lincoln County adjudged the suspension void. The SRC appeals, challenging the district court's decision that trainer's procedural due process right to a prompt post-suspension hearing was violated. We reverse in part and remand.

A. BACKGROUND

On December 22, 1988, the SRC received a report from its appointed testing laboratory that a urine sample taken from a horse named "Follow the Fox," supervised by trainer, tested positive for 3-Hydroxy-N-Methylmorphinan, a metabolite of the potent synthetic morphine painkiller levorphanol. "Follow the Fox" finished first in the eleventh race at Ruidoso Downs on July 16, 1988.

On December 23, 1988, the SRC wrote trainer advising him of the laboratory results and informing him that the SRC would consider these results at its January 19, 1989, meeting. The letter informed trainer that a decision would be reached regarding future action, and advised train-

er: "Should you wish to be present or be represented by Legal Council [sic] at that time, please contact [the] investigator * * * as soon as possible." Trainer received that letter on December 30, 1988. He attended the January 19 SRC meeting without counsel. Trainer did not request an opportunity to respond at that meeting and was not invited to do so.

On January 25, 1989, the SRC sent trainer a copy of its Ruling 520, which summarily suspended trainer's license pending an informal hearing to be held within ten days if requested within that time. The letter forwarding the Ruling requested trainer to return his license, and advised trainer to contact the SRC if he had any questions. Trainer received that letter on February 3, 1989.

Before receiving the summary suspension, trainer wrote the SRC on January 31, 1989, requesting a hearing "at your next regular meeting." In that letter, trainer requested a stay of his suspension until he could be heard. On March 14, 1989, trainer's attorney entered his appearance before the SRC.[1] The letter accompanying the entry of appearance requested notice of any hearing dates. The letter made no request for a hearing date.

On March 15, 1989, the SRC gave notice to trainer that the evidence it had, if not rebutted or explained, constituted probable cause to suspend or revoke trainer's license. The notice explained the basis for probable cause and notified trainer of his right to a hearing pursuant to SRC Rule 43.57, which allows trainer to be represented by counsel, present evidence, and examine witnesses. The notice further advised trainer that because of the seriousness of the charges, the SRC urged trainer to obtain counsel. This notice, no doubt, crossed with trainer's attorney's letter forwarding his entry of appearance, mailed one day earlier.

On June 22, 1989, the SRC conducted a hearing with Dan Myers, a commissioner, acting as hearing officer for the SRC. On July 17, 1989, Mr. Myers filed his report to the SRC. The report contained proposed findings of fact and conclusions of law which determined probable cause to suspend trainer. Trainer and his attorney attended the hearing held on June 22, 1989, and presented evidence. Notice of that hearing had been given to trainer on June 14, 1989.

That hearing considered not only the laboratory tests for "Follow the Fox," but also for two other horses which tested positive for levorphanol. These horses ran in races on June 15, 1988, and August 27, 1988. The hearing also considered trainer's suspension by the State of Texas for 180 days which had expired on May 4, 1989.

On July 18, 1989, the SRC, at a regularly scheduled meeting, suspended trainer's license for five years. Trainer appealed the suspension by filing a petition for a writ of certiorari in the District Court of Lincoln County. The district court issued a preliminary injunction staying the suspension and later held the suspension void. The district court concluded that substantial evidence supported the suspension, and that the SRC's decision was not fraudulent, arbitrary or capricious. The sole basis for voiding the suspension, therefore, was denial of procedural due process. This appeal by the SRC followed.

B. DISCUSSION

1. Analysis of *Barry v. Barchi*

From the briefs, as well as the record, it appears the district court based its decision that trainer had been denied procedural due process on *Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979). In that case, the New York State Racing and Wagering Board (Board), which is empowered to license horse trainers, summarily suspended Barchi's license for fifteen days because a postrace test revealed a drug in the system of a horse he trained. *Id.* at 59, 99 S.Ct. at 2646. Under New York's racing regulations, when a postrace test of a horse reveals the presence of drugs, the

1. This fact is clear from the record, therefore we are not concerned with the district court's refusal to grant this requested finding.

Board will presume—subject to rebuttal—that the horse's trainer either administered the drug or the presence of drugs in the horse resulted from the trainer's negligence. *Id.* A New York statute provides that a suspended licensee is entitled to a post-suspension hearing, but the statute specifies no time in which the hearing must be held. *Id.* at 61, 99 S.Ct. at 2647. The statute ordains that a summary suspension is to remain in force pending the hearing and final determination. *Id.* at 60–61, 99 S.Ct. at 2647. The Board is given thirty days after the hearing to issue a final order. Without resorting to these statutory procedures, Barchi filed suit in federal district court challenging the constitutionality of the New York statute. *Id.* at 61, 99 S.Ct. at 2647.

The *Barchi* Court concluded that Barchi had a property interest in his license sufficient to invoke the protection of the Due Process Clause of the Fourteenth Amendment. *Id.* at 64, 99 S.Ct. at 2649; U.S. Const. amend. XIV, § 1. The Court then balanced the trainer's substantial interest in avoiding suspension with the State's important interest in assuring the integrity of racing carried on under its auspices. *Barchi,* 443 U.S. at 64, 99 S.Ct. at 2649. The Court said that:

> [T]he State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging.

Id.

The United States Supreme Court concluded that *prior* to the suspension of his license, Barchi received all the process that was due him. The Court determined the procedural statute did not affront the Due Process Clause by authorizing summary suspension without a pre-suspension hearing. *Id.* at 65, 99 S.Ct. at 2649. The Court concluded, nevertheless, that Barchi "was not assured a sufficiently timely postsuspension hearing and that [the statute] was unconstitutionally applied in this respect." *Id.* at 64, 99 S.Ct. at 2649.

The Court held that because the consequences to a trainer of even a temporary suspension can be severe, the opportunity to be heard must be " 'at a meaningful time and in a meaningful manner.' " *Id.* at 66, 99 S.Ct. at 2650 (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). The Court determined that the provision for an administrative hearing, neither on its face nor as applied, assured a prompt proceeding and disposition of the issues. Because the statute applied in that case was deficient in that respect, the Court determined Barchi's suspension was constitutionally infirm and voided the suspension. *Id.*

2. Analysis

Although we agree with the district court regarding the suspension insofar as it was based upon the drugging of "Follow the Fox," we do so for a different reason. *Naranjo v. Paull,* 111 N.M. 165, 170, 803 P.2d 254, 259 (Ct.App.1990) (court will affirm if lower court is right for any reason). We disagree with the result reached by the district court with respect to the remaining two horses. We explain our reasoning, commencing with a discussion of the procedural events surrounding the drugging of "Follow the Fox."

a. "Follow the Fox" Incident

From our review of the record, including the SRC Rules which were admitted, as well as testimony given at the preliminary injunction hearing, it appears that the SRC Rules allow race-track stewards to suspend a trainer before a hearing upon receiving positive laboratory results showing that a horse which had raced has tested positive for illegal drugs. The procedure then allows the trainer to appeal that ruling to the SRC. Rule 43.53 provides in part that:

> In disciplinary matters in which a Board of Stewards has suspended a license * * * the Executive Secretary shall set the matter for hearing *as soon as is practicable* in conjunction with a regu-

larly scheduled meeting, unless a stay of the suspension * * * has been granted or unless otherwise agreed by the parties. [Emphasis added.]

The record indicates that because the stewards were no longer available at the track when the test results came in on "Follow the Fox," the matter was handled directly by the SRC. Therefore, in this case, unlike *Barchi,* there was no pre-hearing summary suspension. The SRC in effect sat as a board of stewards on January 19, 1989, when it determined that probable cause existed and issued its Ruling 520 temporarily suspending trainer's license.

SRC Ruling 520 temporarily and summarily suspended trainer's license "pending an informal hearing to be held within ten days if the request is made within ten days of this suspension." As we have already noted, trainer, within that ten days, did request a hearing at the SRC's next regular meeting. According to the testimony at the preliminary injunction hearing, the next meeting would have been in February.

It is generally held that a court will not declare a statute, or in this case, a rule, unconstitutional unless absolutely necessary. *See, e.g., State v. Ball,* 104 N.M. 176, 178, 718 P.2d 686, 688 (1986); *Garcia v. Village of Tijeras,* 108 N.M. 116, 118, 767 P.2d 355, 357 (Ct.App.), *cert. denied,* 107 N.M. 785, 765 P.2d 758 (1988). In other words, we analyze for constitutional infirmity only as a last resort. Regarding suspension based on the positive drug test on "Follow the Fox," we find it unnecessary to resolve the issue on constitutional grounds. As reasonably interpreted, SRC's own Rule 43.53 was not followed and, therefore, trainer's suspension based on the positive laboratory tests for "Follow the Fox" is void. *See Miller v. City of Albuquerque,* 89 N.M. 503, 507, 554 P.2d 665, 669 (1976) (failure to comply with its own regulations was fatal to Commission's decision); *State ex rel. Hughes v. City of Albuquerque,* 113 N.M. 209, 824 P.2d 349 (Ct.App.1991) (relief may be granted if procedures mandated by city ordinance were not followed even if such violation is not considered a denial of constitutional due process) [2]; *see also Vitarelli v. Seaton,* 359 U.S. 535, 539–40, 79 S.Ct. 968, 972–73, 3 L.Ed.2d 1012 (1959) (court found that agency was required to comply with internal regulations and that it was unnecessary to reach any constitutional issues). *See generally* 2 Am.Jur.2d *Administrative Law* § 350, at 162 (1962) ("Rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding as if they were statutes enacted by the legislature."); Kenneth C. Davis, 2 *Administrative Law* § 7.21 (1979); Note, *Violations by Agencies of Their Own Regulations,* 87 Harv.L.Rev. 629 (1974).

Rule 43.53, as we have noted above, requires a hearing "as soon as is practicable." Trainer requested a hearing within the meaning of that rule at the SRC's next regular meeting. He was not afforded that hearing at that time. The testimony indicates that the SRC scheduled a hearing for the April regular meeting but it was canceled for some unexplained reason. The representative of the SRC testified that at least four regular meetings occurred between the time the request was made and the time the hearing was held on June 22, 1989. We hold as a matter of law that this is an unreasonable delay, given the interest involved. We now turn to the suspension based upon the positive drug tests for the remaining horses.

b. Incidents Involving Other Horses

While trainer was temporarily and summarily suspended under Ruling 520, the SRC became aware that trainer had been suspended by the State of Texas Racing Commission for a similar violation for a period of 180 days, with the suspension expiring on May 4, 1989. When this occurred the SRC retested samples from horses trainer had supervised in two other

2. Although *Miller* held that failure of an agency to follow its own procedures resulted in denial of procedural due process, we do not read that case as requiring disposition on constitutional grounds. *See Hughes,* 113 N.M. at 210, 824 P.2d at 350 (violation of law requiring certain procedures is not necessarily a due process violation).

races, one on June 15, 1988, and the other on August 27, 1988. Those samples tested positive for levorphanol. The SRC appointed one of its members, Mr. Dan Myers, to hold a hearing on June 22, 1989. Trainer was given notice on June 14, 1989, of that hearing and was advised by that notice that his suspension would be considered based on the three positive drug tests.

Mr. Myers conducted the hearing at which trainer and his attorney were present and afforded the opportunity to present evidence and to cross-examine witnesses. There is no claim by trainer that he was not afforded all due process rights at this hearing. Within thirty days of that hearing, as the SRC rules provide, the SRC, at a regular meeting, suspended trainer's license for five years by its Ruling 571.

With a full hearing having been held within eight days after notification setting forth the charges, we hold that the requirements of SRC Rule 43.53 that the hearing be held "as soon as is practicable" were satisfied. We also hold that the hearing, as well as the formal action taken by the SRC within thirty days after the hearing, satisfied the requirement of *Barchi* and that SRC Rule 43.53 was not unconstitutional as applied. Trainer concedes that he could not participate in racing in New Mexico from November 1988 through May 4, 1989, because of the Texas suspension. All that remains is to determine whether or not the rule on its face assured a sufficiently timely hearing to satisfy due process safeguards. We hold that it does. In *Barchi,* the New York statute specified no time in which the hearing must be held. SRC Rule 43.53 does. On that basis, we distinguish *Barchi* from the case before us. *See McCahey v. L.P. Investors,* 774 F.2d 543, 553 (2d Cir.1985) (suggesting that rules that do not contain mandatory time for hearing may pass due process muster if a procedure exists that allows claimant a hearing "without appreciable delay").

Because SRC Ruling 571 suspended trainer's license based in part upon the positive drug test on "Follow the Fox," which we hold void, the matter must be remanded to the SRC for reconsideration of the sanctions. Thus, we set aside the district court's judgment and remand for entry of a new judgment consistent with this opinion. The district court, in turn, should then remand the matter to the SRC for further proceedings consistent with the district court's revised judgment.

IT IS SO ORDERED.

APODACA and BLACK, JJ., concur.

829 P.2d 645

Arthur SOLON, as Personal Representative of the Estate of Ivan Ponce on behalf of Ambrosia Ponce, Plaintiff,

and

Alvino Ponce and Maria Ponce, individually and as next friends of Ivan Ponce, deceased, Applicants in Intervention-Appellants,

v.

WEK DRILLING COMPANY, INC., Defendant-Appellee.

No. 19532.

Supreme Court of New Mexico.

March 31, 1992.

Taylor, Gaddy, Rakes & Hall, James E. Bierly and Daniel Rakes, Albuquerque, and J.W. Neal, Hobbs, for appellants.

Mark Terrence Sanchez and Gary Don Reagan, Hobbs, for appellee.

OPINION

MONTGOMERY, Justice.

This, as we view it, is a *Palsgraf*[1] case (though not a particularly good one). The question is whether one who owes a duty to another to provide that other with a safe place to work, and whose negligence in breaching that duty causes the death of the other, also owes a duty to the other's par-

1. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). Appellate jurisdiction in this Court is based on SCRA 1986, 12-102(A)(1), because the applicants' proposed complaint in intervention contains a claim which "sounds in contract"—the claim that defendant breached an implied contractual duty to provide plaintiff's decedent a safe place to work.

ents so that they may sue the tortfeasor, in their own right, for damages sustained as a result of their son's death. Framing the question in this way, we hold that the parents have no cause of action against the tortfeasor and uphold the district court's ruling denying the parents permission to intervene in a wrongful death action brought by the personal representative of their son's estate against the alleged tortfeasor.

I.

The trial court based its order denying leave to intervene on the legal insufficiency of the parents' proposed complaint in intervention. In reviewing that order, we of course accept as true the allegations in the parents' proposed complaint. It alleges that the defendant in the wrongful death suit, WEK Drilling Co., Inc. ("WEK Drilling"), owned and operated an oil-well drilling rig in Eddy County, New Mexico, where the accident happened. Ivan Ponce, the son of the applicants in intervention, Alvino and Maria Ponce ("the Ponces"), was employed by an independent contractor engaged in certain work in and around the drilling rig. Ivan was killed as a proximate result of WEK Drilling's negligence in failing, in various respects, to maintain the rig in a safe condition and operate it in a safe manner.[2]

The proposed complaint in intervention further alleges that, as a proximate result of WEK Drilling's negligence, the Ponces suffered certain damages: loss of financial support provided by their son; loss of consortium with their son, including loss of his society, companionship, and affection; and grief, sorrow, and bereavement in various forms. Ivan was 25 years old at the time of his death and had lived with his parents all his life. As developed at a deposition taken in connection with the Ponces' attempt to intervene, it appeared that Ivan and his parents enjoyed a close and loving relationship and that Ivan contributed to his parents' financial well-being by, among other things, performing work around the family home, putting a new roof on the house, pouring a concrete patio at the rear of the home, and otherwise assisting with the household maintenance and upkeep. Ivan had been married (he was divorced at the time of his death) and had a daughter, Ambrosia, who lived with him at his parents' home.

A few months after Ivan's death in February 1990, the personal representative of his estate, Arthur Solon, brought an action in the District Court of Eddy County on behalf of Ambrosia to recover for her father's wrongful death. The action was brought under the New Mexico wrongful death act, NMSA 1978, Sections 41–2–1 to –3 (Repl.Pamp.1989). Soon thereafter, the Ponces moved to intervene, on the grounds that they claimed an interest in the subject of the action and that their claim and the main action had a question of law or fact in common. They moved, in other words, both for intervention of right under SCRA 1986, 1–024(A), and, in the alternative, for permissive intervention under Rule 1–024(B). They attached their proposed complaint in intervention to the motion. The district court held two hearings and, ruling that the proposed complaint did not state a claim upon which relief could be granted, denied the motion. The Ponces appeal from the order denying their motion to intervene.

II.

Although a district court considering a motion to intervene under Rule 24 has discretion under both subsections of the rule, *see Apodaca v. Town of Tome Land Grant,* 86 N.M. 132, 133, 520 P.2d 552, 553 (1974),[3] the court in this case made

2. Ivan died when an improperly secured counterweight on the boom of the drilling rig struck him on the head.

3. The court's discretion under Rule 24(A), as the phrase "intervention of right" implies, is considerably narrower under paragraph A of the rule than it is under paragraph B. *See Apodaca,* 86 N.M. at 133, 520 P.2d at 553. At the outset of the litigation, the scope of the court's discretion under Rule 24(A) probably ranges from slight to nonexistent.

it clear that it was not denying the motion in the exercise of its discretion. Instead, the court was holding, as a matter of law, that the Ponces' proposed complaint in intervention did not state a cause of action. While a determination that a proposed complaint in intervention is legally sufficient—so as to withstand a motion to dismiss for failure to state a claim under Rule 12(B)(6)—is not *required* before the trial court may grant an application to intervene, it is certainly *permissible* for the court to scrutinize the proffered complaint to see whether it states a cause of action. *See* 3B James Wm. Moore & John E. Kennedy, *Moore's Federal Practice* ¶ 24.10[4], at 24–103 (2d ed. 1991) ("Leave [to intervene] should not be granted if the court could not grant intervenor any relief."); *id.* ¶ 24.14, at 24–144 ("The proposed complaint or answer of the intervenor must state a well-pleaded claim or defense."); 7C Charles A. Wright *et al.*, *Federal Practice & Procedure: Civil 2d* § 1914, at 416–17 (1986) ("The proposed pleading must state a good claim for relief or a good defense."). The applicants here, the Ponces, do not contend otherwise; and they do not seriously challenge the propriety of the district court's determining at the outset whether their proposed complaint in intervention stated a claim upon which relief could be granted.

Nor do the Ponces seriously contend that they had a claim for relief under the wrongful death act. Although their brief in chief contains numerous references to the act, to cases construing the act, and to the wrongful death statutes in other states—many of which permit a decedent's parents to share in the proceeds of a successfully prosecuted wrongful death claim—their brief makes it fairly clear that they are seeking recognition of a cause of action at common law, *outside* the wrongful death act, for their "loss of out-of-pocket economic damages and for their loss of consortium with their son." And in their reply brief they expressly state: "Appellants do not seek to intervene in the cause below as beneficiaries under the Wrongful Death Act. Rather they seek to intervene on an independent cause of action which they request this Court to recognize as existing for them outside the Wrongful Death Act * * * *"

The Ponces' request to intervene must therefore rest on Rule 24(B) relating to permissive intervention; they have no basis to intervene as a matter of right under Rule 24(A), for they do not claim "an interest relating to the property or transaction which is the subject of the action * * * *" SCRA 1986, 1–024(A)(2).[4] Nor could they assert such a claim. Under Section 41–2–3, every action under our wrongful death act is to be brought by the personal representative of the decedent, and the proceeds are to be distributed, where there is no surviving husband or wife but there is a surviving child or children, to such child or children. The parents of the decedent cannot share in the proceeds unless the decedent is survived by neither a spouse, a child, nor a grandchild. The wrongful death act, which we have characterized as a survival statute, provides a cause of action for the benefit of the statutory beneficiaries to sue a tortfeasor for the damages, measured by the value of the decedent's life, which the decedent himself would have been entitled to recover had death not ensued. *See Stang v. Hertz Corp.*, 81 N.M. 348, 350–52, 467 P.2d 14, 16–18 (1970); *see also Kilkenny v. Kenney*, 68 N.M. 266, 270, 361 P.2d 149, 152 (1961); *Natseway v. Jojola*, 56 N.M. 793, 800, 251 P.2d 274, 278 (1952). The act therefore furnishes the basis for recovery, by the statutory beneficiaries, of the *decedent's* damages; but it provides no basis for recovery by the decedent's parents, or anyone else, of *their own* damages flowing from the loss of the decedent's life.

Thus, as noted above, the Ponces' basis for intervening in this lawsuit must lie, if at all, in the provisions of Rule 24(B) authorizing permissive intervention. Although the Ponces' claim and Solon's wrongful

4. The Ponces did not attempt to intervene under Rule 24(A)(1) (providing for intervention of right "when a statute confers an unconditional right to intervene"), since no such statute was available.

death action "have a question of law or fact in common," SCRA 1986, 1–024(B), the question (answered negatively by the trial court) remains: Does the Ponces' proposed complaint in intervention state a legally sufficient common law claim, independent of the wrongful death act, for the economic loss and loss of consortium they suffered from the death of their son, which was caused by the alleged negligence of defendant WEK Drilling? It is to this dispositive question that we now turn.

III.

> In New Mexico, negligence encompasses the concepts of foreseeability of harm to the person injured and of a duty of care *toward that person* * * * *
>
> Duty and foreseeability have been closely integrated concepts in tort law since the court in [*Palsgraf*] stated the issue of foreseeability in terms of duty. If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed *to that plaintiff* by the defendant.

Ramirez v. Armstrong, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983) (emphasis added). *See also Calkins v. Cox Estates,* 110 N.M. 59, 61–62, 792 P.2d 36, 38–39 (1990):

> In determining duty, it must be determined that the injured party was a foreseeable plaintiff—that he was within the zone of danger created by [the tortfeasor's] actions; in other words, to whom was the duty owed?
>
> * * * A duty to an individual is closely intertwined with the foreseeability of injury to *that individual* resulting from an activity conducted with less than reasonable care by the alleged tort-feasor. [Citing *Ramirez* and *Palsgraf.*]

Or, to quote Judge Cardozo's famous aphorism in the *Palsgraf* majority opinion: "[N]egligence in the air, so to speak, will not do." 162 N.E. at 99 (quoting Frederick Pollock, *Law of Torts* 455 (11th ed. 1920)).

As an original matter, the law need not have evolved this way. It could have evolved along the lines suggested by Judge Andrews, dissenting in *Palsgraf:*

> Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others * * * * Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.

162 N.E. at 103 (dissenting opinion). Or, as suggested by Dean Prosser, who has questioned [5] some of Judge Cardozo's reasoning in *Palsgraf:*

> As between an entirely innocent plaintiff and a defendant who admittedly has departed from the social standard of conduct, if only toward one individual, who should bear the loss? If the result is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's entire innocence. If it is unjust to the defendant to make the defendant bear a loss which the defendant could not have foreseen, it is no less unjust to the plaintiff to make the plaintiff bear a loss which the plaintiff too could not have foreseen, and which is not even due to the plaintiff's own negligence.

W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 43, at 287 (5th ed. 1984) [hereinafter *Prosser & Keeton*]. As Prosser observes, the problem is one of social policy: where to draw the line against otherwise unlimited liability. It has been fashionable in this country for many years now for courts and commentators to advocate a wide sweep of liability, based on the notion of loss spreading through devices such as prices, taxes, and insurance, *see id.,* though in recent years perceptible opposition to this trend has been manifested through increasingly strident demands for "tort reform."

But we are not writing on a clean slate, and we do not perceive this case to be a good one in which to reexamine the social policy that limits a tortfeasor's liability to the foreseeable plaintiff and excludes it

5. *See generally* William L. Prosser, *Palsgraf Revisited,* 52 Mich.L.Rev. 1 (1953).

where the plaintiff is unforeseeable. That this in fact is the current state of the law in New Mexico is demonstrated by the statements in *Ramirez* and *Calkins* quoted above, as well as by other applicable authorities. *See, e.g., Bober v. New Mexico State Fair,* 111 N.M. 644, 647, 808 P.2d 614, 617 (1991) (owner or occupier of land has duty to persons who might be harmed by unsafe condition on the land); *see also Klopp v. Wackenhut Corp.,* 113 N.M. 153, 159, 824 P.2d 293, 299 (1992) (quoting *Calkins* and holding airline had duty to guard against unreasonable risk of danger to passenger in airport terminal); *Restatement (Second) of Torts* § 281(b) & comment c (1965) (actor is liable if actor's conduct is negligent with respect to plaintiff or class of persons within which he is included; fact that actor's conduct causes harm to person whom actor could not reasonably have anticipated injury does not make actor liable to person so injured); Fowler V. Harper *et al., The Law of Torts* § 18.2, at 655 (2d ed. 1986) (prevailing view is that obligation to refrain from negligent conduct is owed only to those who are foreseeably endangered by the conduct).

Despite this Court's adoption in *Ramirez* of the *Palsgraf* doctrine of negligence, defined as a breach of duty toward a particular person or class of persons protected against an unreasonable risk of harm from an actor's conduct, *Ramirez* itself stands for something of an exception to the doctrine. In that case we recognized a cause of action for negligent infliction of emotional distress in favor of bystanders (children who witnessed the accident in which their father was struck and killed), even though it could be said that the actor's conduct was negligent toward the children's father but not toward the children, who the actor had no reason to foresee would be present and emotionally distressed by witnessing their father's death. As so viewed, the case may serve as an example of Prosser's suggestion that "the foreseeability of harm to the plaintiff should be but one factor in determining the existence of a duty, and not always conclusive, and that situations will more or less inevitably arise which do not fit within any fixed and inflexible rule." *Prosser & Keeton* § 43, at 288.

In *Ramirez,* the Court considered, in addition to the foreseeability of harm to the plaintiffs (the emotionally distressed children who actually witnessed their father's death), the type of interest that was invaded by the tortfeasor's conduct—the interest in freedom from severe emotional shock—and the relationship between the killed or injured victim of the accident and the plaintiffs—a marital or intimate familial relationship between the victim and the plaintiffs. Implementing the factor of foreseeability that the plaintiffs would be harmed, the Court adopted certain requirements for recovery: contemporaneous sensory perception of the accident, as contrasted with learning of the accident by other means or after its occurrence, and physical manifestation of, or injury to, the plaintiff accompanying or resulting from the emotional injury.[6] *Ramirez,* 100 N.M. at 542, 673 P.2d at 825.

In the present case, the would-be plaintiffs assert an invasion of two interests: their interest in economic security, which they allege was infringed by the loss of their son's contribution to their financial support; and deprivation of their son's companionship, society, and affection—a loss of consortium. The first interest has received recent and explicit recognition by this Court, *Lovelace Medical Center v. Mendez,* 111 N.M. 336, 343–45, 805 P.2d 603, 610–12 (1991), though in that case recovery of economic loss was afforded to a medical malpractice victim to whom the defendants' duty to exercise ordinary care was admittedly breached. The Ponces' claim for invasion of this interest is not particularly strong; as alleged in their complaint and as set forth in Alvino Ponce's deposition, it consists of the loss of their son's services in performing such tasks as repairing the roof, building a pa-

6. The requirement of physical manifestation was overruled in *Folz v. State,* 110 N.M. 457, 471, 797 P.2d 246, 260 (1990).

tio, cutting the grass, chopping wood, and repairing the family's vehicles. There is no claim for loss of a specific monetary amount contributed to the family on a periodic basis. Nevertheless, we may assume, without deciding, that their claim would be sufficient to withstand a motion to dismiss, if other factors (namely, the factor of foreseeability) did not bar the claim.

As for their claim for loss of consortium, they mount a vigorous effort to persuade this Court to depart from existing precedent precluding recognition of a claim for loss of consortium. They acknowledge, as they must, that current New Mexico law presents a formidable barrier to recovery for loss of consortium—spousal, filial, parental, or other. *See Tondre v. Thurmond-Hollis-Thurmond, Inc.,* 103 N.M. 292, 293, 706 P.2d 156, 157 (1985) (refusing to recognize wife's claim for loss of spousal consortium caused by negligent injury to husband); *Roseberry v. Starkovich,* 73 N.M. 211, 218, 387 P.2d 321, 326–27 (1963) (affirming dismissal of wife's action for loss of spousal consortium caused by negligent injury to husband); *Wilson v. Galt,* 100 N.M. 227, 235, 668 P.2d 1104, 1112 (Ct.App.) (denying parents' claim for loss of filial consortium resulting from doctors' negligent treatment of their infant son), *cert. quashed,* 100 N.M. 192, 668 P.2d 308 (1983); *Wilson v. Wylie,* 86 N.M. 9, 16, 518 P.2d 1213, 1220 (Ct.App.1973) (reversing award of $10,000 to parents for loss of society of child resulting from child's negligently caused death), *cert. denied,* 86 N.M. 5, 518 P.2d 1209 (1974); *Hoskie v. United States,* 666 F.2d 1353, 1359 (10th Cir.1981) (under New Mexico law, parents not permitted, in negligence action, to recover for loss of consortium with their child); SCRA 1986, 13–2112 (Uniform Jury Instruction with respect to loss of consortium: "This is not a recognized cause of action in the state of New Mexico."). *But see Kilkenny v. Kenney,* 68 N.M. at 269–70, 361 P.2d at 151–52 (recognizing, in dictum, husband's common law cause of action for loss of spousal consortium caused by negligent injury of wife prior to her death).

We are not inclined to reexamine in this case the law in New Mexico disallowing recovery for loss of consortium, notwithstanding the Ponces' earnest entreaties that we do so. For the factor—if it is a factor—or the prerequisite—if it is that—of foreseeability by WEK Drilling that its failure to maintain its drilling rig in a safe condition would cause harm to Ivan Ponce's parents is just too glaringly absent to convince us to recognize a cause of action in their favor for redress of that harm. We may assume it is foreseeable that a 25-year-old employee of an independent contractor working on the drilling rig would have living parents, but is it foreseeable that he would reside with his parents, that there would be a close and loving relationship with them, and that they would be partially dependent on him for their economic support? These facts do not come as a surprise, but we certainly cannot say that financially dependent parents were foreseeable to WEK Drilling as a matter of law.

It is thoroughly settled in New Mexico, of course, that whether the defendant owes a duty to the plaintiff is a question of law. *E.g., Bober,* 111 N.M. at 650, 808 P.2d at 620 (citing *Schear v. Board of County Comm'rs,* 101 N.M. 671, 672, 687 P.2d 728, 729 (1984)). We have no hesitancy in holding as a matter of law that the existence and interests of the Ponces and their relationship with their son were unforeseeable to defendant WEK Drilling. While it is foreseeable that someone who is not provided a safe place to work will have living parents, the same can be said of the other relatives standing in an "intimate familial relationship" with a tort victim: his or her spouse, parent, child, grandparent, grandchild, brother, sister, and (in the case of a minor) others occupying a position in loco parentis. *See Ramirez,* 100 N.M. at 541, 673 P.2d at 825. The social policy of cutting off the liability that would otherwise extend to these family members seems sound, at least in a case in which they allege no more palpable injury than that claimed here.

By nothing in this opinion do we either reaffirm or retreat from current New Mexico law on recovery for economic harm or

on nonrecovery for loss of consortium by a victim to whom the tortfeasor's duty to exercise ordinary care for the victim's safety undeniably runs.

The order denying the Ponces' motion to intervene is affirmed.

IT IS SO ORDERED.

BACA, J., concurs.

RANSOM, C.J., specially concurs.

RANSOM, Chief Justice (specially concurring).

I concur specially to make the same point that I made in my dissent to *Calkins v. Cox Estates,* 110 N.M. 59, 66, 792 P.2d 36, 43 (1990).

> I agree with the majority in the instant case that whether a duty was owed must be decided as a matter of law using existing legal policy. The crux of the duty analysis that is required, however, is not a factual foreseeability determination, but rather it is a legal policy determination. This distinction is critical. In New Mexico, as stated in the majority opinion, we define negligence as an act foreseeably involving an unreasonable risk to that individual who complains of injury. *See also* SCRA 1986, 13-601. Foreseeability is most often a question of fact and only rarely, as in *Palsgraf,* may foreseeability be considered a false jury issue. Most often, duty as a matter of law turns not on an absence of the fact issue of foreseeability, but rather the policy issue of whether it is reasonable to impose a duty to avoid a risk of injury which, although foreseeable, is remote.

Id. at 67, 792 P.2d at 44. Succinctly, while Chief Judge Cardozo held in *Palsgraf* that there can be no duty in relation to another person *absent* foreseeability ("risk reasonably to be perceived"), it does not follow that duty necessarily is present if risk of injury to that other person *is* foreseeable from one's acts and omissions. Chief Judge Cardozo was addressing only the victim of an act that was innocent and harmless with respect to that victim.

> If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless * * * with reference to [Helen Palsgraf] did not take to itself the quality of a tort because it happened to be a wrong * * * with reference to some one else. * * * The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

Palsgraf, 162 N.E. at 99-100.

When Chief Judge Cardozo wrote that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation," *id.* at 100, he was talking about the absence of a duty in relation to one not foreseeably at risk. It is unfortunate that in *Ramirez v. Armstrong,* 100 N.M. 538, 673 P.2d 822 (1983), this Court stated in reference to *Palsgraf* that, "If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant." *Ramirez,* 100 N.M. at 541, 673 P.2d at 825. That principle simply does not follow from *Palsgraf.* In *Calkins,* the Court fell into error when it adopted that principle, and when it reasoned that a relationship that gives rise to a duty as to one perceived risk necessarily gives rise to a duty as to any risk foreseeably progressing in a natural and continuous sequence from violation of the first duty. The law, not the fact of proximate cause, defines duty.

The Court stated in *Ramirez* that, "In order to insure that the interest to be protected is actually foreseeable, courts * * * have adopted a number of criteria to be met in any case where such injury is claimed." *Ramirez,* 100 N.M. at 541, 673 P.2d at 825. In point of fact, however, the recited criteria did not delimit foreseeability, but rather remoteness as a matter of public policy. For example, one criterion is that shock to the family members claiming negligent infliction of emotional distress must be caused by contemporaneous sensory perception of the accident resulting in physical injury or death to another family member. Yet, it is clearly foreseeable that severe shock may be caused by learning of the accident by means other than contemporaneous perception. *Ramirez* is not a *Palsgraf* case. To the extent it does turn

on foreseeability, *Ramirez* acknowledges the foreseeability of family bystanders unknown in fact to the wrongdoer (not unlike the foreseeability of family dependents unknown in fact to the wrongdoer).

Factually, I cannot accept a resolution of this case that purports to hold as a matter of law it was not foreseeable that a twenty-five-year-old man "would reside with his parents, that there would be a close and loving relationship with them, and that they would be partially dependent on him for their economic support." I believe financially dependent parents indeed are foreseeable. A person is not an innocuous package importing no relation to others as was the package of fireworks that exploded when dislodged from the arms of Helen Palsgraf's fellow passenger. As with severe shock to unknown family bystanders, it is foreseeable that parents of an adult child would suffer loss of financial support and consortium from his wrongful death.

The parents of the deceased failed to state a cause of action, not because the wrongdoer could not reasonably perceive a risk to the economic security of persons dependent upon the victim of wrongful death, rather, as a matter of public policy, because it is not reasonable to impose a duty to avoid a risk of economic injury or loss of consortium to certain dependents. The legislature has declared in the wrongful death act the state's policy as to beneficiaries of damages to be awarded in every action for wrongful death. Others who suffer economic injury or loss of consortium are denied a claim for relief, not because risk of harm to them is unforeseeable, but because of policy set by the legislature.

Finally, in addition to my disagreement that as a matter of law the existence and interests of the parents and their relationship with their son were unforeseeable, I disagree that their interests in economic security and consortium were not "palpable", by which I take the majority to mean those interests were imperceptible or nominal. I agree only that "[t]he social policy of cutting off liability that would otherwise extend to these family members seems sound." Social policy indeed became the determinative rationale of the majority opinion when the author seemingly adopted the suggestion in *Prosser & Keeton* that the presence of foreseeability is but one fact in determining the existence of duty, and "the problem is one of social policy: where to draw the line against otherwise unlimited liability."

829 P.2d 652

Theresa RUTHERFORD, Petitioner–Appellant,

v.

CITY OF ALBUQUERQUE, Arthur A. Blumenfeld, Chief Administrative Officer, Jay Czar, Director of General Services, and the City of Albuquerque Hearing Officer, Respondents–Appellees.

No. 19899.

Supreme Court of New Mexico.

April 16, 1992.

William J. Tryon, Albuquerque, for petitioner-appellant.

David S. Campbell, City Atty., David Suffling, Asst. City Atty., Albuquerque, for respondents-appellees.

OPINION

FRANCHINI, Justice.

This appeal addresses the time parameters for appealing a City of Albuquerque Personnel Board decision. The Albuquerque Merit System Ordinance establishes an administrative procedure for resolving grievances pertaining to disciplinary matters involving city employees. Albuquerque, N.M., Rev.Ordinances, ch. 2, art. IX, § 2-9-25(D) (1989). Theresa Rutherford appealed, by filing a petition for a writ of certiorari in accordance with the ordinance, from an adverse decision of the Board forty-five days after it was signed and within thirty days after it was mailed. The district court dismissed Rutherford's writ of certiorari on the ground that it was not timely filed. We reverse and hold that the time for appeal begins to run upon the mailing of the Board's decision.

The facts surrounding the timeliness of the appeal were not contested. On September 18, 1990, the Personnel Board adopted the recommendation of the hearing officer, upholding Rutherford's dismissal. The written decision was mailed to counsel of record on October 5, 1990. Rutherford's attorney received the decision on October 9, 1990. Rutherford filed a petition for a writ of certiorari on November 2, 1990.

In construing a municipal ordinance, we apply the same rules of construction that we use when construing a statute of the legislature. *Burroughs v. Board of County Comm'rs*, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975). Thus, in interpreting the Albuquerque ordinance, we look to the object sought to be accomplished and the wrong sought to be remedied. *Lopez v. Employment Sec. Div.*, 111 N.M. 104, 105, 802 P.2d 9, 10 (1990). We also read the ordinance in its entirety and construe each part in connection with every other part to produce a harmonious whole. *State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988).

The applicable section of the city ordinance provides: "[a]ppeal of the decision of the Personnel Board to District Court by the employee or the City shall be taken within thirty (30) days of the final adverse decision of the Board." § 2-9-25(D)(5)(c). This section does not specify what constitutes the final adverse decision—the date of the oral decision or the signing of the written decision—nor does it specify how or when the parties should be notified of the decision. The absence of a notice provi-

sion and the failure to tie notice to the time for filing an appeal contrast with the preceding sections of the grievance resolution procedure. Sections 2-9-25(D)(2) to (4) provide in relevant part:

> (2) Within ten (10) calendar days *of the receipt of* the employee's written grievance, * * *. If the employee is unsatisfied with the decision of the Chief Administrative Officer, he or she may, within ten (10) calendar days *of receipt of such notice,* request that the Personnel Board provide him or her a hearing on the matter * * *.
>
> (3) Within ten (10) working days *after receiving* the written request from the aggrieved employee, * * *. As soon as possible but in any event within thirty (30) calendar days after concluding a hearing, the Hearing Officer *shall transmit* ... to the Personnel Board, the Chief Administrative Officer, and the subject employees * * *.
>
> (4) * * * As soon as possible after the Personnel Board has received the recommendation, it shall act; such action shall normally be within thirty (30) days *of transmittal* of the hearing officer's report * * *. (emphasis added)

We must read this ordinance so as to facilitate its operation and the achievement of its goals. *See Griego v. Bag 'N Save Food Emporium,* 109 N.M. 287, 291-92, 784 P.2d 1030, 1034-35 (Ct. App.1989), *cert. denied,* 109 N.M. 262, 784 P.2d 1005 (1990). Additionally, in construing this ordinance, we should "so far as practicable, reconcile different provisions so as to make them consistent, harmonious and sensible." *State ex rel. Clinton Realty Co. v. Scarborough,* 78 N.M. 132, 135, 429 P.2d 330, 333 (1967). There is inconsistency in this ordinance because most sections, in contrast to Section 2-9-25(D)(5)(c), provide for notice and connect the notice to the time for filing an appeal. It is significant in this case that, unlike the final decision of a court of record, the final decision of the Personnel Board is never filed or recorded. The only notice is the mailed decision, although Section 2-9-25(D)(5)(c) does not specify when the decision should be mailed. Thus, the decision of the Board could conceivably be withheld altogether or mailed thirty days after the final decision, thereby denying the losing party due process.

This case differs from our recent opinion in *Maples v. State,* 110 N.M. 34, 791 P.2d 788 (1990), in which a party attempted to appeal from an adverse administrative decision thirty days after it was filed. Although the party did not receive actual notice of the adverse decision until after the time to appeal had lapsed, her counsel was aware that a ruling had been made and he could have determined if the decision had been filed and what the decision was. Under the ordinance at issue here, counsel cannot determine whether a decision has been made or what it is because the decision is never filed or recorded.

The overall intent of the ordinance appears to provide for due process. The essence of procedural due process is that the parties be given notice and an opportunity for a hearing. *Jones v. Nuclear Pharmacy, Inc.,* 741 F.2d 322, 325 (10th Cir.1984). We conclude that the City did not intend to deny due process, but intended to provide a mechanism for the parties to receive notice. This intent is evident in the sections of the ordinance that specify notice and also connect notice to the time for filing an appeal. "A distinct provision of a statute specifically addressing certain conduct should prevail over a more general provision that could be read to govern the same conduct." *State v. Stephens,* 111 N.M. 543, 547, 807 P.2d 241, 245 (Ct.App. 1991). In view of the foregoing, we interpret the ordinance to provide for an appeal within thirty days of the *mailing* of the final adverse decision of the Board. Any other interpretation would be inconsistent with the ordinance's overall intent to provide due process. When there are contrary interpretations relating to the right of appeal, the interpretation permitting review on the merits, rather than one rigidly restricting appellate review should be favored. *In re Application No. 0436-A,* 101 N.M. 579, 581, 686 P.2d 269, 271 (Ct.App. 1984).

For the above reasons, we reverse the order dismissing the writ and remand to the trial court for further proceedings.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

829 P.2d 655

DONA ANA SAVINGS AND LOAN ASSOCIATION, F.A., A Federally Chartered Savings and Loan Association, Plaintiff-Appellee,

v.

Peggy MITCHELL, Respondent,

and

Anthony F. Avallone, Attorney-Appellant.

No. 12051.

Court of Appeals of New Mexico.

April 30, 1991.

Certiorari Denied July 1, 1991.

Mick I.R. Gutierrez, Miller, Stratvert, Torgerson & Schlenker, P.A. Las Cruces, for Judge James T. Martin.

Anthony F. Avallone, pro se.

OPINION

BIVINS, Judge.

Anthony Avallone (attorney) appeals the district court's order imposing a $250 fine against him as a sanction for violating SCRA 1986, 1-011 (Cum.Supp.1990) (Rule 11). He raises three issues on appeal: (1) the district court lacked jurisdiction to impose Rule 11 sanctions, claiming that the sanctions proceeding was criminal in nature and no sworn statement or complaint was filed; (2) the findings were flawed for lack of a finding of subjective bad faith and no showing that the findings made were based on proof beyond a reasonable doubt; and (3) extrajudicial bias and prejudice deprived attorney of due process. We affirm.

When this case was first appealed, this court granted the district court's motion to dismiss the appeal for lack of jurisdiction based on a defect in the notice of appeal. The supreme court granted certiorari to review the dismissal and reversed, remanding to this court to consider attorney's appeal on the merits. *Mitchell v. Dona Ana Sav. & Loan Ass'n, F.A.*, 111 N.M. 257, 804 P.2d 1076 (1991). In compliance with that decision, we now consider the merits.

Background.

Dona Ana Savings and Loan Association (the Association) sued Peggy Mitchell (Mitchell) to collect on a promissory note. Mitchell retained attorney to represent her, and attorney filed an answer to the complaint.

In the answer, attorney denied the complaint's allegations that Mitchell failed and refused to make any payments due under the terms of the note, that the Association had elected to accelerate all sums secured under the note, that the unpaid principal was $8,034.87, and that late charges had accrued and continued to accrue. The answer also demanded proof of the amount owed.

The Association moved for summary judgment supported by the affidavit of an officer showing, among other things, the amounts due and that no payments had been made by Mitchell on the note. At the hearing on the motion, attorney stated that by filing the answer he was not claiming a meritorious defense, only that he wanted proof of the amount owed. He also indicated to the district court that a petition for bankruptcy would be filed on behalf of Mitchell by the end of the week, so not much would be accomplished at the summary judgment hearing.

On its own motion, the district court concluded the answer violated Rule 11 and assessed a fine of $250 against attorney. When the form of judgment was presented, attorney objected to the portion imposing sanctions and requested a hearing. He did not object to the award of judgment in favor of the Association. Judgment was then entered granting the Association summary judgment against Mitchell but reserving for another hearing the "issue as to whether the defendant's answer was frivolous and filed for the purpose of delay, and whether sanctions should be imposed." The district court issued a written order directing attorney to show cause why he should not be subjected to disciplinary ac-

tion under Rule 11. That order was not accompanied by a sworn complaint.

A hearing was held on the order to show cause and, after requested findings of fact and conclusions of law had been submitted, the district court filed its decision and an order imposing sanctions on attorney. At the hearing, the district court judge remarked that attorney was always skirting the rules of procedure and ethics and that he had discussed attorney with another district judge who felt the same way.

I. *Jurisdiction to Impose Sanctions.*

Relying on *State ex rel. Simpson v. Armijo,* 38 N.M. 280, 31 P.2d 703 (1934), and *Lindsey v. Martinez,* 90 N.M. 737, 568 P.2d 263 (Ct.App.1977), attorney argues that the district court lacked jurisdiction because punishment by fine makes the proceeding criminal in nature and he was not provided a sworn, written statement of the charges as required for criminal contempt proceedings under SCRA 1986, 5–201(B). We reject this contention.

The imposition of a fine on an attorney under Rule 11, payable to the court, presents a case of first impression in New Mexico. Fines penalizing attorneys have frequently been held to be appropriate under the analogous federal rule. Annotation, *Comment Note—General Principles Regarding Imposition of Sanctions under Rule 11, Federal Rules of Civil Procedure,* 95 A.L.R.Fed. 107, § 9[b] (1989). Under the federal rule, appropriate sanctions for Rule 11 violations include reprimand, fines levied against the attorney or his client, notification of the disciplinary board, and the award of attorney's fees and costs to the opposing party. *See generally id.;* W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look,* 104 F.R.D. 181 (1985). Although the federal rule differs in part from our Rule 11 in certain respects, we think it is clear that both versions permit the imposition of a fine as a sanction in appropriate cases.

While it is correct that some federal courts, in dealing with the comparable federal rule, have held that fines imposed under Rule 11 are essentially analogous to those imposed for criminal contempt, *see* 2A J. Moore, J. Lucas & G. Grotheer, Jr., *Moore's Federal Practice,* ¶ 11.02[4], text at n. 5 (2d ed. 1990) (hereinafter *Moore's*), attorney has not cited us to any authority, and we have found none, that requires service of a sworn statement. Moreover, the authority of federal cases requiring criminal contempt proceedings when fines for Rule 11 violations are imposed has been criticized. *Donaldson v. Clark,* 786 F.2d 1570 (11th Cir.1986), cited in *Moore's* and relied upon by defendant and other federal circuits, *see, e.g., Cotner v. Hopkins,* 795 F.2d 900 (10th Cir.1986) (also cited in *Moore's*); *Cheek v. Doe,* 828 F.2d 395, 397 n. 2 (7th Cir.), *cert. denied,* 484 U.S. 955, 108 S.Ct. 349, 98 L.Ed.2d 374 (1987), was subsequently vacated, *see Donaldson v. Clark,* 794 F.2d 572, (11th Cir.1986) and then reheard en banc. *See Donaldson v. Clark,* 819 F.2d 1551 (11th Cir.1987).

On rehearing, the appellate court held that it is not necessary for a court to follow the procedures required in criminal contempt proceedings for every case involving Rule 11 sanctions, even where monetary sanctions are imposed. *Donaldson v. Clark,* 819 F.2d at 1559. Policy considerations and fundamental differences between a monetary sanction for a Rule 11 violation and an infraction for criminal contempt mandate against following criminal contempt procedures for Rule 11 violations. A Rule 11 sanction is imposed when an attorney has unjustifiably failed to carry out a responsibility as an officer of the court, whereas an infraction for criminal contempt, for which both attorneys and members of the public can become liable, is an affront to the authority of the court. The power to impose Rule 11 sanctions springs from a different source than does the power to punish for criminal contempt. *See id.* at 1558–59; *see also* 18 U.S.C. § 401 (1988) (court's criminal contempt power is limited to three instances). To uniformly follow criminal contempt procedures whenever contemplating imposing Rule 11 sanctions would, by increasing litigation, without corresponding benefit, be counterproductive to the goals of Rule 11. *Donaldson v. Clark,* 819 F.2d at 1559; *see also Mathews v.*

Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (enunciating principles of due process).

Determining what process is due in a Rule 11 case simply requires an application of familiar principles of due process. *Donaldson v. Clark,* 819 F.2d at 1558. Due process requires an evaluation of all the circumstances and an appropriate accommodation of the competing interests involved. *Rivera v. Brazos Lodge Corp.,* 111 N.M. 670, 808 P.2d 955 (1991). Competing interests in a Rule 11 situation:

> include but are not limited to: the interests of attorneys and parties in having a specific sanction imposed only when justified; the risk of an erroneous imposition of sanctions under the procedures used and the probable value of additional notice and hearing; and the interests of the court in effectively monitoring the use of the judicial system and the fiscal and administrative burdens that additional procedural requirements would entail.

Donaldson v. Clark, 819 F.2d at 1558.

Due process requires that the attorney be given notice of the imposition of Rule 11 sanctions, may require specific notice of the reasons for the imposition of sanctions, and mandates that the accused be given an opportunity to respond. *Donaldson v. Clark,* 819 F.2d at 1559–61. The existence of Rule 11 gives notice of the requirement and the possibility of sanctions.

In the case before us, the district court gave attorney notice of the essential facts in open court at the summary judgment proceeding. When attorney objected to the judgment which included the sanction, the court also gave him notice through the order to show cause, which afforded attorney not only the essential facts but also notice and an opportunity to be heard. We believe attorney was afforded all the process he was due. *See McCoy v. New Mexico Real Estate Comm'n,* 94 N.M. 602, 614 P.2d 14 (1980) (due process embodies reasonable notice and the opportunity to be heard); *Donaldson v. Clark,* 819 F.2d at 1559–61; *see also In re Avallone,* 91 N.M. 777, 778, 581 P.2d 870, 871 (1978) (where court's records show whether a fact of filing was or was not accomplished, affidavit not required to support a show cause order).

We do not deem it necessary to require district courts to file sworn statements as long as the essential facts are made known to the attorney, he is given adequate time to prepare a defense, and notice and opportunity to be heard. As Professor Moore indicates, a court imposing sanctions under Rule 11 has the discretion to decide the procedure to be followed. *Moore's,* ¶ 11.02[4], text at n. 1. In order to restrict costs connected with these collateral proceedings, the district court should make its decisions as to sanctions based on information contained in the record. *Id.,* text at n. 2; *see also Donaldson v. Clark,* 819 F.2d at 1558 ("The specific dictates of due process will be determined by the interaction of several factors").

We also note that attorney apparently did not complain to the district court about the lack of a sworn statement or lack of notice of the essential facts giving rise to the sanction. In fact, attorney's objection to the form of judgment establishes that he was aware of the essential facts.

II. *Judicial Bias.*

Attorney contends that the district court's extrajudicial remarks about the attorney's frequent violation of procedural rules and a similar opinion expressed by another judge should disqualify the district court due to bias and prejudice. We will not dwell on this issue. Suffice it to say that based on our review of the record, we are satisfied the district court based its decision solely on Rule 11 violations and nothing more.

III. *Flawed Findings.*

Attorney lodges two claims with regard to the findings made by the district court. The first is that they do not reflect a standard of proof beyond a reasonable doubt. We note that the leading cases addressing Rule 11 violations make no

mention of a requirement of proof beyond a reasonable doubt. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); *Donaldson v. Clark; Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866 (5th Cir.1988). Without deciding whether due process requires the highest standard of proof, we hold the essential facts before the court met that proof. Attorney did not deny he signed the pleading or that he read it. He interrupted the Association's presentation at the summary judgment proceeding to announce that not much would be accomplished since a petition for bankruptcy would be filed on behalf of Mitchell by the end of the week. This demonstrated that the pleading was filed for the purpose of delay. As to the good grounds to support denial of the Association's complaint, attorney conceded there was no meritorious defense. Based on the pleadings and admissions, the district court could find a Rule 11 violation.

Second, attorney argues that there was no evidence of subjective bad faith. *See generally Cherryhomes v. Vogel*, 111 N.M. 229, 804 P.2d 420 (Ct.App.1990), for a discussion of difficulties encountered by federal court with pre–1983 Federal Rule 11. We have no such difficulty here. In *Business Guides v. Chromatic Communications Enterprises*, 498 U.S. 533, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991), the United States Supreme Court adopted an objective standard for determining whether sanctions can be imposed. *Id.* 498 U.S. at ——, 111 S.Ct. at 924, 112 L.Ed.2d at 1147. The New Mexico rule lacks the phrase "after reasonable inquiry" emphasized in *Business Guides*, and thus we do not interpret the New Mexico rule the same way.[1] Although we agree with attorney that the requirement in our Rule 11, that the violation must be determined to be *"willful"* before a sanction may be imposed, requires subjective evidence of willfulness, we hold attorney's own voluntary admission as to why he denied the complaint suffices to show a willful violation.

Attorneys should not use pleadings to gain unfair tactical advantages or to delay the process. As the district court noted, by denying the allegations when Mitchell told attorney she owed more than the amount of the note and not inquiring of her as to whether she had made any payment, attorney put the Association to the expense of needlessly having to obtain an affidavit, file a motion, and argue for a summary judgment. In the case at bar, what appears improper about the conduct of attorney is not that he lacked sufficient knowledge to support the allegations of the complaint, but that he actually possessed legal and factual knowledge contrary to the allegations. *See Rivera v. Brazos Lodge Corp.* Additionally, the proceeding took up valuable court time. While it would not have corrected the pleading, the district court's comments suggest sanctions might have been avoided had attorney simply alerted the district court in advance of the hearing that Mitchell had no defense and requested the hearing on summary judgment be canceled.

If attorney's claim is that the district court failed to make a specific finding of bad faith, we reject that contention as well since the district court's finding, conclusions of law and order imposing sanctions cover the essential factors, and we conclude that attorney willfully violated Rule 11.

While we have answered attorney's specific challenges to the district court's findings, we note that the standard of review for a Rule 11 sanction is for abuse of discretion, not substantiality of the evidence. *Cherryhomes v. Vogel.* Of course, a discretionary act is usually based on facts. We were benefitted here with findings and conclusions, as required in Rule 11

1. As previously observed by this court in *Cherryhomes*, the language of New Mexico's version of Rule 11 differs from the wording of the present federal rule. Among other things, New Mexico provides, *"For a willful violation of this rule an attorney or party may be subjected to appropriate disciplinary or other action. Similar action may be taken if scandalous or indecent matter is inserted."* (Emphasis added). The italicized language does not appear in the present federal rule.

determinations. *See Rivera v. Brazos Lodge Corp.* Under the proper standard, we find no abuse of discretion.

Conclusion.

The district court's imposition of a $250 fine against attorney for the Rule 11 violation is affirmed.

IT IS SO ORDERED.

DONNELLY and MINZNER, JJ., concur.

829 P.2d 660

A.C., Petitioner–Appellant,

v.

C.B., Respondent–Appellee.

No. 12335.

Court of Appeals of New Mexico.

Jan. 30, 1992.

Certiorari Denied March 24, 1992.

Ruth B. Cohen, Albuquerque, for petitioner-appellant.

Janice D. Paster, Albuquerque, for respondent-appellee.

Gerald R. Bloomfield, Albuquerque, for amicus curiae Legal Research Co., Ltd.

Paula L. Ettelbrick, Marian Rosenberg, Lambda Legal Defense and Educ. Fund, Inc., New York City, Maria Gil de la Madrid, National Center for Lesbian Rights, San Francisco, Cal., Elizabeth Stacy Vencill, Albuquerque, for amici curiae LLDEF & NCLR.

Phillip B. Davis, Civil Liberties Union of New Mexico, Albuquerque, William B. Rubenstein, American Civil Liberties Union Foundation, New York City, Ann C. Scales, Cooperating Atty., Albuquerque, for amici curiae CLUNM & ACLUF.

OPINION

BIVINS, Judge.

Petitioner-appellant's motion to exclude the names of the parties and the child from any opinion written in this matter is granted. The opinion in this case shall be captioned A.C. v. C.B. The parties shall be referred to as the biological mother and Petitioner. The child who is the subject of these proceedings shall be referred to as the child without further identification.

Petitioner appeals from an order of the district court denying her motion under Rule 60(B)(3) of the New Mexico Rules of Civil Procedure, SCRA 1986, 1–060(B)(3), to reopen the judgment of the district court, or, in the alternative, to enforce an oral settlement agreement between the parties. We reverse and remand to the district court for further proceedings consistent with this opinion.

I. *BACKGROUND*

Petitioner's verified Rule 60(B)(3) motion provides most of the factual background giving rise to this litigation. Petitioner, a woman, and Respondent, the biological mother, lived together for approximately fourteen years before separating on July 1, 1987. About seven years earlier, in 1980, the parties, according to Petitioner, entered into an oral agreement to raise a child as coparents. In September of 1980, the biological mother gave birth to the child, conceived through artificial insemination. Petitioner alleges that during the pregnancy she attended Lamaze classes, and after the birth she shared the responsibility of caring for the child. Petitioner also alleges that she spent the majority of her evenings and weekends with the child until the separation. Petitioner and the biological mother together set up a trust fund for the child's education, as well as a savings account and life insurance policy for the child's benefit. Petitioner alleges that she has shared the financial responsibility for raising the child.

Petitioner's motion to reopen the judgment alleges that the biological mother in her will named Petitioner as guardian and trustee of the child. Petitioner claims that the original coparenting agreement was renewed by the parties before their separation and honored until March 1988, the date Petitioner claims that the agreement was breached by severe restrictions on her claimed rights to visit and have contact with the child. Petitioner claims her offers of financial support for the child were refused.

As a result, Petitioner filed this action in October 1988, seeking joint legal custody and time-sharing. In March 1989, the court entered an order dismissing the petition with prejudice. The order was signed by the district judge and the attorneys for each party. The order states that "[t]he parties have entered into a settlement agreement providing for dismissal for this action with prejudice." About five months later, Petitioner filed a verified petition to set aside or reopen or, in the alternative, to enforce the settlement agreement under Rule 60(B)(3). The motion to reopen the judgment alleges that the matter was referred to the district court clinic which made certain recommendations. Petitioner alleges that, as a result of those recommendations, the parties entered into an oral agreement covering time-sharing, parenting classes for Petitioner, therapy, and

mediation. According to Petitioner, counsel for the biological mother refused to reduce that agreement to writing. Petitioner claims that agreement formed the basis for the dismissal of her action with prejudice on March 23, 1989.

In response to the motion to reopen the judgment, the biological mother moved for summary judgment. The summary judgment motion sets up a number of legal defenses which challenge Petitioner's standing to claim any rights to the child. Attached to her motion for summary judgment is the biological mother's affidavit which denies the existence of any agreement made at any time regarding the child. The biological mother asserts her fitness as a parent and states that no legal relationship existed between the child and Petitioner that would confer any "rights, privileges, duties and obligations" on the latter.

Petitioner responded to the biological mother's motion for summary judgment asserting the existence of issues of material fact, i.e., whether agreements between the parties had been made, and whether Petitioner was a de facto parent. Petitioner attached her affidavit to the response which reasserts the agreements and provisions made regarding the child. Petitioner also attached a copy of the biological mother's will naming Petitioner as guardian and trustee of the child.

II. *FINDINGS OF THE DISTRICT COURT*

Following a hearing, at which no testimony was taken, the district court entered an order granting the biological mother's motion for summary judgment and affirming the earlier dismissal with prejudice. The minute order includes findings of fact. Those findings indicate that the district court considered the matter disposable on legal grounds without the need for an evidentiary hearing. The district court found that no valid legal marriage existed between the parties, there was no adoption of the child by Petitioner, and thus, Petitioner had no standing or enforceable rights. The district court recited the earlier dismissal and found Petitioner had not met her burden under Rule 60(B) to reopen the judgment. While determining that it need not address whether or not the parties entered into an enforceable contract, the district court concluded that, even "if some form of contractual relationship existed between the parties, it [was] not in the best interest of the minor child" and, therefore, not enforceable. The district court also upheld the constitutionality of New Mexico statutes that bear on the questions presented. This appeal followed.

III. *DISCUSSION*

A. *General*

Although Petitioner's response to the biological mother's motion for summary judgment raised factual issues regarding the agreements, we read the district court's minute order as resolving the issues on legal grounds.

The posture of this case presents a unique situation. A determination of Petitioner's rights depends on her first, establishing a basis for setting aside the order of dismissal and, assuming she is successful in doing so, second, establishing a basis for either shared custody or visitation. We are unable to review the merits of Petitioner's claims of entitlement to custody and visitation, or for that matter the merits of her Rule 60(B) motion, without factual determinations. Understandably, the district court, having concluded as a matter of law that no basis existed to set aside the dismissal, saw no need to decide factual questions.

While we refrain from making a definitive decision regarding Petitioner's claims at this time, we hold that she made a prima facie showing which, if proved, would justify setting aside the dismissal and authorize consideration of her right to continue her relationship with the child. Thus, on that basis, we reverse and remand.

We first address Petitioner's Rule 60(B) motion. Under that discussion, we decide first whether the district court had jurisdiction to entertain the motion and, second, whether Petitioner made a prima facie showing that would allow the district court

to set aside the dismissal. Next, we consider the district court's determination that enforcement of the alleged settlement agreement would be contrary to the best interests of the child. Finally, we discuss Petitioner's request for alternative relief should the district court decline to enforce the alleged settlement agreement.

B. *Petitioner's Rule 60(B) Motion*

1. *Jurisdiction*

The biological mother argues that when the parties stipulated to a dismissal of the case with prejudice, the district court lost jurisdiction over the parties and the subject matter and could not thereafter decide any matters presented or enforce alleged stipulations of the parties. We recognize that the district court's control over a final judgment exists for a limited period of time. NMSA 1978, § 39-1-1 (Repl.Pamp.1991); SCRA 1986, 12-201. Section 39-1-1, however, has never been viewed as depriving the district court of jurisdiction to consider and resolve a subsequent timely motion under Rule 60(B). *Wooley v. Wicker,* 75 N.M. 241, 244-45, 403 P.2d 685, 687-88 (1965) (decided under NMSA 1953, § 21-9-1, the predecessor to NMSA 1978, § 39-1-1). In fact, the purpose of Rule 60 is "to provide a simplified method for correcting errors in final judgments" and to balance the competing principles of finality and relief from inequitable judgments. *Phelps Dodge Corp. v. Guerra,* 92 N.M. 47, 50, 582 P.2d 819, 822 (1978). We hold, therefore, that the district court had jurisdiction to consider the Rule 60(B) motion.

2. *Denial of Motion*

We turn next to the question of whether the district court properly denied the motion. The motion alleged, in essence, that the biological mother misrepresented her intention to abide by the settlement agreement once the case was dismissed with prejudice. We believe this allegation amounts to a prima facie basis for relief under Rule 60(B)(3). *Unser v. Unser,* 86 N.M. 648, 653-54, 526 P.2d 790, 795-96 (1974) (fraud under Rule 60(B) requires "a misrepresentation of a fact, known to be untrue by the maker, and made with an intent to deceive and to induce the other party to act upon it with the other party relying upon it to his injury or detriment"); *Rios v. Danuser Mach. Co.,* 110 N.M. 87, 93, 792 P.2d 419, 425 (Ct.App.) (relief under Rule 60(B)(3) is available where court determines that misconduct of the opposing party substantially impeded movant's full and fair preparation of its case), *cert. quashed,* 110 N.M. 72, 792 P.2d 49 (1990). Thus, Petitioner's allegations of a settlement agreement and fraud give her standing to seek relief under Rule 60(B)(3).

Since Petitioner's motion to reopen the judgment is based on Rule 60(B)(3), and the parties disagree as to what, if any, stipulation or agreement was made between them before the dismissal, it will be necessary for the district court to conduct an evidentiary hearing. The burden is on Petitioner to establish an agreement with the biological mother which induced Petitioner to agree to dismissal. *Cf. Kulla v. McNulty,* 472 N.W.2d 175, 179 (Minn.Ct.App.1991) (petitioner failed to meet each statutory criterion for visitation). If the district court finds an agreement was made and finds fraud, misrepresentation, or other conduct on the part of the biological mother that induced Petitioner to agree to dismissal, the district court should then proceed to consider what rights, if any, are conferred on Petitioner by reason of any agreements made or actions taken.

C. *The District Court's Determination That Enforcement of the Settlement Agreement Was Contrary to the Best Interests of the Child*

The district court's order determined that, as a matter of law, the agreement was unenforceable because it was not in the best interests of the child. We hold that the district court could not make this determination on the record before it in this case.

This court has previously held that a parent may enter into an agreement with another person concerning the custody of a child. *See In re Adoption of Doe,* 98 N.M.

340, 346, 648 P.2d 798, 804 (Ct.App.) (agreement between natural mother and stepfather), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982). It is true that a parent's power in this regard is not unlimited. Thus, for example, a parent may not sell a child into peonage. *Bustamento v. Analla,* 1 N.M. (Gild.) 255, 261 (1857) (court bound to set child free from improper restraint); *see also Barwin v. Reidy,* 62 N.M. 183, 196, 307 P.2d 175, 184 (1957) (sale of children constituted abandonment as a matter of law). Accordingly, agreements between parents and others concerning children are subject to judicial modification when such modification is in the best interests of the child. *In re Adoption of Doe,* 98 N.M. at 346, 648 P.2d at 804. Both parties recognize that any agreement between them concerning the child would be subject to judicial modification.

The district court's order in this case purports to determine that enforcement of the visitation provisions of the settlement agreement would, as a matter of law, be against the best interests of the child. A determination of the best interests of the child, however, must be made on the basis of evidence before the court. *See, e.g., In re Jacinta M.,* 107 N.M. 769, 771, 764 P.2d 1327, 1329 (Ct.App.1988) (finding must be supported by evidence); *Khalsa v. Khalsa,* 107 N.M. 31, 36, 751 P.2d 715, 720 (Ct.App.) (harm to child cannot be assumed but must be demonstrated), *cert. denied,* 107 N.M. 16, 751 P.2d 700 (1988); *Fitzsimmons v. Fitzsimmons,* 104 N.M. 420, 423, 722 P.2d 671, 674 (Ct.App.) (court's ruling must be supported by evidence), *cert. quashed,* 104 N.M. 378, 721 P.2d 1309 (1986). We hold that, under New Mexico law, the district court erred in concluding that this type of an agreement is unenforceable as a matter of law. *But see Sporleder v. Hermes (In re Z.J.H.),* 162 Wis.2d 1002, 471 N.W.2d 202, 211 (1991) (holding similar agreement void on public policy grounds). Whether visitation would be against the best interests of the child is a factual determination that must be made on the evidence. *See Rhinehart v. Nowlin,* 111 N.M. 319, 329–30, 805 P.2d 88, 98–99 (Ct.App.1990) (affirming district court's determination that, on the facts before the court, court-mandated visitation by a stepmother would not be in the best interests of the children due to the high degree of conflict between stepmother and the father of the children).

In addition, while the record before us does not clearly indicate the existence of a lesbian relationship between the parties during the years they lived together, to the extent it may become an issue on remand, we hold that Petitioner's sexual orientation, standing alone, is not a permissible basis for the denial of shared custody or visitation. The appellate courts of this state have repeatedly held that evidence of sexual and associational conduct may be relevant to determining the best interests of the child, but is not, by itself, sufficient to make that determination. *See, e.g., Boone v. Boone,* 90 N.M. 466, 468, 565 P.2d 337, 339 (1977) (nonmarital sexual activity); *Leszinske v. Poole,* 110 N.M. 663, 670, 798 P.2d 1049, 1056 (Ct.App.) (marriage that is void as against public policy in New Mexico), *cert. denied,* 110 N.M. 533, 797 P.2d 983 (1990); *Fitzsimmons,* 104 N.M. at 426–27, 722 P.2d at 677–78 (nonmarital sexual activity). In addition, this court has previously indicated that a person's sexual orientation does not automatically render the person unfit to have custody of children. *See, e.g., Jacinta,* 107 N.M. at 771–72, 764 P.2d at 1329–30; *In re Doe,* 88 N.M. 505, 509–10, 542 P.2d 1195, 1199–1200 (Ct.App. 1975). Other jurisdictions have held in the context of dissolution proceedings that a parent may not be denied visitation solely on the basis of sexual orientation. *See generally* Caroll J. Miller, Annotation, *Visitation Rights of Homosexual or Lesbian Parent,* 36 A.L.R.4th 997 (1985 & Supp. 1991); Wanda E. Wakefield, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent,* 6 A.L.R.4th 1297 (1981 & Supp.1991). In short, the issue before the court is not the nature of the parent's sexual activities, if any, but whether and how those activities affect the child, if in fact they do. This is a factual issue that must be considered and resolved on specific evidence concerning

the effect, if any, of the activity on the children; it cannot be resolved as a matter of law based on the perceived morality or immorality of the parent's conduct. *See Boone,* 90 N.M. at 468, 565 P.2d at 339; *Fitzsimmons,* 104 N.M. at 426–27, 722 P.2d at 677–78.

D. *Alternative Relief If Settlement Agreement Unenforceable*

Should the district court find fraud but determine that there is no enforceable settlement agreement, Petitioner asks that she be permitted to proceed with her original claim. As noted earlier, the biological mother challenges Petitioner's standing to claim any rights to the child. While guidance for the district court in this rapidly developing area of the law might be useful, we do not think it prudent to issue an advisory opinion, particularly without the benefit of the district court's findings of fact and conclusions of law. Thus, at this point in the proceedings, we consider only whether Petitioner has demonstrated a colorable claim to either shared custody or visitation.

Because the issues on appeal initially appeared to raise important questions regarding the rights of non-traditional parents, as well as other significant issues, this court invited amicus briefs. These briefs, as well as the briefs of the parties, have provided the court insight into the issues presented. *See generally* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed,* 70 Va.L.Rev. 879 (1984); Sandra R. Blair, *Jurisdiction, Standing, and Decisional Standards in Parent–Nonparent Custody Disputes—In re Marriage of Allen, 28 Wn.App. 637, 626 P.2d 16 (1981),* 58 Wash.L.Rev. 111 (1982–83); Elizabeth A. Delaney, Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child,* 43 Hastings L.J. 177 (1991); *Developments in the Law—Sexual Orientation and the Law,* 102 Harv.L.Rev. 1508, 1628–42 (1989); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian–Mother and Other Nontraditional Families,* 78 Geo.L.J. 459 (1989–90); E. Donald Shapiro & Lisa Schultz, *Single–Sex Families: The Impact of Birth Innovations upon Traditional Family Notions,* 24 J.Fam.L. 271 (1985–86); Stephanie H. Smith, *Psychological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution,* 17 J.Fam.L. 545 (1978–79); Wendy E. Lehmann, Annotation, *Award of Custody of Child Where Contest is Between Natural Parent and Stepparent,* 10 A.L.R.4th 767 (1981 & Supp.1991). One in Petitioner's shoes may be able to establish deprivation of a legally recognized right to maintain some type of continuing relationship with the child. *Cf. De Vargas Savings & Loan Ass'n v. Campbell,* 87 N.M. 469, 472, 535 P.2d 1320, 1323 (1975) (injury sufficient to confer standing not limited to economic harm). We hold, therefore, that Petitioner has made a colorable claim of standing to seek enforcement of such claimed rights. *Cf. Buness v. Gillen,* 781 P.2d 985, 988 (Alaska 1989) (non-parent with a "significant connection" to the child has standing to assert custody claim); *Nancy S. v. Michele G.,* 228 Cal.App.3d 831, 279 Cal.Rptr. 212, 215 n. 2 (1991) (rejecting earlier California opinion that lesbian lover lacked standing to seek custody and visitation). *But see In re Z.J.H.,* 471 N.W.2d at 205 (nonparent lacked standing to seek custody or visitation); *Alison D. v. Virginia M.,* 77 N.Y.2d 651, 569 N.Y.S.2d 586, 588, 572 N.E.2d 27, 29 (1991) (petitioner lacked standing because she was not a "parent" as defined by the statute).

E. *Attorney's Fees*

The biological mother asks this court to award her attorney fees for representation on appeal. This court, however, may only award attorney fees for representation on appeal if the award of such fees is authorized by statute or otherwise permitted by the appellate rules. SCRA 1986, 12–403; *Alber v. Nolle,* 98 N.M. 100, 108, 645 P.2d 456, 464 (Ct.App.1982). Biological mother cites no authority for the proposi-

tion that she is entitled to attorney fees on appeal. Accordingly, we do not consider her request. *In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (issues raised on appeal not supported by authority will not be reviewed).

IV. *CONCLUSION*

We wish to express our appreciation to amici, the Legal Research Co., Ltd., Lambda Legal Defense and Education Fund, Inc., the National Center for Lesbian Rights, the Civil Liberties Union of New Mexico, and the American Civil Liberties Union Foundation, for their excellent briefs.

We remand this action to the district court for further proceedings consistent with this opinion. The district court should first determine the merits of Petitioner's Rule 60(B)(3) motion. If granted, the court must then decide the terms of the settlement agreement made between the parties. Should the district court find no valid or enforceable agreement but also find that Petitioner was induced into dismissing her claim thinking there was such an agreement, the court should then determine what, if any, rights Petitioner may have to shared custody or visitation either under the settlement agreement or Petitioner's original claim. The court must, of course, consider the best interests of the child. No costs are awarded.

IT IS SO ORDERED.

MINZNER and BLACK, JJ., concur.

829 P.2d 946

CONTINENTAL INN OF ALBUQUERQUE, INC., Petitioner–Appellant,

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT, Respondent–Appellee.

No. 12658.

Court of Appeals of New Mexico.

March 17, 1992.

Mary E. McDonald, Perry E. Bendicksen, III, Sutin, Thayer & Browne, P.C., Santa Fe, for petitioner-appellant.

Tom Udall, Atty. Gen., Carolyn A. Wolf, Sp. Asst. Atty. Gen., Frank D. Katz, Sp. Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

FLORES, Judge.

Continental Inn of Albuquerque, Inc. (taxpayer) appeals from the decision and order of the New Mexico Taxation and Revenue Department (Department), pursuant to NMSA 1978, § 7-1-25 (Repl.Pamp.1990). The Department's decision and order, in material part, upheld the assessment of compensating tax on the value of construction materials and services purchased by taxpayer from various contractors and materialmen (subcontractors). Taxpayer's sole issue on appeal is whether the Department's conclusion that taxpayer owes compensating tax on the value of the property and services purchased from persons to whom nontaxable transaction certificates were issued, is in accordance with law. We affirm.

FACTS

Taxpayer is a New Mexico corporation formed to construct, own, and operate a hotel in Albuquerque. In 1984 and 1985 taxpayer built the Continental Inn of Albuquerque. Taxpayer, acting as the prime contractor, entered into separate contracts with various subcontractors for the purchase of construction materials and services to be used in the construction of a hotel. Each contract, prepared by taxpayer's attorney, contains a provision stating, in part: "The [subcontractor] shall pay all sales, consumer, use and other similar taxes for the [w]ork or portions thereof provided by the [subcontractor]." Mr. Gagosian, taxpayer's corporate officer in charge of overseeing the construction of the hotel, testified that such language was included in each contract in order to protect taxpayer from any state tax liability for the construction of the hotel by advising subcontractors that they were liable for the payment of state taxes. Mr. Gagosian further testified that the language was also included in each contract so that taxpayer would not have to research, or hire a tax attorney to advise them on, the tax laws of each state.

Notwithstanding the contractual provision, taxpayer issued numerous nontaxable transaction certificates (NTTCs) to subcontractors involved in providing materials and services for the construction of the hotel. Mr. Gagosian testified that Ms. Connie Swanson, taxpayer's bookkeeping employee, had received various telephone calls, during the construction phase of the project, from subcontractors requesting NTTCs. Mr. Gagosian further testified that Ms. Swanson applied for and procured NTTCs from the Department and submitted them to Mr. Gagosian stating that the NTTCs should be completed. Without making further inquiry, the NTTCs were completed and signed by Mr. Gagosian. Mr. Gagosian testified that he did not intend that the delivery of the NTTCs to subcontractors would act to shift the state tax liability from the subcontractors back to taxpayer. Mr. Gagosian testified that none of the subcontractors reduced their contract prices as a result of receiving NTTCs from taxpayer.

In April 1988, the Department assessed compensating tax plus interest and penalties against taxpayer, pursuant to NMSA 1978, Section 7-9-7(A)(3) (Repl.Pamp.1983), for the reporting period August 1, 1984, through September 30, 1987. Taxpayer protested the assessment.

COMPENSATING TAX

Taxpayer first argues that it is not subject to compensating tax. The Gross Receipts and Compensating Tax Act (Act), NMSA 1978, Sections 7-9-1 to -81 (Repl.Pamp.1983), imposes a compensating tax on the person using property or services rendered in New Mexico for the privilege of using such property or services. § 7-9-7. Compensating tax is imposed on the buyer where property or services were acquired as the result of a transaction which was not initially subject to the gross

receipts tax, but because of the buyer's subsequent use of such property or services, should have been subject to the gross receipts tax. § 7-9-7(A)(3). In this case, taxpayer is the "buyer" of such property and services.

Taxpayer argues that, pursuant to Section 7-9-4, subcontractors owe gross receipts tax on their receipts from selling the construction materials and services to taxpayer. The Act imposes gross receipts tax on the seller for the privilege of engaging in business in New Mexico. § 7-9-4. In this case, subcontractors are the "sellers" of such property and services. Taxpayer argues that gross receipts tax was initially applicable to subcontractors for the sale of materials and services at the time of the sales transaction. Therefore, taxpayer argues, because Section 7-9-7 applies only where the taxpayer's acquisition of property and services was *not* initially subject to the gross receipts tax, the compensating tax was improperly imposed on taxpayer. We do not agree.

The Act provides for a deduction from gross receipts tax by the seller of construction materials and construction services who sells to a person engaged in the construction business. §§ 7-9-51, -52. In order to take a deduction from gross receipts tax, the person engaged in the construction business must deliver a NTTC to the seller. *Id.* The Department contends, and we agree, that Section 7-9-7 is designed to impose compensating tax on transactions such as the one at hand which initially would have been subject to the gross receipts tax were it not for the delivery of the NTTCs by the buyer of the materials or services pursuant to Section 7-9-51 or 7-9-52. Section 7-9-51 provides, in part:

> B. The buyer delivering the nontaxable transaction certificate must incorporate the tangible personal property as:
>
> (1) an ingredient or component part of a construction project which is subject to the gross receipts tax upon its completion or upon the completion of the overall construction project of which it is a part; or
>
> (2) an ingredient or component part of a construction project which is subject to the gross receipts tax upon the sale in the ordinary course of business of the real property upon which it was constructed.

Similarly, Section 7-9-52 provides, in part:

> B. The buyer delivering the nontaxable transaction certificate must have the construction services performed upon:
>
> (1) a construction project which is subject to the gross receipts tax upon its completion or upon the completion of the overall construction project of which it is a part; or
>
> (2) a construction project which is subject to the gross receipts tax upon the sale in the ordinary course of business of the real property upon which it was constructed.

The Department argues that the effect of Sections 7-9-51 and 7-9-52 is to avoid the pyramiding of gross receipts tax on construction projects by allowing the prime contractor to purchase construction materials and subcontract construction labor, tax free, so long as the construction project is subject to gross receipts tax upon the construction project's completion or sale in the ordinary course of business by the prime contractor. In this regard, taxpayer initially argues that the subcontractors would only be entitled to the deductions if the subcontractors had sold their construction materials and services to a buyer "engaged in the construction business." We address whether taxpayer is "engaged in the construction business." Taxpayer admits in its brief in chief that it was formed to "construct" a hotel in New Mexico. The record reflects that taxpayer did "construct" a hotel in New Mexico. Additionally, there is evidence that taxpayer held a contractor's license and held itself out to the public as a contractor. There is sufficient evidence in the record to conclude that taxpayer was "engaged in the construction business."

Upon receipt of the NTTCs, the subcontractors were entitled to take a deduction from the gross receipts tax pursuant to Section 7-9-51 or 7-9-52. Taxpayer ad-

ditionally argues that the subcontractors would only be entitled to a deduction pursuant to Section 7–9–51 or 7–9–52 if taxpayer delivered NTTCs to subcontractors in order to incorporate the construction materials or services in a construction project which was subject to the gross receipts tax upon its completion or upon sale of the construction project in the "ordinary course of business." Taxpayer argues that it never intended to be subject to gross receipts tax either upon the completion of the project, because of its contractual provision with subcontractors, or upon its sale, because it never intended to construct the hotel in order to sell it "in the ordinary course of business."

The Secretary of the Department has the authority to issue regulations concerning the use of NTTCs. *See* NMSA 1978, § 7–1–5(A) (Repl.Pamp.1983). The Department has adopted a regulation subjecting the buyer who uses NTTCs to compensating tax. G.R. Regulation 7:6 states, in part:

> A person engaged in the construction business who purchases construction materials and construction services using [NTTCs] provided by the department for use under Sections 7–9–51 and 7–9–52 is liable for the compensating tax on the value of the materials and services purchased at the time when the construction project is initially leased or otherwise occupied prior to the sale.

Because the use of the NTTCs, not the taking of the deduction, subjects taxpayer to compensating tax, we find taxpayer's argument in this regard to be without merit.

Taxpayer further contends that the contracts with the subcontractors prevent the application of compensating tax on taxpayer because the contractual provision provided that the liability of paying all sales, consumer, use, and other similar taxes was on the subcontractors. However, contracts between a taxpayer and a third party regarding the payment of taxes cannot shift the taxpayer's legal incidence of the tax as between the state and the taxpayer. *See First Nat'l Bank v. Commissioner of Revenue,* 80 N.M. 699, 460 P.2d 64 (Ct.App.1969), *appeal dismissed,* 397 U.S. 661, 90 S.Ct. 1407, 25 L.Ed.2d 643 (1970).

GOOD FAITH

Taxpayer argues that the subcontractors' possession of the NTTCs is not conclusive on the application of the deductions available pursuant to Sections 7–9–51 and 7–9–52. We do not agree. First, taxpayer contends that the NTTCs were erroneously issued by taxpayer. The deduction from gross receipts pursuant to Sections 7–9–51 and 7–9–52 is not conditioned upon proper issuance of the NTTCs by the buyer. The determination of whether a NTTC has been properly issued is a matter between the Department and the buyer. *Leaco Rural Tel. Coop., Inc. v. Bureau of Revenue,* 86 N.M. 629, 526 P.2d 426 (Ct. App.1974). In *Leaco,* this court stated that NMSA 1953, Repl.Vol. 10 (1961), § 72–16A–13(A) (Supp.1973) (predecessor to NMSA 1978, § 7–9–43(A) (Repl.Pamp.1983)), explicitly protects a seller holding a NTTC in compliance with the statutory provisions of that section. *Leaco,* 86 N.M. at 632, 526 P.2d at 429.

Section 7–9–43(A) provides, in pertinent part:

> When the seller * * * accepts a [NTTC] within the required time and in good faith that the buyer * * * will employ the property or service transferred in a nontaxable manner, the properly executed [NTTC] shall be conclusive evidence, and the only material evidence, that the proceeds from the transaction are deductible from the seller's * * * gross receipts.

Taxpayer does not contend that the NTTCs were untimely accepted or that the NTTCs were improperly executed, but rather, taxpayer argues that the subcontractors did not accept the NTTCs in good faith as required pursuant to Section 7–9–43(A) and thus, could not avail themselves of the deductions pursuant to Sections 7–9–51 and 7–9–52. Taxpayer argues that the contractual provision, which shifted all state tax liability to subcontractors, placed the subcontractors on notice that payment of

gross receipts tax would be the obligation of the subcontractors. However, the timely delivery of a NTTC from the buyer to the seller conveys a message to the seller that the use of the NTTCs is such that the seller is entitled to deductions under Section 7–9–51 or Section 7–9–52. This court, in *Gas Co. v. O'Cheskey,* 94 N.M. 630, 632, 614 P.2d 547, 549 (Ct.App.1980), stated: "The issuance of a '[NTTC]' does not operate to transform an otherwise taxable transaction into a nontaxable transaction. It represents a statement by the purchaser of goods that its use is such that the seller is entitled to a *deduction* from its taxable receipts." Here, when taxpayer issued NTTCs to the subcontractors, taxpayer, in, essence, represented to the subcontractors that the use of the NTTCs was such that the subcontractors were entitled to deductions from gross receipts tax. Accordingly, we do not agree that the NTTCs were erroneously issued or that the statutory provisions of Section 7–9–43(A) were not met.

CONCLUSION

For the foregoing reasons, we affirm the decision and order of the Department. No costs are awarded.

IT IS SO ORDERED.

ALARID, C.J., and BLACK, J., concur.

830 P.2d 145

TORRANCE COUNTY MENTAL HEALTH PROGRAM, INC., Plaintiff–Appellee,

v.

NEW MEXICO HEALTH AND ENVIRONMENT DEPARTMENT, Defendant–Appellant.

No. 19272.

Supreme Court of New Mexico.

April 13, 1992.

Rehearing Denied May 15, 1992.

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OPINION

MONTGOMERY, Justice.

In this case we answer the question whether punitive damages may be recovered from a governmental entity in an action for breach of contract. We also consider two other damage issues arising under the particular facts in the case and the evidence at trial: whether damages for the plaintiff corporation's "loss in value" caused by the defendant's breach of contract were properly awarded, and whether the plaintiff could recover damages for its employees' efforts in winding up the contract after defendant terminated it.

The first issue is obviously the major one on this appeal. On that issue, we hold that the state's policy of not permitting assessment of punitive damages in tort cases, as reflected in our Tort Claims Act, applies also, despite legislative silence on the issue, to breach-of-contract cases. On the other two issues, we hold that, while damages for loss in value might in a proper case be recovered from the breaching party, the evidence in this case did not warrant submission of the claim to the jury; and that the jury properly awarded damages for the employees' efforts in winding up the contract. We therefore reverse the judgment as to all but the winding-up damages and remand with instructions to enter a new judgment.

I.

Plaintiff Torrance County Mental Health Program, Inc. (TCMHP), is a nonprofit corporation organized to provide mental health and related counseling services in Torrance County, New Mexico. In 1978, defendant New Mexico Health and Environment Department (HED) first contracted with TCMHP to provide specified mental health counseling services in Torrance County. After a series of annual contract renewals, the parties executed a contract for the fiscal year beginning July 1, 1981, and in August of that year amended the contract to authorize TCMHP to provide expanded service to residents of adjacent Valencia County. The contract sum payable to TCMHP in the amended contract was $161,468 for services in both counties.

The contract allowed HED to conduct site visits at TCMHP's offices to monitor the contractor's performance. On September 21–23, 1981, the program manager of HED's Mental Health Bureau, Alfredo Santistevan, conducted a site visit at TCMHP's Torrance and Valencia County offices. He determined, according to HED's version of the facts, that TCMHP had been providing treatment that did not qualify as mental health treatment under the contract and that was therefore unauthorized. He summarized his findings in a report, based upon which HED asserted that TCMHP was guilty of "serious misuse of funds," justifying termination of the contract for cause. The contract provided for termination with or without cause. Termination without cause required thirty days written notice; termination for cause permitted termination without prior notice, with "cause" defined as "client abuse, malpractice, fraud, embezzlement or other serious misuse of funds." Based on Santistevan's site report and HED's evaluation of the program, HED terminated the contract effective December 15, 1981, and directed TCMHP to engage in post-termination activities.[1]

TCMHP's version of the facts, which of course we view in the light most favorable to support the jury's verdict, was that HED terminated the contract as the result of a conspiracy among Santistevan, Robert Garcia (then director of the Behavioral Health Services Division at HED), possibly other

1. The "termination management" provision of the contract required compliance with all directives of HED regarding performance of work in the event of termination.

HED officials, and Sam Vigil. Vigil had been hired by TCMHP's executive director, Madeline Brito–Diaz, and had, according to TCMHP, insinuated himself into a position of power at TCMHP and subsequently assumed executive director-like duties at TCMHP's post-August 1981 program in Valencia County, Valencia Counseling Services Program ("Valencia Counseling"). Valencia Counseling was incorporated with a separate board of directors sometime after HED terminated TCMHP's contract and was subsequently expanded to provide mental-health and related services in three counties. By the time of trial in 1990, it had acquired total assets of $1.5 million. Vigil served as its executive director during all or most of this period.

According to TCMHP (although this is impossible to know, for reasons we shall shortly describe), Vigil conspired and connived with Santistevan and Garcia and others to achieve a position of dominance in the Valencia County program, and HED's termination of the contract occurred as part of the scheme to transfer control of both the Valencia and Torrance County programs to Vigil and withdraw them from TCMHP's management.

TCMHP brought this action against HED in September 1982. As originally filed, the suit sought relief by way of mandamus, injunction, and damages for breach of contract, fraud, and civil rights violations. Nine individuals (consisting of various employees, clients, and members of the board of directors of TCMHP) joined TCMHP as plaintiffs, and three individuals (including Santistevan, Garcia, and George Goldstein, then Secretary of HED) were named along with HED as defendants. In 1985, TCMHP filed an amended complaint, seeking damages for breach of contract, fraudulent and negligent misrepresentation, infliction of emotional distress, and violation of civil rights. Shortly before trial, the claims on behalf of all individual plaintiffs and the claims against all individual defendants were disposed of, either by settlement or by rulings on summary judgment, so that there remained for trial only the claim by TCMHP against HED for breach of contract.

After having been assigned to six different judges, the case was finally ready, more or less, for trial in the spring of 1990. On March 20 of that year, the court entered a pretrial order, specifying, in more detail than had the amended complaint, the nature of the claims of the then plaintiffs (which still consisted of the individuals in addition to TCMHP). The pretrial order, however, did not particularize the nature or extent of the plaintiffs' alleged damages, except that TCMHP's contract claim was asserted to be for "contract damages for work performed from December 15, 1981 through the end of the contract year, June 30, 1982 * * *."

The individual plaintiffs were dismissed as parties to the action following entry of the pretrial order and before commencement of the trial. On the morning of the first day of trial, TCMHP moved to amend the pretrial order to assert claims for damages which, TCMHP's new counsel alleged, had been overlooked by its former counsel in preparing the pretrial order, although new counsel maintained they had been asserted in the amended complaint.[2] The claims sought to be included in the pretrial order by TCMHP's motion to amend were a claim for punitive damages "in the approximate amount of $100,000," a claim for TCMHP's destruction as an operating entity in the mental health field "in the approximate amount of $100,000," and a claim for carrying out its obligations after termination of the contract "in the approximate amount of $26,640.00." The court granted the motion at the beginning of the second day of trial.

The case went to the jury after four days of trial. As to HED's alleged breach of contract, the court instructed the jury simply that TCMHP claimed that HED had breached the contract "by terminating it

2. The amended complaint sought punitive damages, although this relief was related to plaintiffs' claims (in 1985) for misrepresentation, intentional infliction of emotional distress, violation of civil rights, and other assorted torts. The amended complaint asserted no claim for TCMHP's alleged loss in value as a result of HED's breach of contract.

'for serious misuse of funds' which was not true," that HED denied it breached the contract and alleged it had good cause for terminating the contract, and that each party had the burden of proving its claim or defense. Thus, on the record we are called on to review, we know that the jury (assuming it followed the court's instructions) found that HED had breached the contract by terminating it for a reason that was not true and that HED did not have good cause for the termination. We do not know whether or to what extent the jury believed TCMHP's elaborate conspiracy theory—although the size of the punitive damage award, $1.5 million, suggests that the jury gave considerable credence to TCMHP's argument that HED had performed a "hatchet job" and had imposed a "death penalty" on TCMHP, for which it should be made to pay. The court did instruct the jury that it was a breach of contractual duty for a party to act in bad faith—*i.e.*, not to act "honestly under the surrounding circumstances and in accordance with reasonable standards of fair dealing." The court further instructed the jury that it could award punitive damages if it found that HED's acts were reckless or grossly negligent or done in bad faith. The jury returned its verdict in favor of TCMHP, awarding punitive damages of $1,500,000; loss of the corporation's pecuniary value in the amount of $250,000; loss of profits of $0; and damages for reimbursement of five former employees or board members aggregating $27,000 for their services in winding up the contract ("termination management" damages)—for a total award of $1,777,000.

On appeal, HED asserts that the trial court erred: (1) in amending the pretrial order to permit TCMHP to raise new damage claims not previously asserted; (2) and (3) in submitting the claims for compensatory and punitive damages to the jury; and (4) in making erroneous rulings during the trial and giving the jury erroneous instructions. In light of our rulings on what we consider to be the dispositive issues on the appeal—the recoverability of punitive damages and the sufficiency of the evidence supporting the compensatory damage claims—we need not reach (except tangentially in connection with the claim for termination management damages) the issues of whether the trial court abused its discretion in amending the pretrial order at the beginning of the trial and whether the court erred in the various ways claimed in HED's catch-all argument under its fourth point of error. The damages issues are the critical ones on this appeal, because HED does not seriously contest the propriety of the jury's determination that it breached the contract. One sentence in its brief in chief asserts that this determination was not supported by substantial evidence, but the assertion is unaccompanied by transcript references or argument, and we take it as virtually conceded that the jury permissibly determined that HED had improperly terminated the contract. Whether punitive damages are recoverable for this breach, and what compensatory damages could be awarded on the evidence submitted to the jury, constitute the controlling issues on this appeal. We turn now to those issues.

II.

Citing *Brown v. Village of Deming*, 56 N.M. 302, 243 P.2d 609 (1952), and *Rascoe v. Town of Farmington*, 62 N.M. 51, 304 P.2d 575 (1956), HED contends that the law in New Mexico does not permit an award of punitive damages against a governmental entity absent a statute expressly authorizing such an award. In *Brown*, we said:

> It is the general rule, supported by the great weight of authority, that absent a statute so providing, exemplary or punitive damages may not be awarded against a municipality. The reason for the rule is that such damages are awarded by way of punishment of the guilty party, and to grant against a municipality would be to penalize the taxpayers who had no part in the commission of the tort. We do not have a statute authorizing such damages, and believing the majority rule to be sound will follow it.

56 N.M. at 316, 243 P.2d at 618 (citations omitted).

In *Rascoe,* we cited *Brown* as support for the following statement: "Exemplary damages ordinarily are not allowable against a municipality in the absence of a statute so authorizing and we have none." 62 N.M. at 55, 304 P.2d at 577.

TCMHP, assisted by an excellent brief filed by the New Mexico Trial Lawyers Association as amicus curiae, responds, first, that these cases were actions in tort against a municipality, not actions for breach of contract against the state, and, more importantly, to the extent they were based on the theory of sovereign immunity, were overruled in *Hicks v. State,* 88 N.M. 588, 544 P.2d 1153 (1975). Neither *Brown* nor *Rascoe* referred to the doctrine of sovereign immunity, but we assume for purposes of discussion that the theoretical underpinning for the proposition that a governmental entity is not liable for punitive damages was the concept of sovereign immunity. The holding in *Hicks,* of course, was that the common law defense of sovereign immunity for claims in *tort* against the state would no longer (absent statutory authorization) be available, but we agree with TCMHP that the case generally abolished the common law doctrine of sovereign immunity in all its ramifications, whether in tort or contract or otherwise, except as implemented by statute or as might otherwise be interposed by judicial decision for sound policy reasons.

Nevertheless, we cannot agree with TCMHP that *Hicks*'s sweeping abolition of sovereign immunity carried away all defenses of governmental entities, based on their role as state-created entities, regardless of the nature of the claims asserted or the relief sought. *See, e.g., Hydro Conduit Corp. v. Kemble,* 110 N.M. 173, 179, 793 P.2d 855, 861 (1990) (claim against state for restitution, based on unjust enrichment, barred by sovereign immunity as reinstated by NMSA 1978, § 37-1-23).

In *Hydro Conduit,* we remarked: "[T]he common law now recognizes a constitutionally valid statutory imposition of sovereign immunity, and such immunity must be honored by the courts where the legislature has so mandated." 110 N.M. at 177-78 n. 2, 793 P.2d at 859-60 n. 2. TCMHP and the Trial Lawyers insist that the legislature has not imposed sovereign immunity for punitive damages in breach-of-contract actions. They point out that, on the contrary, Section 37-1-23 (Repl.Pamp.1990)—which grants immunity to the state in actions based on contract, except for actions based on a valid written contract—is completely silent on the question of the state's liability or nonliability for punitive damages in such actions. This contrasts rather starkly with the express grant of immunity to the state from liability for punitive damages in an action for a tort for which immunity has been waived under the Tort Claims Act. *See* NMSA 1978, § 41-4-19(B) (Repl.Pamp.1989).[3] This, according to TCMHP and the Trial Lawyers, demonstrates either or both of two propositions: First, that the legislature, by its silence on punitive damages when it reinstated sovereign immunity for actions in contract (except where based on valid written contracts), expressly intended not to waive immunity for punitive damages in such actions; second, that the "common law" as it exists after our abolition in *Hicks* of the doctrine of sovereign immunity dictates that such liability may be imposed when the state breaches a contract, in the same way that any other party may be held liable for punitive damages when that party's breach is malicious, willful, reckless, wanton, grossly negligent, fraudulent, or in bad faith. *See, e.g., Romero v. Mervyn's,* 109 N.M. 249, 255, 784 P.2d 992, 998 (1989); SCRA 1986, 13-1827 (Repl.Pamp.1991) (Uniform Jury Instruction on punitive damages).

As for the first proposition, the Trial Lawyers' analysis, despite its excellence, is somewhat self-contradictory. Amicus clearly relies on this proposition (that the legislature intended to waive immunity for punitive damages in contract actions), saying: "Under this cardinal principle of statu-

3. Section 41-4-19(B) provides: "No judgment against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act shall include an award for exemplary or punitive damages or for interest prior to judgment."

tory construction [that where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed, citing *Richerson v. Jones,* 551 F.2d 918, 928 (3d Cir.1977)], the *Legislature's intent* to subject the State to common law rules of damages in common law contract actions to which statutory immunity was waived could hardly have been more clearly signalled." (Emphasis added.) And again: "Until the Legislature amends the statute to bar punitive damages in contract actions, * * * this Court should honor the *Legislative determination* that, unlike tort cases, the determination of the damages available in contract actions against the state shall be controlled by the same principles applicable to all other persons who breach contracts in New Mexico." (Emphasis added.)

And yet the Trial Lawyers' brief cites and even relies on a chapter by Professor Laurence H. Tribe, entitled "Construing the Sounds of Congressional and Constitutional Silence," in *Constitutional Choices* 29–44 (1985), for the proposition that giving positive legal effect to bare legislative silences is to be assiduously avoided because "insofar as a law's claim to obedience hinges on that law's *promulgation* pursuant to agreed-upon processes for the making of laws * * * those processes do not include *failing* to enact a legal measure." *Id.* at 30.

We agree with Professor Tribe that our legislature's silence on punitive damages in Section 37–1–23 cannot be read as expressing an intention to waive immunity for punitive damages in contract actions, even though in the same act (1976 N.M. Laws, Chapter 58 (2d Session)) the legislature, dealing with the major subject of the legislation (tort claims against the state), expressly granted immunity for punitive damages in tort cases. The "cardinal principle" of statutory construction relied on by the Trial Lawyers is just that—a principle to assist in determining legislative intent when the intent is otherwise unclear. We find no intent one way or the other on the subject of punitive damages in contract actions. Whether by legislative drafting oversight or otherwise, the legislature simply failed to express its will on this subject.

On the second of TCMHP and the Trial Lawyers' two propositions—that the common law since *Hicks* authorizes imposition of punitive damages against the state in the same way that other parties breaching their contracts may be held liable for such damages—we cannot find in *Hicks*'s abolition of sovereign immunity a common law mandate that the state may be assessed punitive damages in contract actions. The "common law," like the relevant statute, is silent on the subject; and the issue is open for decision by this Court, applying what we believe to be the relevant policy considerations dictating a choice for or against the imposition of such liability.

The term "common law" has two meanings—a technical one, with historical and statutory roots; and a more general, popular meaning—a shorthand expression denoting the courts' decisional law as developed in times both ancient and recent. The technical meaning denotes the body of law adopted in this state by NMSA 1978, Section 38–1–3 (Repl.Pamp.1987), and refers generally to the law of England, both statutory and decisional, as developed by Parliament and the courts as of 1776 and incorporated into New Mexico law by the Territorial Legislature in 1876. 1876 N.M. Laws, ch. 2 (now codified as § 38–1–3); *see Boddy v. Boddy,* 77 N.M. 149, 152, 420 P.2d 301, 303 (1966) (New Mexico adopted British decisions and nonlocal statutes "which were in force at the time of American separation from England, and made [them] binding as the rule[s] of practice and decision in the courts of this State" through § 38–1–3).

Since New Mexico's incorporation of the common law of England and the United States in Section 38–1–3, numerous court decisions have announced new rules for the decision of cases. *See, e.g., Lopez v. Maez,* 98 N.M. 625, 651 P.2d 1269 (1982) (abrogating common law rule of nonliability of tavernkeeper for sale of intoxicating liquor to inebriated customer); *Scott v. Rizzo,* 96 N.M. 682, 634 P.2d 1234 (1981) (abolishing judge-made rule of contributory negligence

in favor of doctrine of comparative negligence); *Vigil v. Arzola,* 102 N.M. 682, 699 P.2d 613 (Ct.App.1983) (modifying judicially created rule of employment as terminable at will), *rev'd on other grounds,* 101 N.M. 687, 687 P.2d 1038 (1984) and *overruled on other grounds, Chavez v. Manville Prods. Corp.,* 108 N.M. 643, 777 P.2d 371 (1989); *Flores v. Flores,* 84 N.M. 601, 506 P.2d 345 (Ct.App.) (departing from common law rule refusing to permit wife's action against husband for intentional tort), *cert. denied,* 84 N.M. 592, 506 P.2d 336 (1973). These and similar decisions, to the extent they do not rest on constitutional requirements, are of course always open to legislative modification; but until such legislative change they represent the rules for decision of legal disputes unless and until changed by subsequent judicial overruling or modification. Decisional law of this sort is conveniently referred to as "the common law."

To the extent that the doctrine of sovereign immunity was embraced by the common law under either of the foregoing usages of the term, it was of course abolished by this Court's decision in *Hicks.* But, as Justice Holmes observed,[4] "The common law is not a brooding omnipresence in the sky"; and our decision in *Hicks* did not transform some ethereal "body" of law by substituting, for the old rule that the state *was not* liable (for anything), a new rule that henceforth the state *would be* liable (for any type of claim, seeking any kind of relief). The new rule governing liability or nonliability on a particular claim for relief was left open, for determination in a case in which the issue might be presented and in light of considerations the deciding court might deem relevant.

This case presents the issue of the state's liability for or immunity from punitive damages for breach of contract. Resolution of that issue is not dictated by anything the legislature has said, nor by any judicial precedents decided before or after our decision in *Hicks.* Our holding in *Brown v. Village of Deming* and our statement in *Rascoe v. Town of Farmington* are relevant, but since they may be regarded as resting (although they did not say so) at least partially on sovereign immunity principles, we do not think they are controlling. We are free to decide the issue now, based on such policy considerations as we deem pertinent.

TCMHP and its amicus articulate two powerful policy considerations that we deem pertinent, though ultimately we think they must be subordinated to other considerations. These two considerations are the strong disincentive punitive damages provide against abuse of governmental power and the corresponding positive incentive they create for accountability by government officials in the conduct and management of the programs they are entrusted to administer. TCMHP and amicus argue that the facts of this case furnish a good example of how unchecked governmental power can be abused and of the need for stimulating legislative oversight of government programs to ensure that administrators of such programs will remain responsible to legislative committees and others who must authorize and manage the funds necessary for their operation. Under this view, assessment of punitive damages will "send a message" to the legislature different in kind and degree from any message that imposition of mere compensatory damages will carry.

It was policies like these that the district judge undoubtedly had in mind when he ruled that TCMHP's claim for punitive damages could go to the jury. HED attacks Judge Herrera's statement that this was "the way the law should be" as disregarding this Court's admonition in *State ex rel. Anaya v. Scarborough,* 75 N.M. 702, 410 P.2d 732 (1966), that a judge "is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." *Id.* at 711, 410 P.2d at 738 (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921)). But we do not share HED's criticism of the district judge

4. *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 222, 37 S.Ct. 524, 531, 61 L.Ed. 1086 (1917) (Holmes, J., dissenting) (quoted in *Stroh Brewery Co. v. Director of N.M. Dep't of Alcoholic Beverage Control,* 112 N.M. 468, 477, 816 P.2d 1090, 1099 (1991) (Montgomery, J., dissenting)).

on this score. Rather, we think that Judge Herrera, in deciding the dispute between TCMHP and HED over the recoverability of punitive damages, was fulfilling one of the most important functions of the judiciary: He was deciding an unsettled question of law, based not on his notions of beauty or goodness, but on his conception of the policies that should inform the rule of decision and its application in a particular case.

However, notwithstanding our respect for the judge's discharge of his decision-making function, we are constrained to disagree with his selection from among the competing policies that underlie the choice he was called upon to make. In a nutshell, the countervailing policies we believe must prevail are the necessity to protect public revenues unless their diversion is specifically authorized by statute, coupled with the function of punitive damages to visit *punishment* on one against whom they are assessed. These considerations are especially compelling given the legislature's determination that public revenues shall not be diverted to payment of punitive damages in tort cases.

It was the first two of these considerations that underlay this Court's ruling in *Brown,* quoted *supra,* that punitive damages are awarded to punish the guilty party and ought not to be granted against a municipality and thus penalize the taxpayers. *See also City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 266–67, 101 S.Ct. 2748, 2758–59, 69 L.Ed.2d 616 (1981):

> Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct. Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct. Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers. [Citations omitted.]

The Trial Lawyers attack the theory that imposing punitive damages on governmental entities only punishes innocent taxpayers as a "hackneyed rubric," but we think it is more than that. Revenues for the operation of state and local government programs are notoriously thin these days, and diversion of those revenues to punish a recalcitrant or abusive governmental agency may diminish funds available to carry out other programs that are of equal importance to the chastised program and merit no reduction in funding because of another agency's derelictions. The legislature might well wish to subject its agencies and officials to the additional accountability and prevention of abuse that would flow from exposing them to liability for punitive damages, but that is a choice the legislature has expressly disclaimed in the tort context and we do not see a sufficient reason for making the opposite choice in the context of contracts.

It is this last consideration that we think deserves more than the epithet placed on it in the Trial Lawyers' brief: "mindless symmetry" between the rule applicable in tort cases and that which should apply in contract cases. That there is, or should be, "symmetry" between the two rules strikes us as self-evident. As the Trial Lawyers recognize, "this Court has noted that '[t]he courts of New Mexico do not distinguish between tort and contract in the application of punitive damages.' *Hood v. Fulkerson,* 102 N.M. 677, 680, 699 P.2d 608, 611 (1985)." Similarly, although we have held that the application of punitive damages in contract cases does not depend upon characterization of the breaching conduct as an independent tort, *see Romero v. Mervyn's,* 109 N.M. at 257, 784 P.2d at 1000, it re-

mains true that the conduct for which punitive damages may be recovered in a contract case shares many, if not all, of the qualities for which similar conduct will permit imposition of punitive damages in a tort case. *See Brown v. Coates,* 253 F.2d 36, 39 (D.C.Cir.1958) ("[W]here a breach of contract merges with, and assumes the character of, a wilful tort, calculated rather than inadvertent, flagrant, and in disregard of obligations of trust punitive damages may be assessed.").

The policies that shape development of the "common law"—*i.e.,* the decisional law enunciated by courts in the absence of specific legislative rules—derive from many sources: the background and experience of the judges who formulate the decisions, applicable or analogous policies established in previous cases, and legislatively ordained precepts applied to closely related, though not identical, legal settings—to name a few. *See, e.g., Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 392, 90 S.Ct. 1772, 1783, 26 L.Ed.2d 339 (1970) ("[An] appreciation of the broader role played by legislation in the development of the law reflects the practices of common-law courts from the most ancient times * * *. '[M]uch of what is ordinarily regarded as "common law" finds its source in legislative enactment.' ") (quoting Landis, *Statutes and the Sources of Law,* in *Harvard Legal Essays* 213, 214 (1934)). In the present setting, a breach-of-contract claim for which punitive damages are sought, we cannot ignore the legislative declaration that such damages may not be recovered in the closely related setting of punitive damages for egregious conduct in tort cases. What sense would it make to have one rule disallowing punitive damages for, say, malicious conduct in committing a tort, and the opposite rule for the same or similar conduct in breaching a contract? We think that such a juxtaposition of the operative legal rules would be nonsensical,[5] and we decline the invitation to adopt it.

We therefore hold that punitive damages are not recoverable from a governmental entity which is liable for breach of contract.

III.

We take up next HED's challenges to the trial court's award of compensatory damages. As noted previously, that award consists of two parts: an amount ($250,000) to compensate for TCMHP's "loss in value" as a nonprofit corporation providing mental health services, and an amount ($27,000) to compensate TCMHP for its obligation to reimburse former employees and board members for the services they provided in winding up the contract with HED—the so-called "termination management" damages. We discuss each of these components of the compensatory-damage award separately.

A.

The trial court instructed the jury that, if it found in TCMHP's favor on the claim for breach of contract, it could award damages for "the loss of the value of the corporation caused by the termination and the actions of [HED] surrounding the termination." There is nothing in New Mexico law as it presently stands that authorizes such an award. The general rule for the measure of damages in a breach-of-contract action permits the nonbreaching party to recover the loss in value of the performance promised by the breaching party, less any cost or other loss that the nonbreaching party has avoided by not having to perform. *See, e.g., Louis Lyster, Gen. Contractor, Inc. v. Town of Las Vegas,* 75 N.M. 427, 430, 405 P.2d 665, 667–68 (1965) (proper measure of damages is difference between contract price and cost to plaintiff of having another complete the work); *Restatement (Second) of Contracts* § 347(a) & (c) (1981) [hereinafter *Restatement*]. In addition to these "general" damages, the nonbreaching party may in some circumstances be entitled to recover

5. *See Parks v. City of Marshalltown,* 440 N.W.2d 377, 379 (Iowa 1989) ("There is advantage in having a similar rule for tort and contract * * *. [C]onsidering the nature and purpose of punitive damages, there is no logical reason to protect a tortfeasor more than a person who breaches a contract.").

consequential or "special" damages. *Wall v. Pate,* 104 N.M. 1, 2, 715 P.2d 449, 450 (1986); *Restatement* § 347(b) & comment c. Following the rule of *Hadley v. Baxendale,* 9 Exch. 341, 156 Eng.Rep. 145 (1854), the courts have "freely translated the rule of *Hadley* to mean that special damages may be recovered if the loss was foreseeable by the breaching party at the time of contracting." *Wall,* 104 N.M. at 2, 715 P.2d at 450 (citing Dan B. Dobbs, *Handbook on the Law of Remedies* § 12.3, at 804 (1973)); *see Restatement* § 351(1) (damages not recoverable for loss that breaching party did not have reason to foresee as probable result of the breach when contract was made).

No issue of whether HED could reasonably have foreseen, at the time the contract was entered into, that a breach would cause the complete destruction (which is how the claim for loss in value was argued) was given to the jury,[6] nor was the jury otherwise instructed on how to determine the claimed loss in value. In fact, the record is totally bereft of any evidence to establish how such a loss might be quantified. In closing argument to the jury, counsel for TCMHP simply requested that the jury award $250,000 for this item of damages, stating that it represented a "very small percentage" of the 1990 value of Valencia Counseling, the corporation that had succeeded TCMHP as the mental-health services provider in Valencia and Torrance Counties. That 1990 value—which was the *gross* value of Valencia Counseling's total assets, not its net worth (*i.e.,* assets *minus* liabilities)—was $1.5 million. Neither TCMHP's brief, nor its jury argument, nor—most importantly—the evidence, explains or explained how to relate the 1990 gross asset value of another corporation, with different assets, contracts, client base, etc., to the 1981 value of TCMHP. The leap from $1.5 million in the one case to $250,000 in the other is completely unsupported.

We do not hold that "loss in value" to the nonbreaching party may never be a proper item of special or consequential damages flowing from a breach of contract. Though there is scant authority to support such a measure of damages, a few courts seem to have recognized that a party's loss in value for the other contracting party's breach may, if it was foreseeable by the parties as a reasonably likely consequence of a breach, be compensable. *See, e.g., Hydraform Prods. Corp. v. American Steel & Aluminum Corp.,* 127 N.H. 187, 498 A.2d 339, 346 (1985) (dictum) ("As a general rule, loss in the value of a business as a going concern, or loss in the value of its good will, may be recovered as an element of consequential damages."); *R.E.B., Inc. v. Ralston Purina Co.,* 525 F.2d 749, 755 (10th Cir.1975) (in breach of warranty case, plaintiff's diminished value recoverable but not to extent duplicated lost profits); *American Anodco, Inc. v. Reynolds Metals Co.,* 743 F.2d 417, 423–24 (6th Cir. 1984) (recovery for loss in value denied where duplicative of recovery for loss of profits). Certainly TCMHP's cases[7] do not support this measure of damages in a breach-of-contract case, since they are all cases prescribing elements of damages to a victim of a tort.

We hold that the evidence was insufficient to support a claim for loss in value of $250,000 to TCMHP flowing from HED's breach of contract.

6. The question whether HED could reasonably have anticipated a loss in value to TCMHP of a quarter-million dollars when it executed a contract, terminable without cause on thirty days written notice, for an annual amount of $161,468, would almost seem to answer itself. In any event, the answer to this question calls for more evidence than appears on this record.

7. *Duke City Lumber Co. v. Terrel,* 88 N.M. 299, 302, 540 P.2d 229, 232 (1975) (destruction of business due to economic compulsion); *B.F. Goodrich Co. v. Mesabi Tire Co.,* 430 N.W.2d 180, 183–84 (Minn.1988) (destruction of business resulting from tort of misrepresentation); *Jim-Bob, Inc. v. Mehling,* 443 N.W.2d 451, 463–64 (Mich.Ct.App.1989) (loss of business, similar to loss of profits, resulting from tortious interference with contract and breach of contract), *leave for appeal denied,* 434 Mich. 865 (1990); *Jim's Hot Shot Serv., Inc. v. Continental W. Ins. Co.,* 353 N.W.2d 279, 284–85 (N.D.1984) (diminution in value of business resulting from insurer's negligence).

B.

HED attacks the award of compensatory damages for the termination management services of former employees and board members on essentially two grounds: (1) It was surprised and prejudiced by the last-minute assertion of this claim by TCMHP's motion to amend the pretrial order on the first day of trial, and (2) TCMHP did not really sustain these damages because the employees' claims asserting them were "made up" long after termination of the contract and after the statute of limitations had run against them. As part of this latter ground, HED points out that the claims were authorized at a "special meeting" of TCMHP's board of directors held the week before trial in its counsel's office. While we tend to agree that the validity of the employees' claims is somewhat suspicious, given the after-the-fact way in which they were apparently reconstructed, we think the jury's determination that the claims were valid and that TCMHP was obligated to reimburse the employees rests upon substantial evidence, so we will not disturb it.

HED does not impugn the evidence that various employees and board members actually did render the claimed services in connection with TCMHP's obligation to comply with HED's directives following termination of the contract. Thus, either by virtue of an express or implied contractual obligation on HED's part to reimburse TCMHP for these post-termination services, or on the basis of an obligation in *quantum meruit* to compensate TCMHP for their reasonable value, HED was clearly responsible to pay for the amounts reasonably incurred so that its contractor, TCMHP, could reimburse the individuals who actually performed the services. We see no injustice in the jury's verdict that HED was liable for the amounts the jury determined.

Those amounts may have been calculated "long after" the contract's termination, but HED does not argue that they were therefore unreliable; it argues only that the individuals who incurred them did so without an expectation of reimbursement and that TCMHP had no enforceable obligation to pay them until a resolution was adopted by the board of directors at the "special meeting" the week before trial. As to the individuals' expectation, the jury determined that they did have such an expectation; and as to TCMHP's enforceable obligation, HED cannot take advantage of a statute-of-limitations defense available to TCMHP in order to avoid its (HED's) own obligation to pay for the services it undeniably directed TCMHP to perform.

Finally, with respect to HED's claim that the trial court abused its discretion by amending the pretrial order to permit explicit assertion of TCMHP's claim for these termination management damages, we observe first that modification of a pretrial order to prevent manifest injustice rests within the sound discretion of the trial court. *See* SCRA 1986, 1–016(E);[8] *State ex rel. State Highway Dep't v. Branchau*, 90 N.M. 496, 497, 565 P.2d 1013, 1014 (1977). We see no abuse of discretion here—in large part because HED had already been alerted to TCMHP's claims for these damages. First, the amended complaint, filed in 1985, alleged that TCMHP had "acquiesced in the termination management provisions of the contract and was consequently damaged." Next, in February 1989, in its answers to HED's interrogatories, TCMHP notified HED of its claim for damages (although greatly inflated above those fixed by the jury) for reimbursement to employees for work done in termination management. And finally, as previously noted, the pretrial order of March 20, 1990, provided that TCMHP claimed "contract damages for work performed from December 15, 1981 through

8. The version of this rule of civil procedure in effect at the time the case was filed and which therefore controls the proceedings in this action was N.M.R.Civ.P. 16, NMSA 1978 (Repl.Pamp.1980). The same standard (on the point under discussion here)—"to prevent manifest injustice"—appears in the current version of the rule, SCRA 1986, 1–016(E) (Cum.Supp.1991), effective for cases filed after January 1, 1990.

the end of the contract year * * *." While TCMHP's claim for this particular item of damages may have been buried in the host of other claims asserted in the original complaint in 1982, the amended complaint in 1985, and the pretrial order in 1990, we see no abuse of discretion in the trial court's amending the pretrial order, after the dust had settled, to specify clearly what kinds of "termination management" damages TCMHP would be permitted to prove during the trial.

The judgment awarding TCMHP $27,000 for termination management is affirmed. The judgment is reversed insofar as it awards TCMHP $1.5 million in punitive damages and $250,000 in loss of value, and the cause is remanded for entry of an amended judgment to conform with these rulings. No costs are awarded to either party.

IT IS SO ORDERED.

BACA and FRANCHINI, JJ., concur.

[redacted]

830 P.2d 158

STATE of New Mexico, Plaintiff-Appellee,

v.

Larry HIGHFIELD, Defendant-Appellant.

No. 12868.

Court of Appeals of New Mexico.

Feb. 17, 1992.

Certiorari Denied April 8, 1992.

Tom Udall, Atty. Gen., Katherine Zinn, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Gina Maestas, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

PICKARD, Judge.

Defendant appeals his convictions for assault with intent to commit a violent felony—to wit, murder—in violation of NMSA 1978, Section 30-3-3 (Repl.Pamp.1984), and shooting at an inhabited dwelling in violation of NMSA 1978, Section 30-3-8 (Cum.Supp.1991). He raises five issues on appeal: (1) whether he was convicted of a nonexistent crime, (2) whether the two convictions merge, (3) whether there was sufficient evidence to support his conviction for assault with intent to commit murder, (4) whether he was denied effective assistance of counsel, and (5) whether the jury should have been instructed on a lesser included offense. Issues listed in the docketing statement but not briefed on appeal are deemed abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985). We affirm.

The victim, Pamela Lovelace, was defendant's ex-wife. She testified that she spent the night of February 17, 1990, at a mobile home owned by her father. She stated that she was awakened in the early hours of February 18 by crashing noises and thuds. Someone had shot at the trailer. When she looked out the bedroom window, she saw a pickup truck that resembled defendant's. Other evidence corroborated that defendant did the shooting. Pamela stated that there were six holes on the outside of the trailer, toward the west end and around the living room/kitchen area. Inside, there were holes in the refrigerator, the sink, the dishwasher, a chair, and a flour canister.

Pamela's current husband (Carl) and his stepson also testified about the shooting. They were both staying in the trailer that night. In fact, Carl had been living in the trailer for several months. He had been occupying the west-end bedroom, since Pamela's father was still in the trailer and occupying the east-end bedroom. However, several days before the shooting, Carl

moved into the east-end bedroom, since Pamela's father had moved out of the trailer. Carl and Pamela were sleeping in the east-end bedroom the night of the shooting.

Defendant contends that no crime exists for assault with intent to commit an unintentional murder. That may be true. *See State v. Johnson,* 103 N.M. 364, 707 P.2d 1174 (Ct.App.1985). Here, however, defendant was convicted of assault with the intent to commit intentional murder.

The jury was instructed that in order to find defendant guilty, it had to find that defendant intended to kill Pamela. The jury was also instructed on the elements of second degree murder, and on general-criminal intent in accordance with SCRA 1986, 14–141, which required the jury to find that defendant acted intentionally when he committed the crimes. In combination, these instructions required the jury to determine that defendant acted with the intent to kill. We recognize that the second degree murder instruction, which was given in this case, does not specifically include language on intent to kill. At most, this omission may have created some confusion in the instructions. In order to be preserved for review, however, the claim that instructions are conflicting or confusing must be raised at trial. *State v. Tucker,* 86 N.M. 553, 525 P.2d 913 (Ct. App.1974), *overruled on other grounds by State v. Gonzales,* 86 N.M. 556, 525 P.2d 916 (Ct.App.1974). We note that trial counsel did not object to the instructions on this basis. Contrary to defendant's arguments, he was not convicted of assault with the intent to commit an unintentional murder, and his issue therefore fails.

Defendant claims that the offense of assault with intent to commit a felony (murder) and the offense of shooting at an inhabited dwelling merge. This issue must be analyzed under the two-part test of *Swafford v. State,* 112 N.M. 3, 810 P.2d 1223 (1991); *see also State v. Gonzales,* 113 N.M. 221, 824 P.2d 1023 (1992). The state concedes that the conduct in this case, spraying bullets at the trailer in which defendant knew his ex-wife was staying, is the same conduct used to support the convictions for both crimes. We must then consider whether the legislature intended multiple punishment for this unitary conduct. If the elements of the two crimes are not subsumed one within the other, as they are not in this case, then a presumption is raised that the legislature intended multiple punishment. Defendant argues that the presumption is rebutted by his argument that the legislature intended the two crimes to address the same social evil and, therefore, did not intend multiple punishment for both.

We cannot agree with defendant's argument. When examining the social evils being addressed by the legislature, this court must define those social evils narrowly. *See Swafford,* 112 N.M. at 15, 810 P.2d at 1235. Defendant's argument that both punishments are addressed to bodily integrity is too broad. Our analysis is governed by the recent holding of the New Mexico Supreme Court in *Gonzales.* In that case, the supreme court applied the tests enunciated in *Swafford* and determined that separate convictions and sentences for unitary conduct violating the statutes prohibiting shooting into an occupied motor vehicle and first degree murder did not violate double jeopardy. *Gonzales,* 113 N.M. at 223–25, 824 P.2d at 1025–27. The court held that there was no merger because the murder statute is designed to avoid the unlawful killing of people, while the statute prohibiting shooting into an occupied vehicle is more narrowly aimed at protecting the public "from reckless shooting into a vehicle and the possible property damage and bodily injury that may result." *Id.* at 225, 824 P.2d at 1027.

In light of *Gonzales,* a similar conclusion must be drawn in this case. In enacting Section 30–3–8, we believe the legislature was concerned with conduct typically designed to terrorize or intimidate. Whether or not the dwelling is actually occupied at the time of the shooting does not matter. On the other hand, Section 30–3–3 is directed toward conduct which is motivated by an intention to effect another's death. We hold that the two statutes are directed toward the protection of different social

norms and indicate an intention on the part of the legislature to allow for multiple punishment for the same conduct.

For the same reasons, defendant's argument that he should have been prosecuted only under the more specific statute also fails. The rule on which defendant relies does not apply unless the statutes condemn the same offense. *See State v. Riley,* 82 N.M. 235, 478 P.2d 563 (Ct.App. 1970). Because the elements of Sections 30–3–3 and 30–3–8 are different, they do not condemn the same offense.

Defendant argues that there was insufficient evidence to support his conviction for assault with intent to commit a felony (murder). In determining the sufficiency of the evidence, this court views the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict. *State v. Sutphin,* 107 N.M. 126, 753 P.2d 1314 (1988). This court must determine whether there is substantial evidence, of a direct or circumstantial nature, to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to the conviction. *Id.* Substantial evidence is evidence acceptable to a reasonable mind as adequate support for a conclusion. *State v. Sparks,* 102 N.M. 317, 694 P.2d 1382 (Ct.App.1985).

Assault with intent to commit a violent felony (murder) is defined as "[a] person assaulting another with intent to kill or commit any murder." § 30–3–3. An essential element of the crime is the intent to murder such person, *see Territory v. Baca,* 11 N.M. 559, 71 P. 460 (1903), and that is how the jury was instructed in this case. We believe that the evidence adduced was sufficient to allow the jury to infer an intent to kill.

About one month prior to the shooting, defendant threatened to fire shots into the mobile home where Pamela and Carl slept. Pamela testified that Carl moved into the trailer in November or December 1989, when it—and particularly the east-end bedroom—was occupied by her father. Defendant knew that Carl had moved into the trailer. The only other bedroom in the home was the west-end bedroom. Carl stated that he had been occupying the west-end bedroom but had moved into the east-end bedroom several days before the shooting, since Pamela's father had moved out of the trailer. Because of the move, Carl and Pamela were sleeping in the east-end bedroom, rather than the west-end bedroom, on the night of the shooting.

Defendant argues that, since there was no evidence to show knowledge on his part that Pamela would be in the west-end bedroom or the living room, there was insufficient evidence to support assault with intent to murder. We cannot agree. There was evidence that defendant knew that Pamela's father occupied the east-end bedroom. There was also evidence that defendant knew that Carl had moved into the trailer and was living there at the same time that Pamela's father was there. The jury could reasonably infer that defendant assumed that the west-end bedroom was being occupied by Carl, and that Pamela would be with Carl. There was also evidence that defendant shot into the living room area. Pamela testified that most of the time when she stayed at the trailer she slept in the living room on the couch. This evidence of shooting into the two rooms where defendant thought it would be likely that Pamela slept is sufficient to sustain the jury's verdict for assault with intent to kill Pamela.

Defendant argues that he was denied effective assistance of counsel because counsel argued in closing argument that, at most, he was guilty of shooting at the trailer, and because counsel did not move to dismiss count I, the assault count. The standard for ineffective assistance of counsel is whether defense counsel exercised the skill, judgment, and diligence of a reasonably competent defense counsel. *State v. Crislip,* 109 N.M. 351, 785 P.2d 262 (Ct.App.1989). To show ineffective assistance of counsel, defendant must prove incompetence of counsel and that the incompetence prejudiced him. *State v. Talley,* 103 N.M. 33, 702 P.2d 353 (Ct.App.

1985). This court does not second-guess the tactics and strategy of trial counsel. *State v. Dean,* 105 N.M. 5, 727 P.2d 944 (Ct.App.1986).

During her closing argument, defense counsel argued to the jury that, based on the evidence it had heard, defendant was guilty only of the less serious offense of shooting into an inhabited dwelling. She argued that there was simply no evidence to indicate that defendant was guilty of the more serious crime. When defendant complained to the trial court about this argument after trial, defense counsel explained that the argument was a tactical decision. Because defendant chose not to testify on his own behalf, because there were no other witnesses available that could support defendant's claim that all the other witnesses were lying, and because the evidence was strong on the charge of shooting into an inhabited dwelling, counsel was left with no other alternative but to argue to the jury that it should only find defendant guilty of the less serious offense.

We agree that, under the circumstances, counsel's argument to the jury was a matter of tactics. We believe that counsel was acting competently in trying to convince the jury to convict on the lesser charge and not the greater charge. We cannot say that defendant was afforded ineffective assistance of counsel based on this tactical decision.

Defendant also argues that counsel was ineffective in failing to move to dismiss count I. This argument is based on the fact that the state and defense counsel agreed that the convictions should merge for sentencing purposes. There was no agreement, however, that the crimes merged for the purpose of obtaining convictions. There was no basis for dismissal of count I. Therefore, counsel was not ineffective for failing to make such a motion. *See State v. Stenz,* 109 N.M. 536, 787 P.2d 455 (Ct.App.1990) (counsel is not ineffective for failing to make a motion for which there is no legal or factual basis).

Finally, defendant argues, 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), that the jury should have been instructed on the alleged lesser included offense of negligent use of a firearm. The trial court did not err by failing to give the instruction on negligent use of a firearm because it is not a lesser included offense of shooting into an occupied dwelling. A lesser included offense is one which must necessarily be committed when committing the greater offense. *State v. Alderete,* 91 N.M. 373, 574 P.2d 592 (Ct.App.1977). Defendant's requested jury instruction, defining his lesser included offense, required the jury to find that defendant discharged a firearm, knowing he was endangering a person. This crime would not necessarily have been committed when defendant shot into an inhabited dwelling, which by definition does not have to be occupied by a person at the time of the shooting. § 30-3-8.

Defendant's convictions are affirmed.

IT IS SO ORDERED.

ALARID, C.J., and FLORES, J., concur.

830 P.2d 162

GTE SOUTHWEST INCORPORATED, Plaintiff-Appellant,

v.

TAXATION AND REVENUE DEPARTMENT, Defendant-Appellee.

No. 12419.

Court of Appeals of New Mexico.

Feb. 27, 1992.

Certiorari Denied April 8, 1992.

J.W. Neal, Neal & Neal, Hobbs, William H. Ballard, Irving, Tex., for plaintiff-appellant.

Carolyn A. Wolf, Special Asst. Atty. Gen., Taxation and Revenue Dept., Santa Fe, for defendant-appellee.

OPINION

HARTZ, Judge.

GTE Southwest Incorporated (GTE) appeals from an order of the Taxation and Revenue Department (Department) denying its protest of an assessment for gross receipts tax and a penalty with respect to the reporting period from January 1, 1984, through December 31, 1986. The taxes were imposed on (1) receipts of payments from interstate telephone carriers for access to GTE's local telephone services; (2) receipts of payments from interstate carriers for ancillary services rendered by GTE, such as billing GTE customers for telephone service provided by interstate carriers; and (3) receipts of payments from GTE customers which are identified as pass-throughs of municipal franchise fees. We hold that the gross receipts tax was properly assessed on receipts for ancillary services and for pass-throughs of franchise fees, but no tax should have been assessed on receipts for access services. Of great assistance in our review of this case was the decision and order by hearing officer Gerald B. Richardson. Because his decision and order can serve as a model for administrative law rulings, we attach it as an appendix to this opinion. *See* William W. Bivins, *Findings and Conclusions: A Modest Proposal for Preparation Using a Different Technique,* 30 B.Bull.No. 48, at 4, (N.M.1991).

I. ACCESS SERVICES

A. Background

To explain access services, we begin with some history. The Modified Final Judgment (MFJ) entered in *United States v. American Telephone & Telegraph Co.,* 552 F.Supp. 131 (D.D.C.1982), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983), ordered American Telephone and Telegraph Company (AT & T) to divest its telephone subsidiaries effective January 1, 1984. As a result of the divestiture, the United States was divided into 161 "local access and transport areas" (LATAs). A company cannot provide telephone services both within LATAs and between LATAs. *See AT & T Communications v. Department of Revenue,* 778 P.2d 677, 678–79 (Colo. 1989) (en banc). InterLATA service is provided by such companies as AT & T, Sprint, and MCI. GTE provides intraLATA service. New Mexico is composed of only one LATA. Therefore, in New Mexico all intra-

state calls are intraLATA calls and all interstate calls are interLATA calls.

Under the new arrangement, an interLATA call consists of three components. A customer originates the call by sending the signal over the local exchange on equipment owned by an intraLATA company. The intraLATA company routes the call to a switching center operated by the customer's interLATA carrier. This is the originating link. The interLATA carrier then routes the signal over its long-distance lines and equipment to a switching center in the destination LATA. This is the intermediate link. Finally, the signal is switched from the interLATA carrier to the local exchange network owned by the intraLATA company serving the destination, and the local carrier routes the signal to the end-user receiving the call. This is the terminating link. *See id.; GTE Sprint Communications Corp. v. Department of Treasury,* 179 Mich.App. 276, 445 N.W.2d 476, 477 (1989); *GTE Sprint Communications Corp. v. Wisconsin Bell,* 155 Wis.2d 184, 454 N.W.2d 797, 799 (1990). If, for example, a GTE customer in Hobbs wishes to make a long-distance call via AT & T to someone in Dallas who uses Southwestern Bell as her local carrier, (1) the originating link routes the call over GTE equipment from the Hobbs customer to the AT & T switching center in Hobbs, (2) the intermediate link routes the call on AT & T equipment from Hobbs to the AT & T switching center in Dallas, and (3) the terminating link routes the call from the AT & T switching center over Southwestern Bell lines to the recipient of the call in Dallas. Physically, the process may be identical to what it was prior to divestiture, but the business entities involved and their relationships to one another are now likely to be radically different.

Under this new regime, the customer placing the long distance call pays the interLATA carrier for the long distance service. The interLATA carrier in turn must pay a charge to the intraLATA carriers at each end of the telephone call. "Access service" is defined by the Federal Communications Commission as including "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." 47 C.F.R. § 69.2(b) (1990). The fee paid by the interLATA carrier to the intraLATA carrier for access to the local exchange network is called an access charge. *See* 47 C.F.R. ch. I., subch. B, pt. 69 (1990) (FCC rules for access charges).

GTE has paid and protested a gross receipts tax of $969,311.03 on access charges and a penalty of $114,446.53 arising from delay in paying the protested tax. The protested tax was assessed for receipts from access charges between January 1, 1984—the official date of the AT & T divestiture—and July 1, 1986—the effective date of an amendment to the New Mexico Gross Receipts and Compensating Tax Act that clearly deducted access charges from gross receipts. NMSA 1978, § 7-9-56(C) (Repl.1986); 1986 N.M. Laws, ch. 52, § 7 (effective date).

B. Discussion

The pertinent statutory provision is the following language from the version of NMSA 1978, Section 7-9-55 (Repl.Pamp.1983), in effect during the period at issue in this case:

> Receipts from transmitting messages or conversations by telegraph, telephone or radio other than from one point in this state to another point in this state ... may be deducted from gross receipts.

Reading the statutory provision today, it may seem ambiguous. The ambiguity concerns what is being modified by the words "other than from one point in this state to another point in this state." If the phrase is read as modifying the verb "transmitting," then the tax could be imposed with respect to a transmission between two points in New Mexico even if the message originated outside of New Mexico or was destined for a point outside of New Mexico. For example, when a call is placed from Hobbs to Dallas the tax could be imposed on a receipt for the transmission over GTE lines between the caller in Hobbs and the AT & T switching center in Hobbs. If, on the other hand, the phrase is read as modifying "messages or conversations," then

the tax could be imposed only if the message or conversation originated at one point in the state and was destined for another point in the state. Under this reading, the state could not impose the tax with respect to an intrastate component of the transmission of an interstate telephone conversation between New Mexico and another state.

The proper reading is set forth in our supreme court's decision in *Ealey v. Bureau of Revenue,* 89 N.M. 160, 548 P.2d 440 (1976). The State Bureau of Revenue attempted to impose a gross receipts tax on compensation Mrs. Ealey received as an agent for Western Union Telegraph Company in Farmington, New Mexico. She was paid seventy cents per message that she sent or received. She transmitted both intrastate and interstate messages. Interstate messages that she sent or received were relayed through the Western Union office in Albuquerque. Apparently the transfer of the message to or from the national wires was nearly automatic. The supreme court held that Mrs. Ealey's compensation with respect to interstate messages was exempt under Section 7–9–55, which was then codified as NMSA 1953, Section 72–16A–14.10 (Supp.1975). The pertinent language was identical to the language in effect during the taxing period at issue in this case. The court first held that Mrs. Ealey's compensation consisted of "receipts from transmitting messages." *Id.* at 161, 548 P.2d at 441. The court then stated that the language of the section "appears to us to be clear and unambiguous and is applicable to [Mrs. Ealey] insofar as she transmits interstate messages." *Id.* As we understand *Ealey,* if the message is an "interstate message," then a receipt from transmitting it is deductible from gross receipts, even if the receipt relates only to an intrastate component (say, from Farmington to Albuquerque) of the interstate transmission. In other words, *Ealey* read the statutory language "other than from one point in this state to another point in this state" as modifying "messages or conversations."

The Department attempts to distinguish *Ealey* on two grounds. First, it notes that "Mrs. Ealey was an agent of Western Union, using the Western Union network to transmit the message." In contrast, GTE is independent of every interstate carrier. The *Ealey* opinion itself referred to Mrs. Ealey's status as an agent. The reference appears in the following passage:

> [I]n unequivocal language the words "receipts from transmitting messages" describe [Mrs. Ealey's] position. In addition, she is an agent of Western Union and not an independent contractor. Her activities are vital to the only purpose involved, i.e., the transmission of messages, both interstate and intrastate.

Id. The opinion does not, however, explain why Mrs. Ealey's status as an agent was material to the result, nor does the Department provide an explanation. We do not read *Ealey* as suggesting that an independent contractor could be taxed for receipts from the intrastate transmission of a message that had originated outside the state or that was destined to be forwarded interstate by another carrier. Rather, *Ealey* seems to be saying that even if a person does not actually transmit a message, a fee received by that person for performance of a service is a "receipt from transmitting messages" if the person is an agent (as opposed to an independent contractor) of the company transmitting the message and the service performed is "vital" to the transmission. Our reading of *Ealey* is reinforced by the court's quotation with approval from the opinion of Judge Hernandez in the court of appeals. Judge Hernandez, finding the tax on Mrs. Ealey to be barred by the above-quoted statutory provision, wrote:

> "Once a telegram is transmitted bound for an interstate destination it becomes part of the national network of telegraphic communications. Each separate mode of relay or transmission cannot be isolated and taxed as a local incident."

Id. (quoting *Ealey v. Bureau of Revenue,* 89 N.M. 174, 176, 548 P.2d 454, 456 (Ct. App.1975)). This language certainly implies that Mrs. Ealey's transmission between Farmington and Albuquerque of in-

terstate messages would not be taxable even if she had been an independent contractor.

Second, the Department adopts the hearing officer's view that *Ealey* can be distinguished because "the backdrop for the *Ealey* decision was a now outdated concept of states' ability to tax activities in the stream of interstate commerce." We agree that in the years since *Ealey* was decided, there have been significant changes in United States Supreme Court doctrine regarding taxation of activities associated with interstate commerce. *See, e.g., Goldberg v. Sweet,* 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989). In our view, however, the changes do not undercut the applicability of *Ealey* to this case. On the contrary, an appreciation of United States Supreme Court doctrine at the time that Section 7–9–55 was originally enacted, and at the time that *Ealey* was decided, reinforces our interpretation of Section 7–9–55 and *Ealey.*

The original version of Section 7–9–55, as enacted by 1969 N.M. Laws, Chapter 144, Section 45, and as it still read at the time of *Ealey,* stated:

> Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States Constitution.
>
> Receipts from transmitting messages or conversations by telegraph, telephone or radio other than from one point in this state to another point in this state may be deducted from gross receipts.

The Department's argument would be persuasive if *Ealey* had relied on the first paragraph of the section to hold that Mrs. Ealey's compensation for sending interstate messages was not subject to the state gross receipts tax. If *Ealey* had rested on the determination that the Commerce Clause of the United States Constitution barred the tax on Mrs. Ealey, then the decision would lose its force when the United States Supreme Court substantially changed its Commerce Clause doctrine. As we understand *Ealey,* however, it relies on the second paragraph of the section. Although the *Ealey* opinion refers to cases deciding constitutional issues, the citations are used to support the court's interpretation of the second paragraph. When the *Ealey* court wrote that "[t]he language of [Section 7–9–55] appears to us to be clear and unambiguous and is applicable to the appellant insofar as she transmits interstate messages," *id.* 89 N.M. at 161, 548 P.2d at 455, the "clear and unambiguous" language referred to could hardly have been the general statement in the first paragraph that receipts may be deducted when the constitution so requires. The "clear and unambiguous" language was in the second paragraph of the statute.

Moreover, to the extent that *Ealey* was influenced by former constitutional doctrine in its interpretation of the second paragraph of Section 7–9–55, such reliance on former doctrine would still be appropriate today. Interpreting the language of a statute often requires an understanding of the context in which the statute was enacted. An important part of that context is the surrounding body of law. When writing a statute regarding taxation of activity connected with interstate commerce, the constitutional limitations on such taxation may be of critical importance. Those who enacted Section 7–9–55 were undoubtedly aware of the possibility of such limitations; after all, the first paragraph of the section expressly refers to such limitations and prohibits taxation that would violate the limitations.

In light of the first paragraph, one can presume that the second paragraph was intended to conform to the legislature's understanding of constitutional limitations. If the legislature, thinking that there might be a future change in the United States Supreme Court's interpretation of the Commerce Clause, intended to enact a law that would permit taxation of telephone transmissions that was probably barred by constitutional doctrine at the time of the enactment, then it would have made more sense for the enactment to omit the second paragraph and rely simply on the first paragraph. Under the first paragraph, the tax could be imposed to the full extent permitted by the Constitution, with the imposition

of the tax expanding as new Supreme Court constitutional doctrine permitted the expansion.

What, then, was the likely understanding by the legislature of the constitutional restrictions on taxation of receipts from transmitting messages and conversations? *Ealey* strongly suggests that under Commerce Clause doctrine of the time, a tax on an intrastate component of the transmission of an interstate message would be unconstitutional. Of particular importance in this regard was the United States Supreme Court decision in *Western Union Telegraph Co. v. Foster,* 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006 (1918). *Ealey* summarized the case as follows:

> [T]he New York Stock Exchange agreed to furnish to certain telegraph companies quotations of prices made in transactions upon the Exchange. The quotations, which were furnished in New York, were then telegraphed to Boston where they were translated from Morse code into English, and then transmitted by an operator to the tickers in the offices of those brokers who had subscribed to the service and had been approved by the Exchange. Foster applied for such service to the various telegraph companies involved, but his application was disapproved by the Exchange. As a result, the Public Service Commission of Massachusetts issued an order declaring the refusal by the telegraph companies to supply to Foster the ticker service an unlawful discrimination. The order required the telegraph companies to remove the discrimination and supply Foster with the service. Mr. Justice Holmes, writing for the U.S. Supreme Court, reasoned that *the quotations were interstate commerce when they were transmitted from New York to Massachusetts, and remained interstate commerce until they reached "the point where the parties originally intended that the movement should finally end."* Since the quotations were interstate commerce, the order by the Public Service Commission was an unconstitutional interference by a state, and was therefore void.

89 N.M. at 162, 548 P.2d at 442 (emphasis added). If the state could not regulate the intrastate component of the telegraph transmission, presumably it also could not tax that component. *See Cooney v. Mountain States Tel. & Tel. Co.,* 294 U.S. 384, 55 S.Ct. 477, 79 L.Ed. 934 (1935) (license tax on telephones violated prohibition against tax on interstate commerce). We may assume that the 1969 legislature, when it enacted the original version of Section 7–9–55, had the same view of constitutional limitations as did the *Ealey* court in 1976. *Cf. Quintana v. New Mexico Dep't of Corrections,* 100 N.M. 224, 668 P.2d 1101 (1983) (legislature presumed to be informed as to existing law). Thus, when we interpret the language of the second paragraph of Section 7–9–55 in light of the legal environment in which it was written, it seems most reasonable to interpret the language as prohibiting imposition of a tax on any component of the transmission of an interstate message. In other words, it is very likely that legislative intent was that the words "other than from one point in this state to another point in this state" modify "messages or conversations," which is the holding of *Ealey.*

Furthermore, even if *Ealey* were incorrect in its understanding of the pertinent constitutional doctrine, what *Ealey* did was interpret a statute. As an inferior court, we are bound by our supreme court's interpretation of statutory language. *See Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973).

Another argument by the Department is that access charges are not deductible from gross receipts under Section 7–9–55 because access charges are not "receipts from transmitting messages or conversations." As we understand the Department, it is contending that the access charge is simply a charge for opening the switch so that the interstate (interLATA) carrier has access to the local facilities of an intraLATA carrier such as GTE. We disagree with this characterization of the access charge. As the Department acknowledges, *Leaco Rural Tel. Coop., Inc. v. Bureau of Revenue,* 86 N.M. 629, 526 P.2d 426 (Ct.

App.1974), held that telephone companies sell services rather than tangible personal property. The service paid for by the access charge is virtually identical to the service that GTE supplies to its local customers. Instead of routing a call from one customer in Hobbs to another customer in Hobbs, the access charge pays for routing a call between a Hobbs customer and, say, the Hobbs switching center for AT & T. Our view of the identity of the two services is supported by 47 C.F.R. Section 69.106 (1990), which states:

Local switching.

(a) Charges that are expressed in dollars and cents per access minute of use shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign services.

(b) A per minute charge shall be computed by dividing the projected annual revenue requirement for the Local Switching element by the projected annual access minutes of use for all interstate or foreign services that use local exchange switching facilities.

(c) If end users of an interstate or foreign service that uses local switching facilities pay message unit charges for such calls in a particular exchange, a credit shall be deducted from the Local Switching element charges to such carrier for access service in such exchange. The per minute credit for each such exchange shall be multiplied by the monthly access minutes for such service to compute the monthly credit to such a carrier.

(d) If all local exchange subscribers in such exchange pay message unit charges, the per minute credit described in paragraph (c) of this section shall be computed by dividing total message unit charges to all subscribers in a particular exchange in a representative month by the total minutes of use that were measured for purposes of computing message unit charges in such month.

(e) If some local exchange subscribers pay message unit charges and some do not, a per minute credit described in paragraph (c) of this section shall be computed by multiplying a credit computed pursuant to paragraph (d) of this section by a factor that is equal to total minutes measured in such month for purposes of computing message unit charges divided by the total local exchange minutes in such month.

Under subsection (c) if, say, a GTE customer pays for telephone service not by means of a flat monthly rate but on a per-call (message unit) basis, then the interstate carrier receives a credit on its access charge from GTE for the message unit charge from GTE to the local customer on an interstate call. Implicit in the granting of this credit is a recognition that the message unit charge for an interstate call pays for the same service that is paid for by the access charge; the credit is necessary to prevent double payment to GTE. In short, the access charge is for the service of transmitting the telephone signal between the interLATA carrier's switching center and the local phone customer. Receipts from such charges are "receipts from transmitting messages."

Finally, the Department argues that its interpretation of Section 7–9–55 is compelled by the amendment to the gross receipts tax statute that took effect on July 1, 1986. The amendment deleted the references to telegraph and telephone communications in Section 7–9–55 and added the following Section 7–9–56(C):

> Receipts from providing telephone or telegraph services in this state which will be used by other persons in providing telephone or telegraph services to the final user and thirty-five percent of the receipts of persons providing interstate and foreign telephone or telegraph services from transmitting interstate messages or conversations may be deducted from gross receipts.

The Department, pointing out that this section clearly deducts access charges from gross receipts, argues that prior law must have included such charges as gross receipts because "when [the legislature] enacts a new statute, it is presumed that it intended to change the law which previously existed. *State ex rel. Bird v. Apodaca,*

91 N.M. 279, 573 P.2d 213 (1977)." We disagree for three reasons.

First, although the proposition stated by the Department may be useful in interpreting the meaning of a new statute, it is not a proper canon for construing the earlier statute. We fail to see how legislative action in 1986 is appropriate legislative history for the interpretation of a 1969 law. *See Sullivan v. Finkelstein,* 496 U.S. 617, 626, 110 S.Ct. 2658, 2667, 110 L.Ed.2d 563, 577 (1990) (Scalia, J., concurring in part).

Second, even under our interpretation of the former Section 7–9–55, the amendments changed the law. The new statute imposes for the first time a gross receipts tax on 65% of the receipts from transmitting interstate telephone conversations. Although the first portion of the sentence in Section 7–9–56(C) continues non-taxation of access charge receipts, that language may well have been included by the legislature to avoid any confusion as to whether access charges are considered to be receipts described in the second portion of the sentence.

Third, even if the legislature had enacted only that portion of Section 7–9–56(C) that exempts access charges from gross receipts tax, we would not infer that the legislature believed that prior law permitted taxation of such charges. In light of the breakup of AT & T, the legislature may have thought it useful to clarify a matter that could have been the subject of contention under the prior statutory language. Indeed, the Department's brief states, "It is reasonable to assume that the legislature knew that the Department was taxing access charges." The legislature may well have decided to make it crystal clear that such a tax should not be imposed, even if it thought that a reasonable construction of the prior statute would produce the same result. If we always presumed that a legislative amendment changed prior law, we would discourage legislative efforts to clarify prior law. There is no reason to presume that the legislature agreed that the earlier statutory language provided for taxation of access charges.

In sum, we hold that taxation of the access charge receipts was barred by Section 7–9–55. Because our decision rests on construction of a New Mexico statute, we are not persuaded by decisions interpreting statutes of other states which contain different language. *Compare AT & T Communications v. Department of Revenue,* 778 P.2d 677 (Colo.1989) (en banc) (permitting taxation) *with GTE Sprint Communications v. Department of Treasury,* 179 Mich.App. 276, 445 N.W.2d 476 (1989) (barring taxation). GTE is entitled to a refund of the tax paid and the penalty imposed for failure to pay that tax.

II. ANCILLARY SERVICES

A portion of the tax protested by GTE was gross receipts tax imposed on GTE's receipts for ancillary services performed for interstate carriers. For example, if a Hobbs customer placed a long distance call with AT & T, GTE would bill that call for AT & T, collect the charge from the GTE customer, and remit the revenue to AT & T. Although these services are certainly related to the provision of interstate telephone service, the receipts are not "[r]eceipts from transmitting messages or conversations by ... telephone." Therefore, receipts for these services were not deductible under Section 7–9–55. GTE does not present any other argument for deduction or exclusion of these receipts from taxation. We affirm the denial of GTE's protest of this tax.

III. MUNICIPAL FRANCHISE FEE

Various municipalities impose charges on public utilities granted franchises by the municipalities. The charges are to cover the reasonable expenses incurred in the granting and exercise of the franchise. *See* AG Op. No. 78–3 (1978) (Alarid, Ass't A.G.). GTE pays such fees to various municipalities and then passes on the cost to customers in the respective municipalities. The fee is shown as a separate line item on the telephone bill, which sets out the charge and identifies it as a municipal franchise fee. The tariff governing GTE's rates requires GTE to pass through

to its customers their proportionate share of any municipal franchise fee.

NMSA 1978, Section 7-9-3(F) (Repl.Pamp.1983) says " 'gross receipts' means the total amount of money or the value of other consideration received from ... performing services in New Mexico." The Department has included the pass-throughs of franchise fees in GTE's gross receipts. GTE contends that it is being improperly taxed because it does not receive the pass-throughs for performing a service. We disagree.

In some circumstances a pass-through is not a gross receipt. "Where the tax is imposed on the buyer and the seller merely acts as the collector of the tax, the amounts collected by the seller can be excluded from the gross receipts[.]" *United Nuclear Corp. v. Revenue Div.*, 98 N.M. 296, 301, 648 P.2d 335, 340 (Ct.App.1982). That, however, is not the case here. The municipal franchise fee is imposed on GTE, not on customers of GTE. It is a cost of doing business, just as rent and wages are. The tariff governing what GTE charges its customers does not change the incidence of the tax. Surely if the tariff required a separate line item for the customer's share of expenses for, say, pollution abatement equipment, the customer's payment for that amount would be included in gross receipts. The line item on the customer's bill for a share of the municipal franchise fee is part of the charge to the customer for receiving telephone services, and payment of that amount by the customer is a gross receipt by GTE for provision of telephone services.

The situation here is essentially the same as in *Agron v. Illinois Bell Telephone Co.*, 449 F.2d 906 (7th Cir.1971), *cert. denied*, 405 U.S. 954, 92 S.Ct. 1171, 31 L.Ed.2d 231 (1972). The company was assessed a federal excise tax computed on " 'amounts paid for ... communication services.' " *Id.* at 907 (quoting Section 4251 of the Internal Revenue Code of 1954). The court held that occupation taxes imposed on the company by the state and some municipalities were includable in the excise tax base, even though the local tax was shown separately on the customer's telephone bill.

Also on point is our holding in *United Nuclear Corp.* The taxpayer in that case mined uranium concentrate and shipped it to buyers. A severance tax was imposed on the taxable value of uranium ore. The statute provided that " 'the taxable value means the total amount of money and the reasonable value of other consideration received, or either of them, for the severed and saved uranium ore or processed uranium 'yellowcake' concentrate.' " 98 N.M. at 299-300, 648 P.2d at 338-39. Contracts between taxpayer and its buyers provided that the buyers were to pay the applicable severance tax. Bills to the customers stated the price of the uranium concentrate separately from the severance tax. Nevertheless, we held that the severance tax should be imposed on the full amount taxpayer received from its buyers. The taxpayer was not acting as collector of the tax from the buyer; the legal incidence of the severance tax fell on the taxpayer itself.

We are not persuaded by the one case cited by GTE in support of its position: *Getto v. City of Chicago*, 77 Ill.2d 346, 33 Ill.Dec. 155, 396 N.E.2d 544 (1979), *cert. denied*, 456 U.S. 946, 102 S.Ct. 2012, 72 L.Ed.2d 468 (1982). That decision turned on statutory language not present here.

We hold that the total amount of money received by GTE for selling its telephone services includes the amount identified on its bills as the customer's share of a municipal franchise fee. We therefore affirm the denial of GTE's protest of this tax.

IV. CONCLUSION

For the above reasons, we affirm the denial of GTE's protests of gross receipts taxes imposed on ancillary service fees and pass-throughs of municipal franchise fees, and we reverse the denial of GTE's protest of gross receipts taxes imposed on access charges and the accompanying penalty. No costs are awarded.

BIVINS and APODACA, JJ., concur.

APPENDIX

BEFORE THE SECRETARY OF THE TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO

IN THE MATTER OF GTE SOUTHWEST, INC.,

New Mexico I.D. No. 01–004802–00 2,

Protest to Assessment No. 1029614.

DECISION AND ORDER

This matter came on for hearing before Gerald B. Richardson, Hearing Officer on February 21, 1990. GTE Southwest, Inc., hereinafter "Taxpayer" or "GTE," was represented by J.W. Neal, Esq., and by William H. Ballard, Esq. The Taxation and Revenue Department, hereinafter "Department," was represented by Carolyn A. Wolf, Esq. At the close of the hearing, it was agreed by the parties that the matter would be continued to allow for the filing of briefs and reply briefs by the parties. Final briefing was completed upon the receipt of GTE's reply brief on May 4, 1990 and the matter was considered submitted for decision at that time. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED that:

1. This matter arose as a result of an audit of GTE by the Department which occurred in 1987. Based upon the audit, the Department issued Assessment No. 1029614 for the reporting periods January 1, 1984 through December 31, 1986. The assessment was for gross receipts tax in the amount of $1,851,378.78, compensating tax in the amount of $23,541.08, penalty in the amount of $187,492 and interest in the amount of $791,074.70, for a total of $2,853,486.56. The assessment was dated April 18, 1988 but was mailed to the taxpayer for purposes of computing the time for filing the protest of the assessment, pursuant to Section 7–1–24(B) NMSA 1978 on May 9, 1988.

2. On June 6, 1988, the Taxpayer timely protested the assessment of taxes pursuant to Section 7–1–24 NMSA 1978. At the same time, the Taxpayer transmitted a check in the amount of $1,874,919.86, constituting the tax principle portion of the assessment, in order to prevent the accrual of further interest and penalty upon the assessment, pending resolution of the Taxpayer's protest.

3. At the time the assessment was issued, there were approximately ten areas of dispute between the parties concerning the taxes assessed. By the time of the hearing, however, many areas of dispute had been resolved between the Department and GTE. The Department agreed to abate all tax, penalty and interest arising from several audit issues and GTE conceded that it owed tax and interest on several other issues, while continuing to dispute all penalty assessed. GTE brief, pp. 2–3. *See*, also, Department's Exhibit 1.

4. There remain four areas of dispute between the Department and GTE. They are as follows:

A. taxation of access charges, $969,-311.03 in tax principle;

B. taxation of municipal franchise fees, $10,294.93 in tax principle;

C. taxation of ancillary services, $31,-568.65 in tax principle; and

D. penalty in the amount of $114,-446.53.

These four areas of dispute will be discussed separately.

5. The issue with regard to access charges is whether the revenues which GTE receives from telephone access charges or switched access revenue are subject to New Mexico's gross receipts tax. In order to answer this question, a discussion of the historical and statutory background concerning this issue is necessary. It is significant that the commencement date for the Department's assessment is January 1, 1984. This date coincides with the effective date of the breakup of the Bell System under the terms of the modified final judgment in *United States v. American Tel. and Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. [1001] 101 [103 S.Ct. 1240, 75 L.Ed.2d 472] (1983), the U.S. Justice Department's antitrust suit brought against AT & T. The divestiture

suit forced AT & T to divest itself of its local operating companies, such as Mountain Bell. The access charge revenues at issue here were a product or result of the divestiture litigation. Prior to that time, GTE received its interstate toll revenues for long-distance calls placed with it in New Mexico through a division of revenue process of separations and settlements wherein all telephone companies in New Mexico, including GTE, pooled their interstate toll revenues and then were compensated from that pool based upon their individual investment, expenses and taxes associated with providing interstate toll service. After divestiture, an entirely new system was implemented. The United States was divided into geographical regions called LATAs. LATA stands for local access transport area. Most states were divided into multiple LATAs because of their size and population characteristics. However, the entire state of New Mexico constitutes one LATA. Companies providing telephone services were divided into two categories—those that provide only inter-exchange services (telephone services between LATAs, called inter-exchange carriers) and those that provide only local telephone services, referred to as local operating companies. Inter-exchange carriers can generally be conceived of as providing long-distance telephone services, although these services do not necessarily mean that the calls carried by the inter-exchange carriers are interstate calls because some calls may simply be calls carried between one LATA and another LATA within the same state. Examples of inter-exchange carriers are AT & T, Sprint and MCI. GTE is a local exchange company, which provides local telephone service in a given geographic location. U.S. West is an example of another local exchange company operating within New Mexico. For a description of LATAs, see *U.S. v. Western Electric Company,* 569 F.Supp. 990 (1983).

Under the new system, post-divestiture, each long-distance call is comprised of three parts. The originating call begins when a telephone subscriber, customer or end user initiates a long-distance call, using his local operating company's network. The call is then transmitted to a switch where the call is connected to the long-distance carrier's network. The part of the call that is carried on the long-distance carrier's network is called the intermediate link. The call then leaves the long-distance carrier's network at an exit point in the area where the call is to be received. There it is switched back to a local operating company's network, which transmits the call to the end user. See *GTE Sprint Communications v. Michigan Department of Treasury,* [179 Mich.App. 276] 445 N.W.2d 476 (1989) and *AT & T Communications v. Colorado,* 778 P.2d 677 (Colo. 1989), for descriptions of this system.

Since divestiture, AT & T and other long-distance or inter-exchange carriers have had to pay the local exchange companies, such as GTE, for access services. 47 C.F.R. Section 69.2(b) defines "access service" as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." Thus, access charges are the tariffs which interexchange carriers must pay to the local operating companies for access to the local operating companies' exchange network. The issue presented herein is whether GTE's revenues from providing access services are subject to gross receipts tax in New Mexico during the assessment period at issue.

6. The statutory provisions in the New Mexico tax statutes must also be reviewed with respect to the taxability of the access charges at issue. At the time the audit was commenced, January 1, 1984, the only statutory provision which specifically addressed telephone services with respect to gross receipts tax was Section 7–9–55. It provided in part:

> Receipts from transmitting messages or conversations by telegraph, telephone or radio other than from one point in this state to another point in this state ... may be deducted from gross receipts.

Gross receipts was defined at Section 7–9–3(F) in pertinent part as:

> "Gross receipts" means the total amount of money or the value of other considera-

> tion received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico, ...

There can be little doubt that GTE is rendering services in New Mexico when it provides telephone service to its customers. *Leaco Rural Telephone Co-op, Inc. v. Bureau of Revenue,* 86 N.M. 629, 526 P.2d 426 (Ct.App.1974). Thus, at the commencement of the audit period, GTE was subject to gross receipts tax on its rendition of telephone services, with the exception of the deduction provided by Section 7–9–55 for its receipts from transmitting interstate telephone messages. In 1986, the legislature amended Section 7–9–55 to delete the words "telegraph and telephone," leaving only receipts from transmitting interstate radio messages subject to the deduction found therein. At the same time, Section 7–9–3(F) was amended to include in the definition of gross receipts,

> amounts received from transmitting messages or conversations by persons providing telephone or telegraph services, including interstate and international messages or conversations that either originate or terminate in New Mexico and are billed to a New Mexico telephone number or account.

Additionally, Section 7–9–56 was amended to include a new paragraph (C) which provides:

> Receipts from providing telephone or telegraph services in this state which will be used by other persons in providing telephone or telegraph services to the final user and 35% of the receipts of persons providing interstate and foreign telephone or telegraph services from transmitting interstate messages or conversations may be deducted from gross receipts.

These changes were enacted by Laws 1986, Ch. 52 Sections 1–3, effective July 1, 1986. The effect of these amendments is to specifically include in the definition of gross receipts amounts received from transmitting interstate and international messages which either originate or terminate in New Mexico and are billed to a New Mexico telephone number or account, and then to provide a specific deduction in Section 7–9–56(C) for receipts from providing access services ("telephone services which will be used by other persons in providing telephone services to the final user"), and to provide a deduction for 35% of a telephone company's receipts from transmitting interstate messages or conversations. Since the 1986 amendment specifically provided a deduction at Section 7–9–56(C) for telephone access services, the issue of taxability is only relevant for purposes of this assessment for the period of January 1, 1984 to June 30, 1986.

7. With this background, the issue presented is whether GTE's access charge receipts constitute "receipts from transmitting messages or conversations by ... telephone ... other than from one point in the state to another point in the state ..." so as to be deductible pursuant to Section 7–9–55 NMSA 1978. Prior to January 1, 1984, the Department did not attempt to impose its gross receipts tax upon GTE's receipts which it received under the revenue pooling agreements from transmitting interstate telephone messages. GTE's contention, in a nutshell, is that, although after January 1, 1984 it no longer received interstate toll revenues by way of the pooled revenue settlement process, the access charge revenues it began receiving in January 1, 1984 were merely a substitution for the previous pooled revenues, and that they constitute receipts from transmitting interstate phone messages which are deductible under Section 7–9–55. In support of its position, the taxpayer produced evidence that the process for handling interstate calls did not change after divestiture. The switching process and the transmission path for the telephone calls remained essentially the same, both pre- and post-divestiture. GTE contends that both pre- and post-divestiture, in order for an interstate call to be transmitted, there needed to be access into GTE's local network. It is GTE's contention that access to the local network is an integral process to the transmission of interstate telephone calls, and that therefore, its access charge receipts

are not separable for tax purposes, but rather, constitute receipts from transmitting interstate telephone messages, subject to the deduction at Section 7–9–55. With regard to this question, it is noteworthy that since New Mexico constitutes a single LATA, all access charges GTE received for transmittal of messages into its local network relate strictly to the transmission of interstate phone messages.

8. The Department contends that GTE's receipts for providing access services are not receipts from transmitting interstate messages. Rather, it is payment for access to GTE's switching and transmission capabilities. It thus believes these access services are identifiable as a separate element of an interstate telephone call and are separately taxable.

9. Given the positions of the parties, the resolution of this matter turns on the proper characterization of the revenue stream at issue.

10. Support for GTE's position may be found in *U.S. v. AT & T,* 552 F.Supp. 131 (1982) and *U.S. v. Western Electric Co., Inc.,* 569 F.Supp. 990 (D.D.C.1983), where language may be found suggesting that the access tariffs are a substitute for the funds received for the local operating companies under the division of revenue process which allocated interstate toll revenues between operating companies and AT & T's long lines division. These cases are both cases dealing with the divestiture of the Bell System and did not address any possible tax consequences attributable to the creation of access charges, a new and identifiable element of interstate telecommunications. In fact, the discussion of access charges vs. the former pooling of revenues procedure occurred in the context of a discussion about whether long-distance revenues had subsidized the provision of local telephone services. This issue was never determined because of the consent decree entered into between the Justice Department and AT & T.

11. Further support for GTE's position may be found in *Ealey v. Bureau of Revenue,* 89 N.M. 160, 548 P.2d 440 (1976). Ealey was an agent of Western Union who transmitted and received messages in Farmington and was paid by Western Union 70 cents per message either sent or received. The Bureau of Revenue had assessed gross receipts tax on the amount paid to Ealey by Western Union. Ealey transmitted the messages from Farmington to Albuquerque where they were then switched into an interstate network for transmission. The Bureau of Revenue had contended that Ealey's receipts were receipts from the transmission of the message to or from Albuquerque which therefore did not constitute receipts, deductible under Section 7–9–55, from transmitting interstate messages. The New Mexico Supreme Court reversed the Bureau of Revenue as to messages which were ultimately transmitted out of state, ruling that "once a telegram is transmitted down for an interstate destination, it becomes part of the national network of telegraphic communications. Each separate mode of relay or transmission cannot be isolated and taxed as a local incident." 89 N.M. 160, 161, 548 P.2d 440.

12. There is also support for the Department's position. The precise issue of whether access services are an integral part of an interstate call and are not separable for tax purposes was decided in *AT & T Communications v. Department of Revenue,* 778 P.2d 677 (Colo.1989). In that case, the Colorado Supreme Court thoroughly reviewed the effects of divestiture on long-distance service and analyzed the nature of access charges. It concluded that "access services clearly have identifiable physical characteristics which affect the interstate transmission portion of the telephone call and may be separated from that portion of the call." 778 P.2d 677, 684. In arriving at this conclusion, the court reviewed the effects of divestiture on interstate telecommunications. It noted that after divestiture, purchase and sale of access services are arm's-length transactions between two separate companies, the long-distance carrier and the local operating company. Although both are engaged in providing telephone services which are complimentary, their services are mutually

exclusive. 778 P.2d 677, 683. The court also relied upon *Kahn and Shew,* "Current Issues in Telecommunications Regulation: Pricing," 4 Yale Journal on Regulation, 191 (1987). In this article, the authors argue that access is a service for which subscribers should pay separately from other usages of the system.

13. Further support for the Department's position that access services are separable (and therefore separately taxable) from interstate telephone call revenues can be found in two Michigan tax cases. At issue was whether the purchase of local exchange services (access charges) by interstate telephone carriers (MCI and GTE Sprint) from a local exchange (Michigan Bell) was subject to Michigan's use tax. In the first case, *MCI Telecommunications v. Department of Treasury* [136 Mich.App. 28], 355 N.W.2d 627 (1984), MCI argued that as an interstate carrier, when it purchases access to the Michigan Bell System, it is merely purchasing an integral part of the interstate communication service which it provides to its customers, and its use of the access services should not be separately taxable. The court rejected this argument, ruling that the local exchange services purchased by MCI are separable and separately taxable as an intrastate activity.

In the second case, *GTE Sprint Communications v. Department of Treasury* [179 Mich.App. 276], 445 N.W.2d 476, the court ruled on an issue not raised in the *MCI* case, whether the activity taxed actually fell within the language of Michigan's use tax statute. In ruling that MCI was not subject to use tax on its use of access services provided by Michigan Bell, the court construed the language of the use tax statute to determine that the Michigan legislature had only intended to tax a complete telephone communication (from origination point to destination point). Since access services were not a complete communication but only part of a communication, their use was not subject to tax. Although this case does not directly apply to a determination of GTE's claim of deduction under New Mexico's statutes, nonetheless, it supports the Department's view that access service charges are separable and distinct from interstate call revenues.

14. Resolution of this question is a matter of first impression in New Mexico. Ultimately, it turns on whether the revenues are characterized as receipts from transmitting interstate messages or whether they are receipts to compensate GTE for access to its local telephone network. This is a difficult question, but ultimately, the hearing officer believes that the reasoning of the Colorado Supreme Court in *AT & T Communications v. Department of Revenue, supra,* and the two Michigan cases discussed above, which treat access charges as separable from interstate call revenues, reflects the better reasoned view. Although divestiture did not change the actual manner in which long-distance telephone calls were made, it did identify, for the first time, separate components of interstate telephone call transmission and required telephone companies to file tariffs for the provision of access services "on an unbundled basis specifying each type of service, element by element." *See,* modified final judgment (divestiture case), *U.S. v. AT & T,* 552 F.Supp. 131 at 233.

15. In order to arrive at this conclusion, *Ealey v. Bureau of Revenue, supra,* must be discussed. The hearing officer believes that the conclusion of the New Mexico Supreme Court in the *Ealey* case, that the transmission of a telegram bound for an interstate destination becomes inseparable from the interstate transmission of the telegraph message, no longer reflects the modern realty [sic] of interstate telecommunications or the modern view concerning taxation of messages in interstate commerce. It is noteworthy that Mrs. Ealey was an agent of Western Union, the company which carried the interstate telegraph messages from origination point to destination. There was no separate business entity, as there is now, post-divestiture, which transmits a message into another business entity's transmission network for relay. Since the telegram was transmitted entirely on Western Union's network, it is easy to see how the court in *Ealey* regarded the

transmission of the telegraph messages to be a single and indivisible transmission which was interstate in character. It must also be remembered that the backdrop for the *Ealey* decision was a now outdated concept of states' ability to tax activities in the stream of interstate commerce. The deduction which the court allowed Mrs. Ealey to take, which is identical to Section 7–9–55 before it was amended by Laws 1986, Section 52, contains the identical first paragraph which generally taxed all transactions in interstate commerce except where prohibited by the United States Constitution. *See,* Section 72–16A–14.10 NMSA 1953. *Ealey* was decided in 1976, before the U.S. Supreme Court's seminal decision in *Complete Auto Transit v. Brady,* 430 U.S. 274 [97 S.Ct. 1076, 51 L.Ed.2d 326] (1977), rejected the theory that states cannot impose a tax on the privilege of engaging in an activity within the stream of interstate commerce. Modern Commerce Clause analysis now permits state taxation of interstate telephone calls so long as the tax meets the four-part *Complete Auto Transit* test. *See, Goldberg v. Sweet,* 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989), discussed in paragraph 17, *infra.* Thus, the factual and the legal underpinnings of the *Ealey* decision can be distinguished in the instant case.

16. The most persuasive evidence, however, that access charges were subject to gross receipts taxation commencing with the Bell System divestiture and the commencement point of the Department's assessment can be found in the statutory modifications which occurred in 1986. As noted previously, in 1986, Section 7–9–56 was modified to add a new paragraph C, which provided that "receipts from providing telephone or telegraph services in this state which will be used by other persons in providing telephone or telegraph services to the final user ... may be deducted from gross receipts." Thus the legislature took specific action, effective January 1, 1986, to provide a deduction from gross receipts for telephone access services. Although GTE argues that this indicates a legislative intent that access services should continue to be exempt, this view conflicts with two general rules of statutory construction. The first rule is that the legislature is presumed to know the law in effect, and when it enacts a new statute, it is presumed that it intended to change the law which previously existed. *State, ex rel. Bird v. Apodaca,* 91 N.M. 279, 573 P.2d 213 (1977). Secondly, there is also a presumption that in enacting laws, the legislature does not use surplus language or enact useless laws. *See* also, *State, ex rel. Bird v. Apodaca.* If access charges were already exempt from gross receipts taxation in New Mexico, there would be no need for the specific language of Section 7–9–56(C) to have been enacted to provide for a deduction from gross receipts. Thus, it must be presumed that in enacting Section 7–9–56(C), the legislature sought to provide a tax deduction where none existed before.

17. GTE has also raised the contention that the imposition of New Mexico's gross receipts tax on its access charge revenues impermissibly impacts interstate commerce and the Commerce Clause of the U.S. Constitution. In this argument, GTE relies upon *Goldberg v. Sweet, supra,* which is the U.S. Supreme Court case which upheld Illinois' taxation of interstate telecommunications which originate or terminate in the state and are charged to an Illinois service address against a Commerce Clause challenge. The Court ruled that the tax met the four-part test of *Complete Auto Transit* in that the tax was applied to an activity with a substantial nexus with the taxing state, was fairly apportioned, did not discriminate against interstate commerce, and was fairly related to the services provided by the state. GTE contends that New Mexico's tax on access charges fails to comply with the second prong of the *Complete Auto Transit* test, fair apportionment, because New Mexico's tax on access charges does not have a credit provision, like the Illinois excise tax upheld in *Goldberg,* which allowed a credit if the taxpayer could demonstrate that another state had taxed the same call. This issue is a red herring. The *Complete Auto Transit* test is only applied to taxes imposed upon activities in interstate commerce.

There is no need for such a credit provision with respect to access charges because the access services being provided are for access into GTE's local network within New Mexico. All of the switching equipment and the network itself is located within New Mexico, and there is no basis for another state to have nexus to impose a tax upon charges imposed for access to GTE's New Mexico-located network. It is simply not a transaction in interstate commerce.

18. The final argument GTE raises with respect to the access charges is that somehow the Department has deprived GTE of its right to due process and equal protection in that it failed to notify GTE, by ruling, public announcement or other means, prior to its audit of GTE that it considered GTE's receipts from providing access services to be subject to gross receipts tax commencing with the divestiture of the AT & T system on January 1, 1984. GTE has cited no authority for its contention that the Department is under such a duty. Although it is true that the Department did nothing to officially inform the telecommunications industry that it intended to tax the newly identified category of revenue known as access charges, it is also true that GTE made no attempt to determine whether the Department regarded these revenues as a new category of revenue subject to gross receipts taxation. There is no statute or constitutional provision which requires a taxing agency to advise taxpayers of possible tax consequences when a change in the manner in which a taxpayer does business occurs. Rather, it is the taxpayer's responsibility to determine the tax consequences of its activities. *Tiffany Construction Co. v. Bureau of Revenue,* 90 N.M. 16, 558 P.2d [1155] 1115, (Ct.App.1976), *cert. denied,* 90 N.M. [255] 254, 561 P.2d 1348 (1977).

19. The next issue in dispute is whether GTE is subject to gross receipts tax upon revenues it received for providing "ancillary services." There was little discussion concerning this issue at the hearing, but as best as the hearing officer can determine, it involved the provision of services by GTE such as billing and collection for long-distance carriers, such as AT & T. The example given was where GTE has a billing and collection agreement with AT & T so that if a Hobbs customer originates a call that goes over the AT & T network, GTE would bill that call for AT & T and turn around and remit those revenues to AT & T which it collects from its customer. There is a dispute between the parties as to the proper characterization of these revenues. Apparently, GTE believes that the taxability of these revenues should turn on whether or not they are subject to the deduction for receipts from transmitting interstate telephone messages, found at Section 7–9–55 NMSA 1978. In other words, GTE contends that the taxability of these receipts turns on the tax treatment of access charges. The Department contends that billing subscribers and collecting for long-distance calls is a quantitatively different type of service than an access service, but nonetheless, it contends that the revenues from these services are subject to gross receipts tax. The fees which GTE receives for billing its subscribers, collecting and remitting to long-distance carriers charges for long-distance calls are not receipts from transmitting interstate messages subject to the deduction found at Section 7–9–55. These are receipts from providing a service to the interstate carriers. As such, they are gross receipts as defined in Section 7–9–3(F) NMSA 1978, and there are no applicable exemptions or deductions which would apply.

20. The next issue is whether GTE is subject to gross receipts tax upon the amounts it collects from its customers and remits to municipalities in New Mexico as municipal franchise fees. Section 3–42–1 NMSA 1978 authorizes municipalities to grant, by ordinance, franchises to any person, firm or corporation for the construction and operation of any public utility. Public utility franchise agreements are likened to contracts between the utility and a municipality and, pursuant to these agreements, the municipality may impose charges on the utilities for the reasonable expense incurred in the granting and exercise of the franchise. *See,* 1978 Op.Att'y

Gen. No. 78–3. The receipts at issue are the reimbursements which GTE seeks from its customers to reimburse it for the municipal franchise fees which it must pay to the various municipalities. They are stated as a separate line item on each GTE customer's bill. GTE's theory is that this is simply a reimbursement and does not constitute a gross receipt subject to New Mexico gross receipts tax.

21. Section 7–9–3(F) NMSA 1978 defines gross receipts to mean "the *total amount of money* or the value of other consideration received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico ..." (Emphasis added.) The franchise fee reimbursements at issue are imposed upon GTE by the municipalities in which it operates for the exclusive right to provide local telephone service. It is not a fee that the municipality charges GTE's customers, but rather, it is the fee imposed directly on GTE itself. As such, it is a cost of doing business for GTE. Under the New Mexico general exchange tariff for GTE Southwest, GTE is allowed to, and in fact required to, pass through to its customers their proportionate share of any municipal franchise fee. *See,* Taxpayer Exhibit 2. There are no deductions or exclusions from the definition of gross receipts or from gross receipts tax for the municipal franchise fee reimbursements which GTE receives. As such, they are part of the "total amount of money" which GTE receives from its customers as part of its provisioning of telephone services to its customers in New Mexico, and is therefore a gross receipt subject to New Mexico's gross receipts tax.

22. The final issue remaining is whether the Department's assessment of penalty is proper in this case. Penalty may be assessed for the failure to pay tax when due when there is negligence or disregard of the rules and regulations of the Department. Section 7–1–69(A) NMSA 1978. Section 7–1–17(C) NMSA 1978 provides that any assessment of taxes is presumed to be correct. Section 7–1–3(S) defines tax to mean not only the total amount of each tax imposed and required to be paid, but also, "unless the context otherwise requires, includes the amount of any interest or civil penalty relating thereto." Thus, the presumption of correctness of an assessment of taxes also applies to any penalty assessed. *See also, Tiffany Construction Company v. Bureau of Revenue, supra.* GTE bears the burden to show that it was not negligent or in disregard of the Department's rules and regulations in failing to pay the taxes at issue herein. The only contested tax which GTE has made an argument upon with respect to penalty is the assessment of gross receipts tax upon access charges. Having failed to present evidence or argument to rebut the presumption of correctness as to the penalty assessed on all other taxes assessed, GTE's protest of penalty on these taxes must fail. As to penalty upon the access charges issue, GTE argues that it did not believe gross receipts tax was due upon the access charges because no tax had been collected by the division on its prior long-distance revenues and it argues that the Department should have notified it that it would be subject to tax on access charges when GTE started collecting revenues for access service charges. In *Tiffany Construction Company,* the Court of Appeals ruled that mere belief that one does not owe taxes, without further investigation, constitutes negligence. As stated by the court, "every person is charged with the reasonable duty to ascertain the possible tax consequences of his action." 90 N.M. 16, 17, 558 P.2d 1155. In this instance, GTE has presented no evidence that it sought advice from the Department concerning the taxability of access fees, nor did it make any showing that it sought legal or accounting advice or met any of the other indications of nonnegligence found in T.A. Regulation 69:4. Although there is no question that GTE is a good corporate citizen which did not intentionally attempt to avoid the taxes at issue, the penalty being imposed is not a penalty for the intentional avoidance of tax. Section 7–1–69(A) is designed specifically to penalize unintentional failure to pay tax. *El Centro Villa v. Taxation and Revenue*

Department, 108 N.M. 795, 779 P.2d 982 (Ct.App.1989). GTE's mere belief that it did not owe the taxes, without a showing that its belief was an informed belief based upon competent advice from tax or accounting counsel, fails to overcome the presumption that the penalty assessment is correct.

23. For the foregoing reasons, GTE's protest is hereby denied. The Department is ordered to abate the taxes, penalties and interest reflected in Department's summary of adjustments as noted in Department's Exhibit 1.

Done this ___ day of June, 1990, in Santa Fe, New Mexico.

Gerald B. Richardson
Hearing Officer
Taxation and Revenue Department

GAIL REESE, Secretary
Taxation and Revenue Department

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Decision and Order was served upon GTE Southwest, Inc. by mailing a copy to its attorneys, J.W. Neal, Esq., P.O. Box 278, Hobbs, NM 88241 and William H. Ballard, Esq., GTE Southwest, Inc., P.O. Box 152013, Irving, TX 75015-2013, and upon the Taxation and Revenue Department by hand-delivering a copy to its attorney, Carolyn A. Wolf, Esq., on this ___ day of June, 1990.

Gerald B. Richardson

830 P.2d 179

STATE of New Mexico, Plaintiff-Appellee,

v.

Pete PINELA, Defendant-Appellant.

No. 12765.

Court of Appeals of New Mexico.

March 5, 1992.

Certiorari Denied April 15, 1992.

[redacted]

Tom Udall, Atty. Gen., Max Shepherd, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Hilary Lamberton, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

BLACK, Judge.

Defendant appeals his conviction for possession of cocaine. He argues that the Roswell Municipal Court bench warrant was invalid, and if it was not, Officer Steinbeck was not authorized to execute it in Dexter. The trial court made the following rulings: (1) the warrant was valid, even though not based on a sworn affidavit; and (2) the arrest was legal because a Chaves County sheriff's deputy has the authority to arrest a person in Chaves County based on a Roswell Municipal Court bench warrant. We affirm.

FACTS

Marvin Steinbeck, a police officer in Dexter, stopped Defendant in that city because he was not wearing a seat belt. After Defendant gave Officer Steinbeck his driver's license, Steinbeck ran a license check and a local warrant check on Defendant. The routine check revealed there was an outstanding bench warrant from Roswell on Defendant. Officer Steinbeck took Defendant into custody and did a pat-down search. During the pat-down search, Officer Steinbeck found a small metal tin in Defendant's right trouser pocket. Officer Steinbeck opened the tin and found a small brown vial and three wrapping papers that tested positive for cocaine.

Prior to trial, Defendant filed a motion to suppress on the ground that the Roswell bench warrant was invalid, but that even if it had been valid, Officer Steinbeck lacked authority to execute the warrant.

Lorraine Lucero, a senior clerk at the Roswell Municipal Court, testified at the suppression hearing concerning that court's warrant procedures. She stated that when the clerk's office first receives notice a party has been cited, a card is completed and a computer file is opened. The computer file contains the necessary information about the individual and the fine imposed. If an individual does not pay the fine on or before the date listed on the original citation or any authorized extension, the court's computer automatically prints an order to show cause. Ms. Lucero further testified that in processing the show cause orders, a court clerk mails the original order to the defendant, and places a copy of the order in the court's file. The show cause order contains a deadline by which the defendant must pay the fine or request an extension. If an individual fails to pay or appear by the requisite date, a bench warrant is automatically printed by the court's computer. When the bench warrant is issued, the clerk's office checks each party's file and makes sure that a show cause order was printed and mailed before the bench warrant is sent to the judge for signature. Although the clerks do not swear out an affidavit, they do write the amount of the bond or fine for the judge on an affidavit form. Ms. Lucero testified that this "affidavit" is also filled out by the clerks to indicate when the show cause order expired, and other general information for the judge's use.

At the suppression hearing, Officer Steinbeck testified that although he was a Dexter police officer at the time of Defendant's arrest, he was also commissioned as a sheriff's deputy in Chaves County, where both the city of Roswell and Dexter are located.

VALIDITY OF THE BENCH WARRANT

[redacted] SCRA 1986, 8–206 (Repl.Pamp.1990) (Rule 8–206), governs the issuance of bench warrants by municipal judges. Rule 8–206(A) provides that unless the transgression on which the bench warrant is based is

within the court's "personal knowledge," the warrant may not be issued "except upon a sworn written statement of probable cause." Defendant argues that because the judge had no "personal knowledge" of nonpayment, Rule 8–206 required the municipal court to have a sworn statement of probable cause in order to issue the bench warrant. Defendant cites no authority for this proposition but merely asserts that the "rule needs no interpreting and can be readily applied to the facts of appellant's case."

Defendant misapprehends the nature of the "personal knowledge" required to issue a bench warrant under Rule 8–206. As indicated, the Roswell municipal judge in the case at bar received a computer-generated bench warrant. Before the clerk presented that warrant to the judge, however, the clerk's office had verified that a show cause order had previously been mailed to Defendant and that the response time stated in that show cause order had expired. The clerk's office also noted the amount of the fine and other general information on an unsworn affidavit form before presenting it to the judge.

The "personal knowledge" exception to the affidavit requirement appears to recognize that there is no point in the municipal judge's executing an affidavit when the judge has personal knowledge of facts constituting probable cause. Other jurisdictions have approved the elimination of similar useless formalities in this context. *See, e.g., O'Dell v. City of Knoxville,* 388 S.W.2d 150 (Tenn.Ct.App.1964) (facsimile signature of municipal judge on warrant presumed to be adopted by judge); *Salt Lake City v. Hanson,* 19 Utah 2d 32, 425 P.2d 773 (1967) (stamped signatures of police officer and city judge on complaint charging ordinance violations sufficient).

In this regard, we think the requirement of "personal knowledge" under Rule 8–206 is analogous to the requirement that a witness can only testify as to matters on which he has "personal knowledge" under SCRA 1986, 11–602 (Rule 602). The federal courts have repeatedly recognized, under the virtually identical federal rule of evidence, that a witness can acquire "personal knowledge" through a review of records kept in the regular course of business. *United States v. Endicott,* 803 F.2d 506, 512 (9th Cir.1986), *cert. denied,* — U.S. —, 111 S.Ct. 529, 112 L.Ed.2d 540 (1990); *Teen–Ed, Inc. v. Kimball Int'l, Inc.,* 620 F.2d 399, 403 (3d Cir.1980); *Cities Serv. Oil Co. v. Coleman Oil Co.,* 470 F.2d 925, 932 (1st Cir.1972), *cert. denied,* 411 U.S. 967, 93 S.Ct. 2150, 36 L.Ed.2d 688 (1973); *cf. Nichols Corp. v. Bill Stuckman Constr., Inc.,* 105 N.M. 37, 41, 728 P.2d 447, 451 (1986) (principal in construction project allowed to testify on value of materials and labor based on his review of business records). The federal courts have also recognized that a person supervising the employees who actually compiled the data may thus acquire sufficient "personal knowledge." *United States v. Sutton,* 795 F.2d 1040, 1057 (Temp.Emer.Ct.App.1986), *cert. denied,* 479 U.S. 1030, 107 S.Ct. 873, 93 L.Ed.2d 828 (1987).

The number and type of records kept, and the virtually universal use of computers to record vast quantities of information in our society, make it unrealistic to require a witness to have personally observed each aspect of a transaction if he is familiar with the method the organization routinely uses to compile and record such data. The fifth circuit recognized as much in *United States v. Quezada,* 754 F.2d 1190 (5th Cir. 1985), holding there was sufficient "personal knowledge" to support testimony in an analogous factual setting. The defendant therein appealed his conviction for illegal re-entry after deportation, arguing that the border patrol agent who testified at trial lacked personal knowledge that the defendant had previously been deported. The agent testified on his knowledge of standard deportation procedure and then relied upon the prior deportation warrant and a letter to the defendant warning him of the penalties for re-entry. *Id.* at 1195–96. Although the agent did not testify that he actually participated in the defendant's prior deportation, the district court found sufficient "personal knowledge" under Federal Rule of Evidence 602. *Id.* The fifth circuit affirmed and likened it to testimony

concerning mailing a letter in the normal course of business. *Id.* at 1196 n. 14.

AUTHORITY TO EXECUTE ON WARRANT BEYOND CITY LIMITS

Defendant next argues Officer Steinbeck did not have the authority to arrest Defendant in Dexter on the basis of a Roswell Municipal Court bench warrant. In support of this position, Defendant relies upon NMSA 1978, Section 35–14–2(C) (Repl.Supp.1988), which extends the personal jurisdiction of municipal courts "to any defendant who has been properly served with criminal process of the court anywhere in the state if that criminal process arises out of a charge of violation of a municipal ordinance prohibiting driving while under the influence of intoxicating liquor or drugs." Section 35–14–2(A), which grants municipal courts the authority to issue warrants, contains no such reference to the jurisdictional extent of proper service. Defendant reasons that by specifically allowing statewide service of warrants based on driving while intoxicated (DWI), by negative inference the legislature recognized that the personal jurisdiction of municipal courts on charges other than DWI is more limited.[1]

Defendant overlooks NMSA 1978, Section 3–13–2(A) (Cum.Supp.1990), which provides in relevant part:

> A. The police officer of a municipality shall:
>
> (1) execute and return all writs and process as directed by the municipal judge of the municipality employing the police officer;
>
> (2) execute and return all criminal process as directed by the municipal judge of any incorporated municipality in the state if the criminal process arises out of a charge of violation of a municipal ordinance prohibiting driving while under the influence of intoxicating liquor or drugs;
>
> (3) serve criminal writs and process specified in Paragraphs (1) and (2) of this subsection in any part of the county wherein the municipality is situated....

Because a bench warrant is legal "process," *State v. Gutierrez,* 102 N.M. 726, 729, 699 P.2d 1078, 1081 (Ct.App.), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985), municipal police officers clearly have county-wide jurisdiction to execute on warrants authorized by their municipality. *See* AG Op. No. 61–3 (1961–62) (under prior version of statute village marshall has power to execute a municipal court arrest warrant anywhere in the county). Thus, a Roswell city police officer would have been authorized by Section 3–13–2(A)(3) to execute the bench warrant anywhere in Chaves County, including Dexter. Furthermore, NMSA 1978, Section 35–15–4 (Repl.Supp.1988), provides that a county sheriff can "serve any process ... authorized to be made by any city or town officer." Deputy Steinbeck, as a Chaves County deputy sheriff, was therefore authorized to serve the Roswell warrant in Dexter.

In this day of transitory populations and cross-deputization,[2] common sense dictates that courts not look for hypertechnical statutory interpretations to limit cooperation among police officers in adjoining jurisdictions. We will not strain to find such an interpretation when the language employed by the legislature in Section 35–15–4 seems clearly intended to allow county sheriffs to serve valid municipal court warrants throughout the county.

CONCLUSION

We agree with the district court that the Roswell municipal judge had sufficient "personal knowledge" to support the bench warrant from his review of the information on the unsworn affidavit from the clerk's office. We also hold that Officer Steinbeck, as an authorized Chaves County deputy sheriff, had the authority to execute on the Roswell Municipal Court warrant any-

1. NMSA 1978, Section 31–1–4(E) (Repl.Pamp.1984), would also seem to suggest that a municipal court warrant cannot be served throughout the state.

2. NMSA 1978, Section 29–8–3 (Repl.Pamp.1990), for example, even allows the state Environmental Improvement Division to seek assistance from city and county enforcement agencies to enforce asbestos disposal regulations. AG Op. No. 87–48 (1987).

where within the county. Accordingly, the district court was correct in denying the motion to suppress and is affirmed.

IT IS SO ORDERED.

HARTZ and FLORES, JJ., concur.

830 P.2d 183

STATE of New Mexico, Plaintiff-Appellee,

v.

Carlton BROWN, Defendant-Appellant.

No. 12871.

Court of Appeals of New Mexico.

March 9, 1992.

Certiorari Denied April 15, 1992.

Tom Udall, Atty. Gen., Margaret McLean, Asst., Atty. Gen., Santa Fe, for plaintiff-appellee.

Sammy J. Quintana, Chief Public Defender, Gina Maestas, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

MINZNER, Judge.

Defendant appeals from his conviction of two counts of larceny under $100, contrary to NMSA 1978, Section 30–16–1 (Cum.Supp. 1990) (petty misdemeanor), one count of larceny over $250, contrary to Section 30–16–1 (fourth degree felony), and one count of residential burglary, contrary to NMSA 1978, Section 30–16–3(A) (Repl.Pamp.1984) (third degree felony), contending (1) the two convictions for larceny under $100 merged, and (2) there was insufficient evidence to support the conviction for larceny over $250. We agree that the convictions for larceny under $100 merged and remand for resentencing. We affirm the conviction for larceny over $250.

I.

Julie Oliver and Vivian Adams lived at 611 Lead, S.W., Apartment 706, in Albuquerque. A little after 6:00 a.m. on March 17, 1990, Oliver awakened and discovered Defendant sleeping on the living room couch. She summoned the police. Defendant told the police that an acquaintance had let him in with a key and had then departed. Oliver's backpack was on the patio next to Defendant's bicycle. Inside the backpack were a Sony compact disc player and eight compact discs. Defendant said that the items on the patio belonged to him. Adams's gloves were found in Defendant's pocket and her briefcase was found outside on the lawn. Officer Trout found two screwdrivers lying under a front window of the women's apartment.

The police found several hundred dollars in Defendant's pockets. Officer Wood asked Defendant where he obtained the money, and he replied that he had been paid. He did not have any documentation.

James Molling and Chad Bridges lived at 611 Lead, S.W., Apartment 722. At approximately 9:00 a.m. on March 16, 1990, Molling noticed that a Sony compact disc player owned by Bridges and approximately $400 in $20 bills were missing. Bridges had purchased the player for $100. Bridges noticed later that six of his compact discs were missing. The police gave the money found in Defendant's pockets to Molling.

A grand jury indicted Defendant for two counts of residential burglary, one count of larceny over $250, and two counts of larceny under $100. One of the counts of larceny charged Defendant with taking Adams's gloves and briefcase; the other charged him with taking Oliver's backpack. The trial court directed a verdict regarding one count of residential burglary.

II.

Defendant argues that his two convictions for larceny of the items taken from Oliver and Adams must merge under the single larceny doctrine. Under that doctrine, the stealing of property from different owners at the same time and the same place constitutes only one larceny. *See generally* Daniel H. White, Annotation, *Single or Separate Larceny Predicated upon Stealing Property from Different Owners at the Same Time,* 37 A.L.R.3d 1407 (1971 & Supp.1991). We conclude that *Herron v. State,* 111 N.M. 357, 805 P.2d 624 (1991), controls the disposition of this appeal and that under the analysis adopted by the supreme court in *Herron,* Defendant's convictions do merge. We also conclude that as a result of *Herron,* we should now recognize the validity of the single larceny doctrine in New Mexico.

In *Herron,* the supreme court held that numerous convictions for criminal sexual penetration violated guarantees against double jeopardy because they subjected the defendant to multiple punishments for the same offense. In making this determination, the court first identified "the appropriate unit of prosecution" under the relevant statute. *Id.* at 359, 805 P.2d at 626. Absent legislative intent that non-distinct

acts could be punished separately, the court required proof that each act charged was in some sense distinct from the others charged. *See State v. Mares,* 112 N.M. 193, 812 P.2d 1341 (Ct.App.1991) (adopting the approach used in *Herron* to allegations of multiple batteries). We apply the same analytical approach. Under that approach, the first inquiry is how the legislation has defined the crime.

Section 30–16–1 defines larceny as "the stealing of anything of value which belongs to another." This court has said that in prosecuting larceny, the state need not prove ownership in a particular person; proof that the property belonged to someone other than the defendant is sufficient. *State v. Ford,* 80 N.M. 649, 459 P.2d 353 (Ct.App.1969). Nothing in the statutory language indicates that the legislature intended to create a separate offense for each taking of property belonging to different persons during a continuous episode. *Cf. State v. Callaghan,* 33 Or.App. 49, 576 P.2d 14, 19–20 (1978) (where legislature had expressed its intent that where there were multiple victims, multiple counts were proper, evidence that the defendant at one time and in one place withheld property from twenty different victims supported his conviction of twenty separate theft offenses). We conclude that the legislative intent is ambiguous. Any doubt will be resolved against construing ambiguous legislative intent in favor of allowing multiple punishments for one act. *Herron v. State.* The remaining question is whether, under *Herron,* the two acts charged as larcenies under $100 were separate and distinct.

Herron set forth a number of factors to be considered in reviewing acts of criminal sexual penetration occurring during a single attack. *Mares* paraphrased those factors so they could be applied to allegations of multiple batteries. We further refine the factors for application in this multiple larceny case. They include the time between the criminal acts, the location of the property when it was taken, the existence of any intervening events, distinctions in the manner of committing the thefts, the defendant's intent, and the number of victims.

There was evidence that Adams's gloves were taken from her bedroom or the kitchen, that her briefcase was taken from her bedroom closet or the living room, and that Oliver's backpack was taken from the room in which she slept, which was the den, in the same apartment. The State argues that this evidence establishes that the items were taken from different locations and must have been taken at different times. However, a brief interval between thefts makes no difference if they were part of the same transaction. *State v. Sampson,* 157 Iowa 257, 138 N.W. 473 (1912) (theft of roommates' possessions from different places in the same room); *cf. State v. Pedroncelli,* 100 N.M. 678, 675 P.2d 127 (1984) (successive takings from a single owner pursuant to a single, sustained criminal impulse constitute a single larceny regardless of the time which may elapse between each act). Furthermore, the fact that Defendant took the items from different rooms in the apartment and that the items were separately owned by the two roommates does not establish that they were not part of the same transaction. *See Hudson v. State,* 9 Tex.App. 151 (1880) (thefts of items owned by different persons from different rooms in a family residence). There was no evidence, for example, that Adams and Oliver did not have common rights in the location from which the other's property was stolen. *Cf. State v. Bolen,* 88 N.M. 647, 545 P.2d 1025 (Ct.App. 1976).

Adams's and Oliver's possessions were subsequently recovered from different locations in and near their apartment. The State contends that this evidence establishes two distinct criminal intents. We disagree. The fact that Defendant placed the items in different places after he seized them is not probative of two distinctive general intents when he committed the thefts.

There was no evidence that a significant period of time separated the thefts, that the items were taken from locations in which the other owner had no substantial

rights, that the thefts were accomplished in diverse manners, that Defendant's intent in committing the two thefts was different, or that the larcenies were separated by an intervening event. The only factor weighing in favor of separate offenses is the number of victims. Multiple ownership alone will not support multiple convictions. *See State v. Klasner,* 19 N.M. 474, 145 P. 679 (1914). At most, Defendant could be found guilty of one larceny under $100.

Bolen indicates that under the single larceny doctrine, " '[t]he stealing of property from different owners at the same time and at the same place constitutes but one larceny.' " 88 N.M. at 647, 545 P.2d at 1025 (quoting 2 Ronald A. Anderson, *Wharton's Criminal Law and Procedure* § 451 (1957)). *See generally* 3 Charles E. Torcia, *Wharton's Criminal Law* §§ 358, 359 (14th ed. 1980) (discussing "Single or multiple larcenies; same owner" and "— Different owners"). "The underlying theory is that there is only one taking." *Id.* § 359, at 314–16. As we understand the doctrine, had we applied it rather than *Herron,* we would have reached the same result. Under these circumstances, we conclude that as a result of *Herron,* we should recognize the validity of the single larceny doctrine.

We note, however, that in at least one jurisdiction the analysis of robbery counts differs from the analysis of larceny counts. *Compare State v. Mills,* 671 S.W.2d 437 (Mo.Ct.App.1984) (defendant properly convicted of five separate robberies where he simultaneously robbed five persons in a bar) *with White v. State,* 694 S.W.2d 825 (Mo.Ct.App.1985) (there was only one robbery where the defendant, after threatening an employee with a gun and removing his keys, helped himself to company funds and also to the employee's wallet). There may be a legal foundation for a similar distinction in New Mexico. In robbery, unlike larceny, the legislature has defined a crime that includes the element of "use or threatened use of force or violence." NMSA 1978, § 30–16–2 (Repl.Pamp.1984). Thus, in robbery, unlike larceny, the number of victims may be sufficient to support separate convictions. *Id.* That issue, however, is not before us.

III.

Defendant contends that since the trial court granted a directed verdict with respect to the charge of residential burglary of the men's apartment, it follows that the evidence was insufficient to establish that Defendant stole items from the apartment because the only way he could have obtained them was through a burglary. Defendant does not cite any authority to support his contention. *See In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984) (issues not supported by cited authority not considered). Furthermore, the elements of larceny and residential burglary are dissimilar. *Compare* § 30–16–1 *with* § 30–16–3. We are not persuaded that the directed verdict on the second residential burglary count requires reversal of the related larceny count. *See State v. McAfee,* 78 N.M. 108, 428 P.2d 647 (1967) (larceny is not necessarily involved in burglary); *see also State v. Leyba,* 80 N.M. 190, 195, 453 P.2d 211, 216 (Ct.App.1969) (acquittal, even though irreconcilable with conviction on a different count, does not require conviction to be set aside). "Our business is to review the verdict of conviction." *Id.*

Defendant also argues that while the jury could have inferred that the compact disc player found on the women's patio belonged to Bridges, the money found in Defendant's pockets could have belonged to Defendant, and possession of the allegedly stolen items was insufficient to establish that Defendant took them from the men's apartment. We disagree.

The jury was not required to draw an inference favorable to Defendant with respect to the ownership of the money. *See State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978) (on review of a conviction, we indulge in all permissible inferences in favor of the verdict). Where other circumstances are present linking Defendant with a theft, possession of the stolen property combined with the other circumstances can justify such a conviction. In *State v. Aragon,* 109

N.M. 632, 788 P.2d 932 (Ct.App.1990), we considered such circumstances as similarity in the method of carrying out the crimes, temporal and geographical connections between crimes, and a taped conversation in which the defendant made several statements implying that he committed the burglaries. In this case, there was evidence that Molling was missing approximately $400 and that Defendant had Bridges' compact disc player in his possession. There was a temporal and geographical connection between the theft of Molling's money and Defendant's apprehension with a large sum of money. The women's apartment was burglarized within the same twenty-four hour period in which the items were stolen from the men's apartment, and Defendant was apprehended while still at the same street address of both apartments. Under these circumstances, the jury was entitled to infer that the funds found in Defendant's pocket belonged to Molling. *See Dull v. Tellez,* 83 N.M. 126, 489 P.2d 406 (Ct.App.1971) (reasonable inference is a rational and logical deduction from facts established by the evidence, when such facts are viewed in the light of common knowledge or common experience).

Defendant argues that *Aragon* is distinguishable. In this case, there was no taped conversation and there was no evidence that the two residential burglaries were accomplished in the same manner. While we agree that there are differences in the evidence in *Aragon* and the evidence offered in this case, we are not persuaded by those differences that the evidence in this case is insufficient.

IV.

Defendant's conviction for larceny over $250 is affirmed. We affirm one of the two convictions for larceny under $100, and we reverse the judgment and sentence of the district court, remanding with instructions to vacate one of Defendant's convictions for larceny under $100, to impose a new sentence, and to enter an amended judgment and sentence. *See Herron v. State.*

IT IS SO ORDERED.

ALARID, C.J., and BLACK, J., concur.

830 P.2d 554

STATE of New Mexico,
Plaintiff-Appellee,

v.

Timothy DUNCAN, Defendant-Appellant.

No. 10563.

Court of Appeals of New Mexico.

May 31, 1990.

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

J. Michael Norwood, UNM Clinical Law Program, Albuquerque, for defendant-appellant.

OPINION *

APODACA, Judge.

Defendant appeals his jury convictions for aggravated burglary, kidnapping, false imprisonment, two counts of armed robbery, six counts of criminal sexual penetration (CSP) in the second degree, two counts of attempt to commit CSP in the second degree, and unlawful taking of a motor vehicle. He raises three issues on appeal: the trial court erred in (1) excluding the expert testimony of a psychologist concerning the character of the person defendant claimed coerced him, offered in connection with his defense of duress; (2) refusing defendant's requested jury instruction also relating to his defense; and (3) instructing the jury on the CSP charges where the evidence was insufficient to support the instruction. We reverse and remand for a new trial on the first issue, concluding the trial court's exclusion of the testimony denied defendant his defense of duress in that the coercer's character was an essential element of the defense.

We also address the second and third issues because they may arise again at a second trial. As to those issues, we affirm because we conclude the trial court did not err in refusing the tendered instruction and in instructing the jury on the CSP charges.

FACTS

A. *Factual Background*

Defendant met the primary victim (Polly) and her husband through a prison fellowship program while defendant was incarcerated at the Los Lunas Correctional Facility (the facility). Defendant temporarily stayed with Polly's family after he was released from the facility in 1985. Their friendship continued after defendant moved into his own place. Both Polly and defendant testified that defendant thought of Polly as a mother or grandmother. She would often assist him by arranging transportation and dental appointments. Ultimately, another inmate, Jim Wiggington, was released from the facility sometime in late July 1986.

* The following Court of Appeals opinion in *State v. Duncan* has been published merely to set forth the facts and issues addressed in the Supreme Court's opinion published at 111 N.M. 354.

Defendant has been in and out of correctional institutions most of his life. He first met Wiggington in 1980 while they were incarcerated at the state penitentiary in Santa Fe. Eventually both were transferred to the facility, where they continued to be friends. In both institutions, they appeared to have been living in the same unit and to have spent a good deal of time together.

Wiggington had bragged to defendant that he had killed people during the 1980 riot but had not been caught. Both of them, along with other inmates, spent a fair amount of time playing Dungeons and Dragons, a fantasy quest game. Most inmates played to pass the time; Wiggington, however, played to antagonize and intimidate. He also seemed to particularly enjoy bullying and intimidating defendant while playing the game. One of his tactics was to "discover" and "kill," in bizarre ways, members of defendant's imaginary family. Defendant was aware Wiggington received counseling at the facility. It was this counseling that gave rise to the expert testimony at issue in this appeal.

B. *Facts Surrounding the Incident*

The charges against defendant grew out of an incident that occurred during the late night hours of August 5 and the early morning hours of August 6, 1986. Wiggington had been released about a week or ten days before the incident. Defendant had stored some boxes of Wiggington's personal belongings in Polly's garage. On July 30, 1986, defendant, Wiggington, and another former inmate went to Polly's home to get the boxes. Although they were there for only thirty minutes, they learned that Polly's husband would be away on the night of August 5.

On August 5, Wiggington picked up defendant at work. Instead of taking defendant home, Wiggington took him to a supermarket near Polly's house. He told defendant that they were going to play Dungeons and Dragons "for real" that night. He pulled a knife out of a satchel and told defendant he was going to use it to cut Polly's throat. Defendant protested, saying he loved Polly like a mother. Wiggington told defendant that if defendant went along, he would not have to kill Polly.

Defendant testified he accompanied Wiggington to prevent him from killing Polly and also because he feared Wiggington would kill him if he refused to go. Wiggington's use of the phrase "are you with me or against me," as well as his reference to the fact that he believed himself to be a magical person who would not be caught, reminded defendant of the way Wiggington had played Dungeons and Dragons. Defendant thought Wiggington was crazy, that he was extremely unstable, and that, if defendant refused to go with him, Wiggington would go alone and kill Polly.

At the supermarket, Wiggington told defendant to telephone Polly. Still possessing the knife, Wiggington was present when the call was made. Polly agreed to pick up defendant so he could spend the night at her house. When she arrived, Wiggington persuaded her to let him stay at the house also.

They arrived at Polly's home about 11:15 p.m. Polly went into her bedroom to get clean sheets, and Wiggington followed her. He immediately pulled the knife and told Polly he was going to rape and rob her. Throughout the course of the night, he forced her to commit various sexual acts. On several occasions during the night, at Wiggington's request, defendant brought coffee and cigarettes to Wiggington in the bedroom.

During the night, Wiggington told Polly he was possessed by two spirits, Dramasus and another whose name Polly could not remember. Wiggington considered himself a warlock who had sold his soul to the devil. The knife he was going to use to kill Polly had been dedicated on an altar for that purpose. Dramasus was mad at Polly because she had hung up the phone on Dramasus. Dramasus was also telling Wiggington to do terrible things to her because of her strong Christian faith.

Later, Wiggington attempted to murder Polly by suffocating her. He directed defendant to do the same to Paula, an exchange student living with Polly and her

husband. Paula also had been kept hostage during the night. Defendant did not do what Wiggington instructed. Instead, he eventually persuaded Wiggington to leave the two women alive. They then left with household belongings defendant had stacked in the living room during the night.

SUMMARY OF TRIAL PROCEEDINGS

A brief summary of what occurred at trial will provide an understanding of how the testimony exclusion issue arose. Wiggington did not testify at trial. Thus, the facts regarding Wiggington and the incident were introduced through the testimony of Polly, Paula, and defendant. A psychologist called by defendant and a psychiatrist called by the state testified concerning defendant's psychological status. There was little, if any, conflict in the facts of the incident. Defendant's defense of duress was premised on two contentions: (1) he had gone along with Wiggington because he was afraid Wiggington would kill Polly if he did not; (2) he feared Wiggington would kill him also, if he did not do as Wiggington directed.

Before trial, the state had moved to exclude the testimony of defendant's two psychologists. The trial court reserved ruling on the motion until trial. At trial, the state renewed its motion and requested a ruling. The expert testimony of only one of the psychologists is at issue. The state represented the testimony as follows:

> [The psychologist's] sole purpose for testifying is that he knows ... Wiggington; ... he worked with [him] as a patient at Los Lunas; ... he believes that ... Wiggington is a very scary person. On one occasion he has seen ... Wiggington transform himself into a different physical appearance; ... he's changed the color of his skin and not through the use of make-up; and ... he's changed the shape of his face; and ... he believes ... Wiggington is a very frightening, ... menacing person.

Defendant later adopted this statement as his offer of proof, with the addition of the fact that the psychologist had been employed by the Corrections Department for seven years.

The state asserted that the expert testimony was about things "years ago." Defendant countered that the psychologist had treated Wiggington until he was released from the facility just a few days before the crime was committed. Relying on *State v. Bazan,* 90 N.M. 209, 561 P.2d 482 (Ct.App.1977), defendant argued the evidence was admissible under SCRA 1986, 11–405(B). He contended this case was one in which character or a trait of character of a person was an essential element of a charge, claim or defense. The trial court initially ruled the evidence was not relevant, but the discourse continued. The state again maintained that the physical transformation to which the psychologist would testify "preceded this incident by a considerable period of time." The trial court, apparently focusing only on the events that occurred on the night of the incident, finally concluded there was no evidence of a physical transformation of Wiggington on that night and disallowed the testimony as irrelevant.

DISCUSSION

A. *Exclusion of Expert Testimony*

To hold that the trial court committed reversible error, we must conclude that the error affected a substantial right of defendant. SCRA 1986, 11–103(A). An accused has a fundamental right to present evidence of a defense as long as the evidence is relevant and is not excluded by an established evidentiary rule. *Commonwealth v. Greene,* 469 Pa. 399, 366 A.2d 234 (1976).

Defendant contends his prior experiences with Wiggington were relevant to the issue of duress and that Wiggington's character was an essential element of the defense. This argument is based in part on an analogy to self-defense cases, since there are presently no cases in New Mexico directly on point. Defendant also argues that the expert testimony was important to corroborate his own testimony, particularly concerning Wiggington's alter ego. As part of this argument, defendant contends the psychologist was prepared to testify concerning defendant's character, Wiggington's character, and the interaction between the

two. This contention, however, was not in the offer of proof, and therefore was not preserved for our review. We thus do not address it. In countering defendant's arguments, the state essentially contends the testimony was both irrelevant and constituted inadmissible character evidence under SCRA 1986, 11–404.

Relevance does not exist in a vacuum; instead, it is the logical relationship between evidence and a proposition in issue that the party seeks to prove. *Cf. State v. Martin,* 101 N.M. 595, 686 P.2d 937 (1984) (character evidence of defendant's prior husband found irrelevant, for it failed to show a logical connection to the crime charged). For this reason, it would be useful to consider what defendant was attempting to prove in support of his defense.

The elements of a duress defense are stated in the uniform jury instructions, SCRA 1986, 14–5130:

> Evidence has been presented that the defendant was forced to ..... under threats. If the defendant feared immediate great bodily harm to himself or another person if he did not commit the crime and if a reasonable person would have acted in the same way under the circumstances, you must find the defendant not guilty.
>
> The burden is on the state to prove beyond a reasonable doubt that the defendant did not act under such reasonable fear.

Relevant evidence is defined by the rules of evidence, SCRA 1986, 11–401, as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Additionally, SCRA 1986, 11–402 provides, "All relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules or by other rules adopted by the supreme court."

Both parties represent that the specific issue in this appeal, that is, the relevance of psychological testimony concerning the coercer, has not been addressed in New Mexico. We agree. Yet, the few cases existing on the duress defense strongly suggest that the relationship between a defendant and the coercer is relevant in determining the existence of a threat, as well as its immediacy. *See, e.g., Esquibel v. State,* 91 N.M. 498, 576 P.2d 1129 (1978) (holding duress is a defense, and the evidence was sufficient to present a jury issue on the immediacy of the danger where there was a long history of beatings of defendant by guards and the most immediate episode was two to three days before defendant's escape from the penitentiary); *State v. Torres,* 99 N.M. 345, 657 P.2d 1194 (Ct.App.1983) (evidence that woman had been beaten by man she referred to as her common-law husband over a period of seven years, the last of which occurred two or three days before the crime, was sufficient to present question for the jury; trial court erred in instructing that husband had to be present in the store at the time of the fraud).

By analogy to the self-defense cases, defendant contends the character of the coercer is an element of the claim or defense. We agree. *See State v. Branchal,* 101 N.M. 498, 684 P.2d 1163 (Ct.App. 1984) (holding it was reversible error to exclude prior acts of the victim, in part because they bear directly on defendant's perception of danger); *State v. Melendez,* 97 N.M. 740, 643 P.2d 609 (Ct.App.1981), *rev'd on other grounds,* 97 N.M. 738, 643 P.2d 607 (1982) (specifically holding that evidence of the reputation of the victim is admissible as probative evidence of " 'an essential element of ... [self-] defense' ") *Cf. State v. Smith,* 92 N.M. 533, 591 P.2d 664 (1979) (no abuse of discretion to exclude evidence of the victim's drug habit in a first degree murder conviction). We note that, in *Bazan,* the defendant had not raised self-defense. For that reason, the character evidence at issue was treated as collateral rather than as an essential element of a claim or defense. Indeed, such evidence has been held admissible even if the defendant was unaware of the victim's character or reputation. *See State v. Mon-*

toya, 95 N.M. 433, 622 P.2d 1053 (Ct.App. 1981).

In the context of cases where self-defense was an issue, the exclusion of such evidence has been held to be reversible error, even if a defendant or other witnesses testified to the specific acts independently. *See State v. Ardoin,* 28 N.M. 641, 216 P. 1048 (1923) (reversible error to exclude evidence of prior specific acts of victim to third person, even though defendant testified victim had told him of the specific act); *State v. Chesher,* 22 N.M. 319, 161 P. 1108 (1916) (reversible error to exclude testimony by defendant's witnesses concerning a conversation between himself and the victim, even though defendant had testified to the conversation himself); *State v. Melendez* (reversible error to exclude testimony of police officers concerning reputation of victim, even though defendant had testified concerning reputation of victim); *State v. Elliott,* 96 N.M. 798, 635 P.2d 1001 (Ct. App.1981) (reversible error to exclude expert testimony concerning defendant's intent, even though lay witnesses have testified on the same issues); *State v. Brown,* 91 N.M. 320, 573 P.2d 675 (Ct.App.1977), *aff'd on other grounds,* 91 N.M. 349, 573 P.2d 1204, *cert. denied,* 436 U.S. 928, 98 S.Ct. 2826, 56 L.Ed.2d 772 (1978) (reversible error to exclude psychologist's testimony concerning defendant's fear of police, even though lay witnesses testified on the same issues).

We understand the state's argument on relevancy to be that, because the standard on the duress issue is an objective one, expert psychological testimony is not necessary or relevant. We need not decide whether this argument is a correct characterization of the standard. To be sure, the plain language of the jury instruction on duress suggests to us that the standard consists of both subjective and objective components: (1) did defendant in fact fear immediate great bodily harm?; if he did, (2) would a reasonable person have acted in the same way under the circumstances? In 2 P. Robinson, *Criminal Law Defenses* Section 177(d), (f) (1984), Robinson suggests that the first part of the standard is a subjective rather than an objective test. *See also State v. Gallegos,* 104 N.M. 247, 719 P.2d 1268 (Ct.App.1986) (holding, in a self-defense case, that the standard has both subjective and objective components).

In their respective briefs, the parties have discussed the various factors considered in assessing the objective aspect of the defense of duress. Additionally, both parties rely on Robinson's treatise as authority, and among the factors cited by Robinson as appropriate to be considered is the apparent likelihood of execution of the threat. From a strictly practical point of view, it would appear that the character of a defendant and of the alleged coercer, including their respective psychological makeup, are relevant to the issue of the likelihood of the execution of the threat.

We believe defendant's purpose in introducing the expert testimony was to prove the gravity of the threat in connection with his defense of duress. Evidence bearing on the question of aggression and on defendant's reasonable apprehension are material and relevant. *See State v. Ardoin* (the court found reversible error in the exclusion of victim's prior violent acts in defendant's claim of self-defense). Based on our discussion, we hold that the expert testimony was relevant.

The state contends the expert testimony was not admissible under any of the exceptions under Rule 11–404, even if we determined it was relevant. However, in *Bazan,* we held that, where character is an element of the crime, claim or defense, testimony of such character is relevant. As such, that evidence is not prohibited under Rule 11–404 and is admissible under Rule 11–402. *State v. Bazan.* Such character evidence may be proved by three methods: (1) reputation; (2) opinion; or (3) specific instances of conduct. *Id.* Obviously, the expert testimony at issue here encompasses one of these methods. Our inquiry is not completed, however.

Having determined that the expert testimony was relevant under Rule 11–401 and admissible under Rule 11–402, the only question remaining is whether the trial court could have excluded it under SCRA

1986, Rule 11–403, which 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."

We hold that the expert testimony was not excludible under Rule 11–403. Exclusion for "unfair prejudice" involves an undue tendency to suggest a decision on an improper basis, usually on emotions. *See* 28 U.S.C.A. R. 403 note 189, at 191. We fail to see how the expert testimony would have injected an emotional element into the trial proceedings. Instead, the psychological evidence could have afforded the jury a further explanation of the rather bizarre events that transpired on the night of the incident. Neither was the proffered testimony misleading nor confusing, since it tended to identify, explain or corroborate the fear and threat testified to by defendant and the immediacy of the threat. Finally, the testimony was not cumulative and would not have unduly delayed the trial. On the contrary, defendant was entitled to buttress his testimony concerning his fear of Wiggington, as well as to explain Wiggington's actions on the night of the incident. Defendant should not be expected to depend solely on Polly's and Paula's testimony, which was a part of the state's case, for this purpose.

The state relies on *State v. LeMarr*, 83 N.M. 18, 487 P.2d 1088 (1971), contending there is a factual similarity between that case and this appeal. In *LeMarr*, our supreme court held that the trial court had properly refused the defendant's jury instruction on duress, where the evidence showed: (1) the coercer threatened the defendant with a knife but later handed the knife to the defendant; and (2) the defendant had several opportunities to escape. The state argues that in this case, like in *LeMarr*, defendant had a number of opportunities to escape.

We reject the state's argument for two reasons. First, this court has held that *LeMarr* was not to be read literally on the issue of the immediacy of the compulsion, given the holding of *Esquibel* that the issue of immediacy is a question of fact. *State v. Torres*, 99 N.M. at 347, 657 P.2d at 1196. Second, *LeMarr* is factually distinguishable. There, the defendant argued he was compelled by threats against himself. Here, the evidence indicated that defendant was concerned not only for himself but for Polly. He specifically testified he went along in order to prevent Wiggington from killing Polly. When the fear is for a third person, it would seem that opportunities for a defendant to escape are less compelling on the issue of immediacy.

The state further argues that expert testimony was not "necessary" and that defendant's testimony, as well as Polly's and Paula's testimony, was "sufficient" to provide the jury with a "reasonable basis" from which it could decide defendant's duress claim. The state also claims that defendant could have called Wiggington as a witness. We believe this argument begs the question and consequently fails. Polly had met Wiggington only once before, for thirty minutes. Paula never had. Wiggington had invoked his fifth amendment right against self-incrimination and refused to testify. As noted in *Melendez, Chesher,* and *Ardoin,* in a case involving this kind of defense, the credibility of a defendant is on the line. For that reason, it is extremely important that he be allowed to buttress his testimony through the testimony of other disinterested witnesses. *See also State v. Elliott* (suggesting the issue is not whether the testimony is necessary, but whether it is properly admissible).

We realize it is entirely possible that the jury may have chosen to reject the expert testimony, in any event. That may be, but that is not the issue. Defendant was nonetheless entitled to present the testimony as a part of his defense of duress. We thus conclude that the trial court committed reversible error in excluding the testimony.

B. *Refusal of Jury Instruction*

Defendant contends the trial court erred in refusing his requested instruction con-

cerning the lack of a duty to prevent commission of a crime. The instruction read as follows:

> For criminal liability to be based upon a failure to act, there must be a duty to act—a legal duty and not simply a moral duty. One has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself.

As authority, the instruction cited W. LaFave & A. Scott, *Criminal Law* Section 26, at 183 (1972) and *People v. Beardsley,* 150 Mich. 206, 113 N.W. 1128 (1907).

Defendant draws our attention to the procedural context of the request for the instruction and its refusal. During cross-examination, the state asked defendant a series of questions emphasizing the affirmative steps defendant could have taken to prevent commission of the crime. For example, defendant, Wiggington and Polly walked into Polly's home through the garage, where a broom and tools were located on a shelf. The state asked defendant if he had attempted to pick up any of these objects to hit Wiggington. Defendant immediately objected, contending there was no duty in Anglo–American law to prevent a crime and that the examination deprived defendant of due process. Defendant then requested the trial court to instruct the jury that defendant was not under a duty to prevent a crime. The court denied an oral instruction to the jury at that time but informed defendant it would be included in the instructions given to the jury later, and defendant could request such an instruction then. At the conclusion of the trial, defendant proffered the written instruction, which was also denied.

Defendant argues the jury "was unable to make an informed decision on the question of duress" because of the trial court's failure to give the instruction. He distinguishes between cross-examination dealing with opportunities to escape, which he concedes is relevant, and cross-examination implying defendant should have taken affirmative steps to stop the sequence of events. We interpret defendant's argument as contending that, without the instruction, the jury may have misunderstood the law on duress. Although the state appears to believe that defendant objected to the refusal of not one but two instructions (the other one concerning aiding and abetting), we do not view defendant's contention as such.

Jury instructions must be read as a whole, and, when so considered, if they fairly and correctly present the law, nothing more is required. *State v. Fields,* 74 N.M. 559, 395 P.2d 908 (1964). Additionally, since adoption of the uniform jury instructions, trial courts are required to give them without substantive modifications or substitution. *State v. Blakley,* 90 N.M. 744, 568 P.2d 270 (Ct.App.1977). In *Blakley,* the defendant was convicted of vehicular homicide while driving recklessly. The trial court gave the uniform jury instructions on the crime but refused to give the defendant's requested instruction defining reckless driving. The trial court also refused to give a uniform jury instruction defining willful and wanton conduct. This court upheld the trial court on both issues, holding that the trial court must give instructions as directed by the supreme court without substantive modifications or substitution. *See also State v. Sparks,* 102 N.M. 317, 694 P.2d 1382 (Ct.App.1985) (if the subject matter is adequately covered in the instructions, a requested jury instruction is properly refused); *State v. Beal,* 86 N.M. 335, 524 P.2d 198 (Ct.App.1974) (instructions should be read as a whole, and where other instructions adequately cover the issue, refusal to give a separate instruction is not error). Thus, the issue on appeal is narrowed to the question of whether the instructions given here adequately defined the crime.

On the whole, we believe the trial court correctly refused the requested instruction. Even if we assume there is no legal duty to act to prevent a crime, that is not the issue. The issue is whether the jury was adequately instructed on the duress defense. Since the trial court used the uniform jury instruction without substantive modification, we must conclude that the jury was adequately instructed.

C. *Sufficiency of the Evidence to Instruct on CSP*

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 there was not sufficient evidence to warrant instructing on CSP. An instruction on a criminal charge is warranted if it is supported by substantial evidence. *Cf. State v. Mosley,* 75 N.M. 348, 404 P.2d 304 (1965) (court not required to charge jury on defendant's theory of the case unless it is supported by substantial evidence); *State v. Lara,* 109 N.M. 294, 784 P.2d 1037 (Ct.App.1989) (defendant entitled to self-defense instruction if there is evidence to support it); *State v. Armijo,* 90 N.M. 614, 566 P.2d 1152 (Ct.App.1977) (defendant entitled to instruction on lesser offense if some evidence tending to establish it). It is the jury's duty to determine the weight and sufficiency of the evidence, including all reasonable inferences. *State v. Vialpando,* 93 N.M. 289, 599 P.2d 1086 (Ct.App.1979). Applying these standards to the facts of this appeal, we believe that the evidence reviewed below, although admittedly circumstantial, was sufficient to support the instructions on CSP.

Defendant himself never assaulted Polly sexually. Nor was that the state's contention. Instead, the jury was instructed it could convict defendant if he aided and abetted Wiggington in the commission of the CSP. This required a showing that defendant intended the crimes to be committed and helped, encouraged, or caused their commission. SCRA 1986, 14–2822. We proceed to review the evidence with this premise in mind.

Defendant placed the original call to Polly. Shortly after entering the house, he went into Polly's bedroom and saw her partially naked on the bed with Wiggington. While there was a fair amount of moving around during the six or seven hours defendant and Wiggington were in the house, it was clear that Wiggington and Polly were spending a lot of time in the bedroom. Defendant entered the bedroom a number of times to bring Wiggington coffee and cigarettes. Defendant had a knife in his belt during some part of the night. Although the testimony was not clear as to whether defendant had a knife in his belt on one or more of the occasions when he went into the bedroom, the jury could infer that he did.

At some point, defendant was asked by both Polly and Paula whether he had participated in planning the crimes. Both questions referred generally to the crimes, not to the specific crimes of CSP, but the jury could infer that the questions referred to all crimes committed that night. Defendant's testimony at trial explained his failure to deny planning the crimes in response to Polly's and Paula's inquiries, but the jury was entitled to disbelieve his explanation.

Defendant essentially argues that all the evidence against him was circumstantial. However, circumstantial evidence alone can be sufficient to prove guilt beyond a reasonable doubt. *See State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984); *State v. Duran,* 86 N.M. 594, 526 P.2d 188 (Ct.App.1974) (circumstantial evidence can be sufficient to sustain a conviction); SCRA 1986, 14–5001. Additionally, he contends that even the evidence concerning his planning of the crime with Wiggington, which he denied, goes only to the planning of the robbery, not CSP. He contends further that presence, even with mental approbation, is not, in itself, sufficient to support a conviction, unless it is accompanied by some outward manifestation or expression of approval. *State v. Luna,* 92 N.M. 680, 594 P.2d 340 (Ct.App.1979).

Defendant also argues that the aider and abettor must share the criminal intent of the principal. *See State v. Harrison,* 81 N.M. 324, 466 P.2d 890 (Ct.App. 1970). We would have viewed this a more compelling argument in connection with a different crime. However, CSP does not require a specific intent. *See State v. Ramirez,* 84 N.M. 166, 500 P.2d 451 (Ct.App. 1972) (decided under former law). In a general intent crime, the only intent required is one of conscious wrongdoing. *See State v. Mascarenas,* 86 N.M. 692, 526 P.2d 1285 (Ct.App.1974).

On the whole, the jury was entitled to infer that defendant was well aware of the repeated CSP perpetrated throughout the night. We believe that this knowledge, coupled with defendant's actions of bringing Wiggington coffee and cigarettes, possibly while defendant was armed with a knife, and the evidence concerning planning the crimes in advance, met the test of sufficiency. From this evidence, the jury could have concluded and inferred that defendant intended the crimes to be committed, and that he helped, encouraged or caused their commission. The admission of the jury instructions was proper.

CONCLUSION

In summary, we hold that the exclusion of the expert testimony denied defendant his defense of duress in that Wiggington's character was an essential element of the defense. We therefore reverse defendant's convictions under Issue 1 and remand for a new trial. We affirm the trial court on Issues 2 and 3.

IT IS SO ORDERED.

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

830 P.2d 563

Robert KEGEL, as Father and Next Friend of Eric Kegel, a Child, Plaintiff–Appellant,

v.

STATE of New Mexico, New Mexico Human Services Department, Defendant–Appellee.

No. 12516.

Court of Appeals of New Mexico.

March 5, 1992.

Steven Granberg, Albuquerque, for plaintiff-appellant.

Helen P. Nelson, Deputy Gen. Counsel, Office of Gen. Counsel, Human Services Dept., Santa Fe, for defendant-appellee.

OPINION

MINZNER, Judge.

Robert Kegel, the father and next friend of his minor son, Eric Kegel, appeals the termination of Eric's health care benefits by the Human Services Department (the Department). The sole appellate issue is whether the Department erred in determining that the trust of which Eric is a beneficiary is a "Medicaid qualifying trust" under 42 U.S.C. Section 1396a(k) (1989) and that the trust estate, proceeds of a personal injury settlement, was "available" under 42 U.S.C.A. Section 1396a(a)(17)(B) (Supp. 1991). We conclude that the trust of which Eric is a beneficiary is not a Medicaid qualifying trust because there is insufficient evidence in the record to support a determination that he should be characterized as the grantor, and we reverse.

I. FACTS.

Eric, who is seven years old, was born with cerebral palsy and a seizure disorder. He is severely physically disabled and will "most likely always need total care." The record indicates that his "cognitive abilities are an unknown factor." Eric has been a recipient of health care benefits through the Department since July 1987.

Eric's injuries were the basis of a malpractice action filed by his parents. Eric became an additional plaintiff, and the district court appointed a conservator for him pursuant to NMSA 1978, Section 45–5–401 (Repl.Pamp.1989) (conservatorship proceedings). The case was settled prior to trial. The settlement agreement provided for a "trust fund to be established in Eric Kegel's behalf" of which his conservator would be trustee.

In the settlement process, several checks were issued. With the exception of one check, which was payable to the Department, the checks were issued jointly to Eric's parents, his conservator, and their attorneys. On one of the three checks contained in the record, each parent is listed "Individually and as natural guardian of Eric Kegel." On the others, they are named payees without any qualifying language after their names. Each of the checks lists Eric's conservator by name and title. As part of the settlement process, as well, the defendants in the malpractice action assigned an annuity to "Eric Kegel, a minor/Margaret Burgess as the next friend and Conservator of the Estate of Eric Kegel, a minor, Suzanne Bakewell Kegel, individually and Robert Kegel, individually."

Eric's father used a portion of the initial lump sum received in settlement to pay medical bills. The remaining money and an annuity were placed in a trust, which is evidenced by a written trust agreement that designates Eric's conservator as both "Grantor" and "Trustee." Both the trust and the settlement agreement were signed in December 1988.

The agreement describes the trust as "providing discretionary supplemental benefits/support to the beneficiary beyond those available to him through any Federal, State, local, or other private programs or funds[.]" The trust provides that "[n]o trust income or principal shall be distributed for the benefit of the beneficiary as long as the Trustee determines that sufficient funds or benefits are thus otherwise available." Nothing in the record documents the transfer of the funds represented by checks or any interest in the annuity from Eric's parents to his conservator, but both parents signed written consents to the creation of the trust.

Upon learning of the trust and the monthly annuity subject to the trust, the Department notified Eric's father of its intent to terminate Eric's benefits. After a hearing, the Department concluded that Eric was ineligible because (1) the trust was a Medicaid qualifying trust, (2) the maximum amount available to him exceeds the eligibility limitations of the program under which he receives benefits, and (3) the trust assets were otherwise "available."

Eric's father contends on his son's behalf that the Department, which relied on a

legal opinion issued by the Health Care Financing Administration (HCFA), erred in characterizing the trust as a Medicaid qualifying trust. We agree.

II. MEDICAID QUALIFYING TRUST.

It is clear that in this case Eric's father had a duty to keep the Department informed of any change in his son's financial situation. *See* Income Support Division Rule 161.3 (1990). At the administrative hearing conducted below, however, the burden of proof was upon the Department to show that Eric was no longer eligible for benefits by showing that the trust fund in question was a Medicaid qualifying trust, and thus "available" income, under Section 1396a(k). *See Simmons v. Van Alstyne,* 65 A.D.2d 869, 410 N.Y.S.2d 400 (1978) (burden of proof when discontinuing benefits based on excessive available income is on local agency, not petitioner, in first instance).

In determining program eligibility, the Department was entitled to consider "only such * * * resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient." § 1396(a)(17)(B); *see generally Miller v. Ibarra,* 746 F.Supp. 19, 25 (D.Colo.1990) ("To determine eligibility for and the extent of Medicaid assistance, state plans are allowed to take into account only income that is actually 'available' to the claimant."). The Department has argued on appeal that the trust is an "available resource" under Section 1396a(k). Section 1396a(k)(1) characterizes as available "the maximum amount of payments that may be permitted under the terms of [a Medicaid qualifying trust] to be distributed to the grantor, [under the terms of the trust,] assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor."

Section 1396a(k)(2) defines a Medicaid qualifying trust as:

> [A] trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.

The letter from HCFA on which the Department relied noted the following:

> The HCFA *State Medicaid Manual* interprets the provisions of Section 1902(k) of the Social Security Act, and provides that the beneficiary of the trust must be the person, or spouse of the person who established the trust. This requirement is met where the beneficiary's guardian or legal representative, acting on his/her behalf establishes the trust.

HCFA reasoned that Eric's conservator, under New Mexico law, was acting on his behalf in receiving the settlement proceeds, *see, e.g.,* § 45–5–401(A)(1), (2), (B)(1); *see also* NMSA 1978, §§ 45–5–423, –424(C)(24) (Repl.Pamp.1989), and concluded "[t]herefore, when Ms. Burgess transferred the annuity payments into the corpus of the trust created for Eric's benefit, it was the legal equivalent of Eric himself transferring the assets and creating the trust himself." The Department asks us to hold that a trust created by a conservator for the benefit of the conservator's ward is a Medicaid qualifying trust.

While there is some legal support for the Department's view and the analysis by HCFA on which the Department relied, *see Hatcher v. Department of Health & Rehabilitative Servs.,* 545 So.2d 400 (Fla.Ct.App. 1989) (holding that a guardian's creation of a trust for the benefit of a Medicaid claimant was subject to consideration as part of the claimant's available resources), there is also authority to the contrary. *Miller,* 746 F.Supp. at 33 (analyzing *Hatcher* as relying on Florida law "to reach the conclusion that the guardian was merely acting in place of the incompetent person"; distinguishing Colorado law and holding that the creation of a trust by a conservator under Colorado law was not a transfer by the incompetent person on whose behalf the trust was created). We are not prepared to say that there is a relevant difference, for purposes of Section 1396a(k), between the

relationship of a conservator and that of a guardian to the ward. *Compare* 39 Am. Jur.2d *Guardian and Ward* § 1 (1968) ("[I]n some jurisdictions a conservator may be appointed. He has the same powers and obligations as a guardian so far as they relate to the property of the ward, so that, in effect, he is a guardian of the estate.") *and In re Estate of Guerra,* 96 N.M. 608, 633 P.2d 716 (Ct.App.1981) (guardians of a ward's property are bound by duties of a trustee and officer of the courts). We cannot reconcile *Hatcher* and *Miller* on that basis.

Nevertheless, the only kind of trust to which Section 1396a(k)(2) expressly extends is one created by the beneficiary or the beneficiary's spouse. *See, e.g., Pollack v. Department of Health & Rehabilitative Servs.,* 579 So.2d 786, 788 (Fla.Ct.App.1991) (trust established by appellant's husband gave her income for life and a contingent interest in the principal; trust held a Medicaid qualifying trust). States may not create an exclusion from eligibility for receipt of public assistance benefits unless federal law clearly authorizes it. *See, e.g., Philbrook v. Glodgett,* 421 U.S. 707, 719, 95 S.Ct. 1893, 1901, 44 L.Ed.2d 525 (1975). In *Miller,* Judge Carrigan noted that the guidelines applicable to Medicaid qualifying trusts, which are consistent with the HCFA letter on which the Department relied, "have never been promulgated as regulations even though issued in May 1989." *Miller,* 746 F.Supp. at 31. Under these circumstances, it is reasonable that a state court should not construe Section 1396a(k)(2) to include trusts other than those to which it expressly or by clear implication extends. *See Philbrook,* 421 U.S. at 719, 95 S.Ct. at 1901.

As we understand Section 1396a(k)(2), Congress intended to correct a specific abuse. The conference committee report on the provision that became Section 1396a(k)(2) explained that "distributions from grantor trusts, not distributions or principal from non-grantor trusts, such as those established by parents for children" were the problem Congress intended to address. 132 Cong.Rec. H11432 (daily ed. October 17, 1986 (reprint of conference committee report)). In reporting the legislation of which Section 1396a(k)(2) is a part, the House Committee on Energy and Commerce said: "The Committee does not intend that trusts established solely for the benefit of disabled children, from which the grantor or other individual can under the terms of the trust receive no benefit, be treated as Medicaid qualifying trusts." H.R.Rep. No. 99–265, 99th Cong., 1st Sess., at 72 (1985).

Judge Carrigan's decision in *Miller* emphasizes the narrow purposes for which Section 1396a(k) was enacted and the importance of determining whether a particular transfer in trust is the type of trust the assets of which Congress intended should be considered "available." "The Congressional purpose for prohibiting Medicaid qualifying trusts is the same as that behind banning transfers without fair consideration. Congress sought to prevent wealthy individuals, otherwise ineligible for Medicaid benefits, from making themselves eligible by creating irrevocable trusts in order to preserve assets for their heirs." *Miller,* 746 F.Supp. at 34.

In *Miller,* Judge Carrigan held that (1) incomes of mentally incompetent nursing home patients that were subject to judicially imposed trusts created pursuant to Colorado statute could not be considered "available" to the beneficiaries for purposes of determining eligibility, (2) the court's actions in creating the trusts were not transfers for less than fair market value in violation of state regulations or transfer of resources rules set out in the Medicaid statute, and (3) the trusts were not Medicaid qualifying trusts. In reaching the last of the three holdings, the court noted that the trusts had not been created by the beneficiaries because they neither initiated nor acquiesced in the decision. The *Miller* beneficiaries were incapable of participating in the transfer. Moreover, Judge Carrigan reasoned, the trusts should not be characterized as created by the beneficiaries because of the powers vested in probate courts on behalf of each beneficiary. He noted that "such courts do not act as the plaintiffs themselves. Instead,

these courts are governed by an objective best interest standard. That a court has authority to act in a person's best interest does not indicate that that person has competence to perform the same act on her own behalf." *Id.* at 31.

Judge Carrigan suggested at the outset of his decision that the trusts at issue had been created in response to "a trap created by the interaction of highly technical federal and state statutes and regulations." *Id.* at 20. The trap

> deprives many senior citizens of Medicaid payments for nursing home expenses to which they are otherwise entitled. When their incomes are too low to enable them to pay their own nursing home costs, but too high to qualify for Medicaid benefits, * * * [t]hey are not allowed to pay as much as they can, and have Medicaid pay the balance, but instead are totally disqualified for any Medicaid assistance.

Id.

We conclude that the question of whether the trust of which Eric is a beneficiary is a Medicaid qualifying trust within the meaning of Section 1396a(k)(2) presents a factual issue as well as a policy question. The factual question is whether Eric is the grantor of any part of the trust and the policy question is whether, in the event that he is not technically the grantor, he should nonetheless be treated as such in furtherance of the underlying policies of Section 1396a(k)(2). We also conclude that the necessary inquiry involves an examination of the circumstances surrounding the creation of the trust, including the purposes for which it was created. When engaging in this review we look to the whole record to determine whether the Department's decision is supported by substantial evidence. *Akel v. New Mexico Human Servs. Dep't*, 106 N.M. 741, 749 P.2d 1120 (Ct.App.1987). We hold that it is not. *But see In re Welfare of K.S.*, 427 N.W.2d 653, 659–60 (Minn.1988) ("We decline * * * to adopt * * * a case-by-case analysis * * * and conclude instead that a minor's settlement fund is always an available asset for medical assistance eligibility purposes.").

III. ERIC'S ROLE IN CREATING THE TRUST.

There is nothing in the record to support a finding or conclusion that Eric or his conservator was entitled to any particular portion of the proceeds. The record indicates that his parents and the conservator acted jointly in deciding upon a trust as a vehicle for managing the funds they anticipated as a result of the settlement. To the extent the parents funded the trust with their share of the settlement proceeds, the Department appears to concede that the trust was not a Medicaid qualifying trust. *Accord Hatcher*, 545 So.2d at 402 ("there is no doubt that the trust in question would have been exempted from eligibility considerations if it had been created by appellant's father during his lifetime").

In fact, it is difficult on this record to identify the grantor. The record supports a determination that the trust was created in part by the defendants to the malpractice action. Regarding the annuity, one might argue that the trust was created by the promise of the defendants in the malpractice suit "to pay money or to make a conveyance of property to [Eric's conservator] as trustee * * * *" *See Restatement (Second) of Trusts* § 17, cmt. on Clause (e) (1959); *see also* § 17(e) ("A trust may be created by * * * a promise by one person to another person whose rights thereunder are to be held in trust for a third person."). Regarding the cash, one might argue that the trust was created by Eric's father's transfer of the balance of the lump sum settlement to the conservator. *Id.* at (b) ("A trust may be created by * * * a transfer inter vivos by the owner of property to another person as trustee * * * for a third person"). The trust agreement signed by the conservator, formally assigning the annuity and cash to herself as trustee, might be said to recognize a trust relationship that already existed. *Cf. id.* at (a) ("A trust may be created by * * * a declaration by the owner of property that he holds it as trustee for another person").

The creation of this trust involved multiple grantors. Eric never had unrestricted legal or equitable title to the additional

sums made available, and he himself played no role in the decision to create the trust. We conclude that there is too little in this record to support a determination that Eric was the grantor of the trust in this case.

The record indicates that neither the monthly income of the trust nor the monthly sum provided by the state is sufficient to meet the cost of Eric's medical and related expenses. The trust income appears to be achieving its stated purpose of supplementing a much needed but in fact insufficient amount of public support.

Eric receives approximately $3,000 per month in benefits from the state. In addition to that sum, the trustee testified at the hearing that she had spent $2,100 a month on the average since the date of the settlement on various items for him.

> [B]asic expenses are in several categories. One of the biggest expenses in this is for care-givers, personal care-givers for Eric, that are not covered by the current medicaid program that he's under. As Robert noted this with the stress of being a single parent and the time factor is a need to make a living and so forth. Even though this good coverage from the government program there still needs to be supplemental child care, so a good part of it is going for that. Some of it is going to pay for additional medical expenses which aren't large but they are medications that aren't covered with the insurance. There have been legal fees and business fees associated with the trust. And then therapies have been provided for as we talked about some of the therapies provided under other programs are somewhat minimal and we see, I see Eric as needing some pretty intensive therapy in real counseling, constant working with all this line to reach his potential and so that some of it is going to outside therapies and then for the purchase of equipment.

In this respect, this case is similar to *Miller*. There, too, the trusts that were created allowed the beneficiaries to avoid the "trap" of being too well-off to qualify for Medicaid, yet too poor to pay for the costs of necessary care. We do not believe that Congress drafted Section 1396a(k) to reach such transactions.

We hold that the trust fund is not within the express or implied intent of Congress in enacting Section 1396a(k)(2). We conclude that, under Section 1396a(k)(2), it is not a Medicaid qualifying trust. *See Philbrook*, 421 U.S. at 719, 95 S.Ct. at 1901; *Miller*, 746 F.Supp. at 33.

IV. CONCLUSION.

The Department's decision to terminate Eric's benefits appears to have been based solely on the trust's availability as a Medicaid qualifying trust. We do not discuss its availability other than under Section 1396a(k). *Cf. In re Welfare of K.S.*, 427 N.W.2d at 659 (court relied on state statutes and rules specifying examples of personal property to be included as well as exempt in determining eligibility and on state rule that " 'local agency must consider as available an asset that a person receives in a tort settlement, whether the settlement is entered into by the person or the person's guardian, that is structured to be paid over a period of time.' ") (quoting Minn. Rule 9505.0061 (1987)). We do note that under the terms of the trust, the conservator has limited discretion in making any distributions to Eric. *See Miller*, 746 F.Supp. at 26–27 (discussing various state court rulings on the availability of trust funds in determining medical eligibility).

Section 1396a(k) does not authorize the Department's exclusion of Eric from eligibility for health care benefits. Therefore, the exclusion was contrary to law. *See Philbrook*. We reverse with directions for the Department to authorize benefits for him. *See* NMSA 1978, § 27–3–4(F)(3) (Repl.Pamp.1989).

IT IS SO ORDERED.

DONNELLY and FLORES, JJ., concur.

830 P.2d 569

In the Matter of the ESTATE of Joseph S. GAINES, Deceased.

Joseph Casey GAINES, Petitioner-Appellant,

v.

Joseph Blair GAINES, Respondent-Appellee.

No. 12560.

Court of Appeals of New Mexico.

March 5, 1992.

Dean E. Border, Border Law Office, Tucumcari, for petitioner-appellant.

Terrence R. Kamm, John William Clever, Kastler and Kamm, Raton, for respondent-appellee.

OPINION

BLACK, Judge.

Joseph Casey Gaines appeals from the trial court's denial of his Rule 60(B) motion for relief from a judgment that the will of Joseph S. Gaines was invalid. SCRA 1986, 1–060(B) (Rule 60(B)). We uphold the trial court.

FACTS

Joseph S. Gaines died on November 22, 1983. He was killed by his alleged wife, Cecilia Duran. Joseph S. Gaines was survived by Cecilia Duran; their adult son, Joseph Casey Gaines ("Casey"); and his adult children from a prior marriage, Joseph Blair Gaines ("Joe") and Julie Blair.

An application for informal appointment was filed by Joe in the Probate Court of Colfax County, New Mexico, on December 6, 1983. On the same day, the probate judge signed an order appointing Joe as administrator of the estate. On January 12, 1984, the probate judge transferred the probate cause to the Colfax County District Court, where it was captioned Estate of Joseph S. Gaines, Deceased, Probate No. 84–3–PB.

On January 26, 1984, Joe filed a petition for formal testacy ("first petition"). In the first petition, Joe alleged that Cecilia Duran claimed to hold a will executed by Joseph S. Gaines but stated, "[p]etitioner believes the decedent either destroyed or intended to destroy the original of said will prior to his death." He prayed the district court to "find and order that the decedent left no unrevoked, valid will."

On January 27, 1984, Joe's attorney certified that he sent a copy of the first petition to Casey, who does not deny receiving this petition. On February 1, 1984, Joe filed an amended petition ("amended petition") in which he requested, among other things, a specific determination that any purported will be declared invalid. The amended petition was never served on Casey.

On February 16, 1984, Cecilia Duran filed a petition seeking formal probate of decedent's will and requesting appointment as personal representative ("mother's petition"). Casey filed an acceptance of service of his mother's petition. On November 30, 1984, Casey, along with his mother Cecilia Duran, executed a joint retainer agreement employing Stephen M. Peterson to represent them in the pending probate matters.

Casey was deposed on May 10, 1989, and was subpoenaed to testify at the trial on the merits, which was scheduled for October 24, 1989. That setting was vacated. Casey was again subpoenaed and testified at the trial commencing March 19, 1990.

After hearing all the evidence, including Casey's testimony, the jury determined that: (1) the last will and testament of Joseph S. Gaines was not validly executed; and (2) Cecilia Duran feloniously and intentionally killed Joseph S. Gaines. The trial court entered judgment on the verdict on March 29, 1990. On May 16, 1990, Casey filed a motion for relief from judgment under Rule 60(B). The trial court denied this motion.

ISSUES

Casey argues that: (1) he did not receive the notice required by NMSA 1978, Section 45–3–412 (Repl.Pamp.1989), and due process; (2) the trial court lacked jurisdiction to adjudicate the validity of the will in his absence because he was an indispensable party; (3) the trial court erred in applying the doctrine of laches; and (4) the trial court's denial of the relief requested under Rule 60(B) is not supported by substantial evidence.

NOTICE UNDER SECTION 45-3-412(A)(1)

Casey maintains that the judgment should be set aside because Joe did not comply with statutory and constitutional notice requirements. Section 45-3-412(A)(1) reads:

> A. Subject to appeal and subject to vacation as provided in this section and in Section 3-413 [45-3-413 NMSA 1978], a formal testacy order under Sections 3-409 through 3-411 [45-3-409 to 45-3-411 NMSA 1978], including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:
>
> (1) the court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent *if it is shown that the proponents of the later-offered will* were unaware of its existence at the time of the earlier proceeding or *were unaware of the earlier proceeding and were given no notice thereof, except by publication* * * *. [Emphasis added.]

First, we note that Section 45-3-412(A)(1) places the burden upon the party challenging the validity of the court's final order. *See Mathieson v. Hubler,* 92 N.M. 381, 387, 588 P.2d 1056, 1062 (Ct.App.), *cert. denied,* 92 N.M. 353, 588 P.2d 554 (1978); *cf.* NMSA 1978, § 45-3-407 (Repl.Pamp.1989) (burden of proof in contested cases).

Second, the purpose of Section 45-3-412(A)(1) is to allow the trial court to consider a will that was not tendered before a formal testacy order was entered. In the present case Casey has no new will to offer, but merely wants a chance to advance the same will offered by his mother, a will that was already considered by a jury and found invalid.

Even if Section 45-3-412(A)(1) can be invoked by one promoting a will which has previously been rejected, Casey cannot satisfy its requirements. Casey contends that he was "unaware of the earlier proceeding and [was] given no notice thereof." § 45-3-412(A)(1). The facts refute this. It is undisputed that Casey received the first petition by certified mail. This petition for formal testacy, filed by Joe on January 26, 1984, alleged that the decedent intended to destroy the will held by Cecilia Duran and requested a finding that the decedent left no valid, unrevoked will. It is also undisputed that Casey received the petition filed by his mother, Cecilia Duran. The record also contains unrebutted evidence that Casey and his mother retained counsel, Stephen M. Peterson, to represent them in the probate proceeding initiated by his stepbrother, Joe. The retainer agreement, executed by both Casey and Cecilia Duran, specifically provides:

> We, Cecelia Duran Gaines and Joe Casey Gaines, retain the Law Offices of Stephen M. Peterson, (herein referred to as "PETERSON") as our Lawyer in all cases involving the recovery of the assets of the Estate of Joseph S. Gaines, Deceased, which cases are presently pending in the District Court of New Mexico in Colfax County, New Mexico, and being entitled the Estate of Joseph S. Gaines, Deceased, Probate No. 84-3 PB and all claims arising against Joseph Blair Gaines, both personally and as Personal Representative of the Estate of Joseph S. Gaines, Deceased, and any claims otherwise arising directly or indirectly therefrom, including but not limited to, the recovery of any Insurance Claims.

Casey testified during discovery and at trial, and his lawyer, representing both Casey and his mother, was involved at every phase of the proceeding. Casey makes no claim his counsel did not receive all pleadings and notice of all hearings.

Casey's argument not only ignores this evidence, but misapprehends the purpose of notice in probate proceedings. Casey argues that his notice was inadequate because it did not inform him of all issues and contentions involved in the will contest between his mother and stepbrother. Ini-

tially, we note that Section 45–3–412(A)(1) allows a petition to vacate an order of probate and offer a new will if petitioner was "unaware of the earlier proceeding *and* [was] given no notice thereof, except by publication." (emphasis added). The Probate Code does not require that a non-party be notified of every hearing in a proceeding. *See In re Protective Proceeding for Strozzi,* 112 N.M. 270, 814 P.2d 138 (Ct.App.1991). Nor is notice inadequate because it does not keep him informed of the development of subsequent issues which differ from the relief initially requested. *See id.* (notice was adequate where grandnephew received original petition for guardianship and conservatorship, but was not informed of later court order creating limited power of attorney). Notice is only required to " 'apprise him of the litigation and his rights to participate in it.' " *Id.* at 274, 814 P.2d at 142 (quoting 53 A.L.I.Proc. 303 (1976)).

Casey received Joe's first petition, which specifically challenged any will possessed by Cecilia Duran. He also accepted service of his mother's petition seeking admission of the very will from which his alleged rights derived. He was thus apprised "of the litigation and his rights to participate in it," and indeed, he retained an attorney to do just that. Clearly Casey cannot maintain he was "unaware of the earlier proceeding." Moreover, his contention that notice must comprehensively inform the recipient of the specific claims at issue has been directly rejected. In *Kortz v. American Nat'l Bank,* 571 P.2d 985 (Wyo.1977), the contestant argued that the three-month Wyoming limitation for challenging a will should not apply where someone had allegedly substituted a page in the original filed will and this was ascertainable only upon examination of the actual court file. The challenge was rejected by the trial court as untimely. The Wyoming Supreme Court affirmed.

This aspect of *Kortz* was considered by John A. Warnick in *The Ungrateful Living: An Estate Planner's Nightmare—The Trial Attorney's Dream,* 24 Land & Water L.Rev. 401 (1989). Like the Wyoming Supreme Court, Warnick rejects the contention that potential claimants must be given notice of more than the bare fact that a will has been submitted for probate:

> Presumably once they have been notified it is up to each creditor to take whatever steps, including making an investigation of the probate court file, to protect its interests. There seems to be no policy reason to require that the will be sent to the heirs along with the notice of probate. Once they have received notification each heir must take steps to protect his interest and those steps would include an investigation of the probate court's file.

Warnick, *supra,* at 431; *see DiMauro v. Pavia,* 492 F.Supp. 1051 (D.Conn.1979).

Requiring a contestant to protect his own interests is especially appropriate where, as in the instant case, he is aware of probate proceedings lasting a protracted period. Debra A. Falender, *Notice to Creditors in Estate Proceedings: What Process Is Due?,* 63 N.C.L.Rev. 659, 676–77 (1985); *cf. Jordan v. Dobrowski,* 22 Mass.App.Ct. 996, 498 N.E.2d 409 (1986) (cousins who had actual notice of decedent's death before will was allowed but took no action for over two years not allowed to vacate final account).

In any event, the Probate Court eliminates any requirement of notice at the point of the three-year statute of limitations on any claim under a will. *Compare* NMSA 1978, § 45–3–108 (Repl.Pamp.1989) *with* § 45–3–412(A)(3)(b). In this case Casey did not make his claim until more than six years after he received notice that the will under which he claimed had been tendered to the district court.

Nor are we persuaded by Casey's reliance on *In re Estate of Holmes,* 183 Mont. 290, 599 P.2d 344 (1979). In that case decedent had expressly disinherited his two adult sons and devised all his property to the Shriners Crippled Children's Home. The personal representative petitioned for formal probate. *Id.* at 345. At the hearing one of decedent's sons objected to the will. *Id.* Although the Shriners were given notice of the hearing, they did

not appear and were not thereafter given notice of the objection. *Id.* The court clerk then failed to comply with Montana's rule of procedure requiring him to give notice to the Shriners of the district court decision, which held two-thirds of the devise void under Montana's Mortmain Statute. *Id.* at 345–47. The Montana Supreme Court held that the Shriners were not barred because they had not received proper notice from the court clerk. *Id.* at 347. Unlike the Shriners in that case, Casey had notice of an objection to the tendered will, and New Mexico has no procedural rule comparable to that relied upon by the Montana Supreme Court in *In re Estate of Holmes.*

DUE PROCESS

Casey next argues that, if the Probate Code does not require that he receive notification of his rights and duties in the pending litigation, it violates due process. Relying upon the Fourteenth Amendment, U.S. Const. amend. XIV, he argues that he has not been afforded minimal due process, because neither of the two petitions he received informed him to respond, gave him notice of a hearing, or made evident to him his specific rights in the matter.

Once again we believe Casey advances well-established legal and constitutional principles which do not apply to the present facts. We agree that due process requires reasonable notice. *See In re Estate of Engbrock,* 90 N.M. 492, 565 P.2d 662 (1977). What notice is constitutionally "due," however, depends upon the type of proceeding, the rights involved, and the length of time given to respond. Falender, *supra,* at 691–97.

Casey argues that, since he was never served with his stepbrother's amended petition specifically challenging the validity of the will from which Casey's claim derived, he was deprived of the opportunity to be heard on that issue. Even if he had not testified by deposition and at trial, and assuming that he did not learn of the issues from his lawyer or his mother, we could not accept this argument. Once Casey received the first petition in which his stepbrother challenged the continued validity of his mother's will, he had received sufficient notice of the issues to satisfy the requirements of due process. *See National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,* 107 N.M. 278, 283–84, 756 P.2d 558, 563–64 (1988) (would-be participant need only have notice of the hearing, not each issue that may be considered).

The court rejected a due process challenge in a similar situation in *DiMauro v. Pavia,* 492 F.Supp. 1051 (D.Conn.1979). The decedent's widow therein received notice of a New York hearing on a final accounting and judicial settlement of the estate. The widow's Connecticut attorney was present at the hearing but did not enter an appearance, and the hearing was vacated to allow the widow to retain New York counsel. *Id.* at 1057. Instead, the Connecticut attorney decided the better strategy was to file suit in Connecticut, challenging the administrator's conduct. *Id.* at 1057–58. Without further notice or proceedings, the New York court then entered a final decree which was upheld on appeal. The federal district court in Connecticut held that the widow had sufficient notice of the prior New York proceeding to comply with due process. *Id.* at 1060–61. The court's observations regarding both the requirements of due process and the "unofficial" appearance of Connecticut counsel are relevant in the present case:

> DiMauro argues that even if the Surrogate's Court proceeding was properly undertaken, she cannot be bound by the final decree if she failed to receive notice and to appear. By her own admission and by recital of the decree of the Surrogate's Court, however, DiMauro did receive notice of the hearing scheduled for the purpose of closing the administrator's account. Her Connecticut counsel came to the court at the scheduled time, though he did not enter an appearance. The notice was constitutionally adequate to accord DiMauro an opportunity to appear and be heard in the orderly process of the determination of the interests of all claimants, resident and nonresident, in the estate of her husband. See *Mullane v. Central Hanover Bank & Trust*

Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950).

Id. at 1060–61.

We conclude that Casey received sufficient notice to comply with the requirements of due process.

INDISPENSABLE PARTY

Casey also contends that he was an indispensable party under SCRA 1986, 1–019 (Rule 19), and the trial court therefore lacked jurisdiction to enter judgment in his absence. While this argument has superficial appeal, it does not fit the facts of this case.

The Uniform Probate Code makes the Rules of Civil Procedure applicable "[u]nless specifically provided to the contrary in the Probate Code, or unless inconsistent with its provisions." NMSA 1978, § 45–1–304 (Repl.Pamp.1989). The specific issue, then, is whether the concept of indispensable parties is consistent with the Uniform Probate Code provisions on "interested" parties. *See* NMSA 1978, § 45–1–201(A)(19) (Repl.Pamp.1989).

It is less than clear that the concept of "indispensable parties" under Rule 19 fits within the framework of the Probate Code. Where, as here, the would-be devisee seeks to reopen the probate proceedings, the language of Section 45–3–412(A), for example, provides a different procedure than Rule 19. Probate proceedings grew out of equity practice, where strict pleading requirements did not apply. James M. Henderson, 1 *Bancroft's Probate Practice* §§ 39, 65 (2d ed. 1950). Probate proceedings, then, must be seen as distinct from general civil litigation and joinder provisions may be inconsistent. *Id.* § 38. Courts in other jurisdictions have split on whether the treatment of interested parties under the Probate Code is consistent with the mandate of rules of civil procedure regarding party participation. *Compare In re Estate of Van Dyke,* 54 Wash.App. 225, 772 P.2d 1049 (1989) (Probate Code provision requiring notice to legatees is not inconsistent with necessary party provisions of Rule 19) *with In re Estate of Davis,* 219 Cal.App.3d 663, 268 Cal.Rptr. 384 (1990) (Probate Code definition of interested person provided alternative contrary to California civil procedure intervention provisions).

New Mexico has not decided the applicability of the Rule 19 concept of indispensable parties under the Uniform Probate Code. Nor is our earlier law necessarily dispositive. Although probate proceedings have been recognized as in rem proceedings in which there are no "parties" per se, *In re Towndrow's Will,* 47 N.M. 173, 181, 138 P.2d 1001, 1005–06 (1943), the concept of indispensable parties has also been applied in probate proceedings. *See C. de Baca v. Baca,* 73 N.M. 387, 388 P.2d 392 (1964) (sole beneficiary was indispensable party).

Even assuming that Rule 19 is applicable in probate proceedings, however, the determination of indispensable parties must be made in context. *See State ex rel. Blanchard v. City Comm'rs,* 106 N.M. 769, 770, 750 P.2d 469, 470 (Ct.App.1988). "Because the doctrine of indispensability is equitable in character, the court will not dismiss for nonjoinder when special circumstances would make it inequitable to do so." Charles A. Wright et al., 7 *Federal Practice and Procedure* § 1611, at 175 (2d ed. 1986). Even when a contingent beneficiary can be considered indispensable, in order to reopen a judgment he must also prove that his joinder would not be useless. *Travelers Ins. Co. v. Young,* 580 F.Supp. 421, 425 (E.D.Mich.1984). We do not think Casey can meet this requirement. Casey objects to not being heard on the validity of the will under which he was a contingent beneficiary. While this might be a valid claim in some contexts, it cannot be so here where the same will was defended by his mother through the same attorney who represented Casey's interest in the same proceeding. After six years of preparation and a full trial, at which Casey testified, the will was found invalid. Casey has failed to make any showing that his participation in the proceedings in a different role would have persuaded the jury that the will was validly executed.

Finally, the timing of Casey's motion regarding his indispensable status is a factor to be considered. *See C.E. Alexander &*

Sons v. DEC Int'l, 112 N.M. 89, 811 P.2d 899 (1991). Once the trial in a probate proceeding has been concluded, pragmatic considerations of the compulsory joinder rule weigh heavily in favor of preserving the judgment of the trial court. *Id.; see also Cudworth v. Cudworth,* 312 N.W.2d 331, 334 (N.D.1981). Waiting six years after he was aware the will had been tendered for probate would also drop the bar of laches across Casey's Rule 19 claim of indispensability. *Cf. National Bd. of Y.W.C.A. v. Y.W.C.A. of Charleston,* 335 F.Supp. 615, 627 (D.S.C.1971); *Benger Labs. Ltd. v. R.K. Laros Co.,* 24 F.R.D. 450 (E.D.Pa.1959).

LACHES

The trial court also held that Casey's claim should be denied under the equitable doctrine of laches. While the decision to apply laches is within the sound discretion of the trial court, *Archuleta v. Pina,* 86 N.M. 94, 99, 519 P.2d 1175, 1180 (1974), we do not think it is necessary here. As noted earlier, the statute of limitations under the Probate Code is three years. *See* § 45–3–108. If the statute of limitations has run, the court need not consider laches. *Fidel v. Fidel,* 87 N.M. 283, 286, 532 P.2d 579, 582 (1975).

RULE 60(B)(4)

Casey's final argument is that the district court's refusal to grant relief pursuant to Rule 60(B) is not supported by substantial evidence. Casey had the burden of proof under Rule 60(B). To the extent that there was inadequate evidence to make a fact-finding on an essential factual question, therefore, Casey bears the risk of nonpersuasion. In any event, the evidence recited in our prior discussion of the issues raised by Casey suffices to support the trial court's rulings.

For the reasons stated above, we do not feel that the trial court erred in refusing to find that the judgment entered on the jury verdict was void. A person, especially one represented by counsel, who has participated in a case can be assumed to be aware of developments in the proceedings. *See Maples v. State,* 110 N.M. 34, 791 P.2d 788 (1990); *Chavez v. Village of Cimarron,* 65 N.M. 141, 333 P.2d 882 (1958). A person who is represented by counsel and participated in proceedings is estopped, as a matter of law, from seeking relief under Rule 60(B) based on lack of knowledge of the details of the litigation. *In re Four Seasons Secs. Laws Litig.,* 525 F.2d 500 (10th Cir.1975). Nor may a party, served with an initial summons and thus having actual notice of the litigation, claim "excusable neglect" under Rule 60(B) for not being aware of subsequent proceedings in the matter. *FDIC v. Spartan Mining Co.,* 96 F.R.D. 677, 682–83 (S.D.W.Va.1983), *aff'd sub nom. FDIC v. Schaffer,* 731 F.2d 1134 (4th Cir.1984). Conversely, it is not an abuse of discretion under Rule 60(B) to deny relief when the party is actually aware of the proceedings, even if his attorney is not. *See Standard Newspapers, Inc. v. King,* 375 F.2d 115 (2d Cir.1967).

CONCLUSION

The judgment which Casey challenges is not void for lack of jurisdiction. The trial court did not abuse its discretion in refusing relief under Rule 60(B).

The order of the district court denying relief under Rule 60(B) is affirmed.

IT IS SO ORDERED.

BIVINS, J., concurs.

HARTZ, Judge (Specially Concurring).

I concur in the result and join in Judge Black's opinion except for the discussions of "Indispensable Party" and "Rule 60(B)(4)."

The Probate Code states that it prevails over any inconsistent provision in the Rules of Civil Procedure. NMSA 1978, § 45–1–304 (Repl.Pamp.1989). The determination of whether the Probate Code prevails over a rule must be made on a case-by-case basis; some aspects of a rule may apply while others do not. *See Mathieson v. Hubler,* 92 N.M. 381, 389, 588 P.2d 1056, 1064 (Ct.App.1978). The Probate Code specifically addresses and rejects the sub-

stance of Casey's arguments for relief under SCRA 1986, 1–019 and 1–060(B). Therefore, we need not consider whether he would be entitled to relief under Rules 1–019 or 1–060(B), because to grant relief under either rule would conflict with the Probate Code.

830 P.2d 1348

Raymond E. PADILLA, Plaintiff–Appellee,

v.

ESTATE OF Tomas S. GRIEGO, deceased, and Martha S. Griego, d/b/a Mountain View Bar, Defendants–Appellants.

No. 11668.

Court of Appeals of New Mexico.

Feb. 17, 1992.

Kathrin Kinzer–Ellington, W. Anthony Sawtell, Daniel Cron, Catron, Catron & Sawtell, P.A., Santa Fe, N.M., for plaintiff-appellee.

Harold Worland, Albuquerque, N.M., for defendants-appellants.

OPINION

HARTZ, Judge.

Defendants, the Estate of Tomas S. Griego, deceased, and Martha S. Griego, d/b/a Mountain View Bar, appeal from district court orders granting summary judgment to Plaintiff, Raymond E. Padilla, and denying Defendants' motion for relief from the summary judgment. The judgment awarded Padilla $250,000 in compensatory damages against Defendants, jointly and severally, and also awarded Padilla $50,000 in punitive damages against Martha Griego. We affirm.

On August 29, 1986, Padilla filed a complaint against Defendants, alleging that he

was assaulted by Tomas Griego on October 4, 1983, at the Mountain View Bar, which was owned by Martha Griego. The complaint alleged that she was liable for compensatory damages under the doctrine of respondeat superior and was liable for punitive damages for permitting Tomas Griego to operate the bar when she knew or should have known of his violent and cruel disposition and the danger he posed to patrons.

The district court granted Padilla's Motion for Summary Judgment on June 15, 1989. The Motion for Summary Judgment relied on an affidavit by Padilla, matters admitted in the answers to the Complaint filed on behalf of Defendants, and matters deemed admitted by Defendants' failure to respond to requests for admissions served upon them by Padilla. Defendants did not respond to the Motion for Summary Judgment, did not appear at the pretrial conference at which the district court considered the Motion, and did not appear at the hearing at which Padilla's counsel presented the Order Granting Summary Judgment to the district court for signature. On June 23, 1989, barely a week after the filing of the summary judgment, Defendants moved for relief from the judgment under SCRA 1986, 1–059 and 1–060(B). The motion and accompanying affidavits asserted that Defendants were unaware of their attorneys' failure to respond to various pleadings filed in the case and claimed that they had a meritorious defense in that Tomas Griego was physically incapable of committing the alleged assault and that he was not an agent, servant, or employee of the bar. The district court denied the motion.

I. APPEAL FROM SUMMARY JUDGMENT

A. *Jurisdiction*

Defendants' sole contention in their appeal from the summary judgment is that the district court lacked jurisdiction over the subject matter of the Complaint. Defendants rely on NMSA 1978, Section 37–2–4 (Repl.Pamp.1990), which reads:

> No action pending in any court shall abate by the death of either, or both, the parties thereto, except an action for libel, slander, malicious prosecution, assault or assault and battery, for a nuisance or against a justice of the peace [magistrate] for misconduct in office, which shall abate by the death of the defendant.

Tomas Griego had died by the time Padilla filed his Complaint. Defendants argue that therefore the district court had no jurisdiction to consider the civil action for assault against the Estate, nor did it have jurisdiction against Martha Griego because, in their view, the Complaint against her was premised solely on respondeat superior liability for the actions of Tomas Griego. Defendants' argument is raised for the first time on appeal. No pleading in district court refers to Section 37–2–4.

Defendants' jurisdictional argument was resolved by our supreme court in a decision handed down shortly after the briefs were filed in this case. *Sundance Mechanical & Utility Corp. v. Atlas,* 109 N.M. 683, 789 P.2d 1250 (1990) holds 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[.]" *Id.* at 689, 789 P.2d at 1256. The court reasoned that it would not be possible to determine whether a petitioner successfully stated a cause of action unless the court had jurisdiction to examine the claim. In other words, "[i]f the facts pleaded must constitute a cause of action before the court has jurisdiction, then who is to determine that fact?" *Id.* (quoting *Abraham v. Homer,* 102 Okl. 12, 226 P. 45, 49 (1924)).

B. *Right to Appeal*

On occasion, however, the term "jurisdictional error" is used loosely to refer simply to an error that can be raised for the first time on appeal. Particularly because the opinion in *Sundance* was not available to Defendants before they filed their briefs in this case, they may have used the word "jurisdiction" in this sense. We therefore

consider the possibility that their contention under Section 37–2–4, although not a true "jurisdictional" claim, is nevertheless properly before this court on appeal.

Our Rules of Civil Procedure strongly imply that a contention that a complaint fails to state a claim upon which relief can be granted must be made prior to appeal. SCRA 1986, 1–012(H) states as follows:

> **Waiver or preservation of certain defenses.**
>
> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process or insufficiency of service of process is waived:
>
> (a) if omitted from a motion in the circumstances described in Paragraph G of this rule; or
>
> (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 1–015 to be made as a matter of course.
>
> (2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 1–019 and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 1–007, or by motion for judgment on the pleadings, or at the trial on the merits.
>
> (3) Whenever it appears by suggestions of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

The rule describes three categories of defenses. The first category—including lack of jurisdiction over the person, etc.—must be raised promptly, usually in the answer. The third category—lack of jurisdiction of the subject matter—can be raised at any time. The second category—which includes failure to state a claim upon which relief can be granted—can be made "at the trial on the merits."

The structure of the rule indicates that the defense of failure to state a claim cannot ordinarily be raised after the trial on the merits. This appears to be the interpretation that the federal courts have uniformly given to Federal Rule of Civil Procedure 12(h), which is in all material respects identical to our Rule 1–012(H). As stated in 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1392, at 763 (1990):

> According to the plain language of Rule 12(h)(2), the three enumerated defenses [including failure to state a claim upon which relief can be granted] are waived if they are not presented before the close of trial. Thus, for example, they may not be asserted for the first time on appeal. Nor can these defenses be asserted through any type of post-trial motion. [Footnote omitted.]

Accord Brule v. Southworth, 611 F.2d 406, 409 (1st Cir.1979); *Weaver v. Bowers*, 657 F.2d 1356, 1360 (3d Cir.1981), *cert. denied*, 455 U.S. 942, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982); *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 479–80 (5th Cir.1984); *Black, Sivalls & Bryson v. Shondell*, 174 F.2d 587, 590–91 (8th Cir.1949); *Simpson v. Providence Wash. Ins. Group*, 608 F.2d 1171, 1174 (9th Cir.1979); *Snead v. Department of Social Servs.*, 409 F.Supp. 995, 1000 (S.D.N.Y.1975) (three-judge court); *Gonzales v. Union Carbide Corp.*, 580 F.Supp. 249, 252–53 (N.D.Ind.1983). (The rule does not, however, deprive an appellate court of power to hear an issue raised for the first time on appeal if such review is permitted under other appellate rules or doctrines. *See* SCRA 1986, 12–216(B)(1) (failure to preserve issue does not preclude appellate court from considering, in its discretion, question of general public interest); *Weaver v. Bowers.*)

If we were to rely on this authority, we would refuse to consider Defendant's contentions predicated on Section 37–2–4. *Sundance*, however, states that in New Mexico the rule is otherwise. 109 N.M. at 690, 789 P.2d at 1257. Several appellate opinions, ultimately deriving from *Baca v. Perea*, 25 N.M. 442, 184 P. 482 (1919),

which predated our rules of civil procedure, indicate that the defense of failure to state a claim may be raised for the first time on appeal. We therefore proceed to the merits.

C. *Merits*

By its terms, Section 37–2–4 does not apply to the Complaint filed in this case. The Complaint was filed after the death of Tomas Griego. Section 37–2–4 applies only when death occurs while an action is pending; it describes which pending actions abate when one of the parties dies. The statute governing which actions can initially be brought is NMSA 1978, Section 37–2–1 (Repl.Pamp.1990). Sections 37–2–1 and 37–2–4 were originally enacted by the territorial legislature in 1884. For convenience, we shall refer to all predecessors of Sections 37–2–1 and 37–2–4 by these section numbers, although the section numbers actually varied with the codification. In 1884 Section 37–2–1 read:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

1884 N.M.Laws, ch. 5, § 1. One would expect the two sections of the 1884 law to be consistent. That is, one would expect that if a pending action abated under Section 37–2–4 when a party died, then Section 37–2–1 would not have permitted initiation of a suit on the same cause of action after the death of that party. In particular, one can assume that the 1884 legislature thought that at common law a suit for libel, slander, malicious prosecution, or assault (which abated under Section 37–2–4 if a party died) could not be brought in the first place if either the tortfeasor or the victim had died. Apparently, this was the common law rule. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 125A (5th ed. 1984). Thus, under the original version of Section 37–2–1, Padilla's cause of action, at least the claim against the Estate, would not have been permitted.

In 1941, however, the state legislature amended Section 37–2–1 to add: "The cause of action for wrongful death and the cause of action for personal injuries, shall survive the death of the party responsible therefor." 1941 N.M.Laws, ch. 79, § 1. The law has not been further amended. In common parlance, a claim of assault would be considered a "cause of action for personal injury." Consequently, the Complaint in this case stated a proper cause of action against the Estate unless the term "personal injury" has a special meaning in Section 37–2–1.

Perhaps the 1941 legislature intended to limit the meaning of "cause of action for personal injuries" so as not to include causes of action for libel, slander, malicious prosecution, or assault (the torts that abate under Section 37–2–4), but we do not construe the language in that manner. First, we are unaware of any usage of the term "cause of action for personal injuries" that would exclude those specific torts. Second, even were there an ambiguity in the language of Section 37–2–1, we avoid a construction that produces an absurd result. We presume that the legislature acted in a rational manner. *See State ex rel. Rodriguez v. American Legion Post No. 99,* 106 N.M. 784, 786–87, 750 P.2d 1110, 1112–13 (Ct.App.1987). Because we cannot conceive of a rational basis for the legislature to permit the survival of all causes of action for personal injury except for some peculiar category that includes libel, slander, malicious prosecution, and assault, we decline to construe "causes of action for personal injuries" to exclude such torts. Defendants argue that it is appropriate to foreclose a claim for assault once the alleged assailant has died because the cause of action derives from the criminal sanction, whose purpose is punishment and deterrence, and those purposes can no longer be served once the alleged assailant has died. This argument, however, would ap-

ply only to a civil claim for punitive damages against the decedent. No such claim is raised here. The purpose of the claim against the Estate in this case is solely to obtain compensation for actual loss. We see no reason why the legislature would wish to permit a claim for injuries caused by negligence to survive the death of the tortfeasor while not permitting survival of a claim for compensatory damages arising from an assault. Indeed, when statutory schemes have permitted the survival of most causes of action for personal injury but have excluded others, appellate courts have found the distinction to be so irrational as to deny equal protection of the law. *See Thompson v. Estate of Petroff,* 319 N.W.2d 400 (Minn.1982) (statute provided for survival of personal injury causes of action based on negligence, strict liability, statutory liability, or breach of warranty, but not those based on intentional torts); *Moyer v. Phillips,* 462 Pa. 395, 341 A.2d 441 (1975) (statute provided for survival of all causes of action except actions for slander or libel). Here, we need not decide any such constitutional issue. We simply give the phrase "cause of action for personal injuries" its natural meaning and avoid what other courts have found to be an irrational distinction. *See generally Rodgers v. Ferguson,* 89 N.M. 688, 556 P.2d 844 (Ct.App.1976) (critical discussion of common law survival rules).

In short, we reject Defendants' argument that Padilla's cause of action is barred by Section 37–2–4. The applicable section is Section 37–2–1, which clearly permits the present cause of action. We need not address whether Section 37–2–4 was repealed (at least in part) by implication when Section 37–2–1 was amended in 1941, nor whether Section 37–2–4 passes constitutional muster. Perhaps the legislature will act on the matter before there is any need for a judicial ruling.

II. MOTION FOR RELIEF FROM JUDGMENT

Shortly after entry of the summary judgment, Defendants moved to set aside the judgment. Their motion relied upon Rules 1–059 and 1–060(B). On appeal, they rely only on Rule 1–060(B). In particular, they claim that they were entitled to relief under Rule 1–060(B)(1) for excusable neglect, and they appear also to claim that relief was required under Rule 1–060(B)(6), which permits a judgment to be set aside upon "any other reason justifying relief." We find no basis for relief under Rule 1–060(B)(1) or (6). We therefore need not consider whether Defendants adequately established a meritorious defense. *Cf. Rodriguez v. Conant,* 105 N.M. 746, 749, 737 P.2d 527, 530 (1987) (party seeking relief from *default* judgment must show (1) grounds for opening or vacating judgment and (2) a meritorious defense).

To begin with, we note that this case involves a summary judgment, not a default judgment. If Defendants were attempting to set aside a default judgment, they would face a less severe standard in establishing entitlement to relief under Rule 1–060(B). *Compare Restatement (Second) of Judgments* §§ 65–68 (1980) (grounds for relief from default judgment) *with id.* §§ 69–72 (relief from judgment in contested action). Defendants answered the Complaint. In this context, " 'default judgment' means a judgment rendered without any appearance." *Id.,* Introductory Note at p. 152.

The neglect by defense counsel was extreme. Counsel of record filed no response to requests for admission and no response to the Motion for Summary Judgment. They did not appear at the pretrial conference, at which the Motion for Summary Judgment was heard. They did not respond to the notice of presentment of the order for summary judgment, nor did they appear at court at the time that the judgment was presented. Defendants' counsel on appeal made no effort in their briefs to provide an excuse for these failures by the attorneys of record below. The neglect was not excusable.

Defendants' claim that they are entitled to relief is predicated on the conten-

tion that they should not be bound by the failures of their attorneys. This contention is contrary to settled law. The United States Supreme Court has written:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Link v. Wabash R.R., 370 U.S. 626, 633–34, 82 S.Ct. 1386, 1390–91, 8 L.Ed.2d 734 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955 (1879)). The court added:

> [K]eeping this suit alive merely because [defendant] should not be penalized for the omissions of his own attorney would be visiting the sins of [defendant's] lawyer upon the [plaintiff].

Id. at 634 n. 10, 82 S.Ct. at 1390 n. 10. *Accord Power Constructors v. Acres Am.*, 811 P.2d 1052, 1056 (Alaska 1991); *Suttles v. Vogel*, 160 Ill.App.3d 464, 112 Ill.Dec. 149, 157, 513 N.E.2d 563, 571 (1987), *reversed on other grounds*, 126 Ill.2d 186, 127 Ill.Dec. 819, 533 N.E.2d 901 (1988); *Charson v. Temple Israel*, 405 N.W.2d 895, 898 (Minn.Ct.App.1987); *Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122, 1124 (1987); *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 470 N.W.2d 859 (1991). The interests of the opposing party are not the only interests at stake. As the Wisconsin Supreme Court stated in explaining why dismissal was appropriate for violation of court orders by the attorney of an innocent party:

> The court's authority to dismiss actions emanates not merely from a need to prevent injustice to the parties in the particular action, but also from a need to prevent injustice to the operation of the judicial system as a whole. The circuit courts have a duty to discourage the protraction of litigation, preserve judicial integrity, and promote the orderly processing of cases. Dismissal, in some instances, is necessary to maintain these interests. Each time the court's orders are disregarded, the administration of justice suffers because the court's time is misused to accommodate the noncomplying party's dilatoriness at the expense of the other party and all other litigants awaiting the court's attention. A continuing failure to sanction may be perceived by the noncomplying party and other litigants as a green light to flaunt court orders.

Id. 470 N.W.2d at 867 (citation omitted).

The record in this case gives us no reason to consider a limitation on the general rule binding a party to the conduct of its attorney. The affidavits of Martha Griego and Emma Griego (personal representative of the Estate), which they submitted in support of the motion to set aside the summary judgment, stated that they had not been informed of pertinent events in the case. Emma Griego's affidavit also stated that (1) Lance Bailey (an attorney of record for Defendants) told her that he thought Lee Deschamps (who entered an appearance in the probate matter but not in this case) had taken care of the matter, and (2) Deschamps told her, "I dropped the ball." The affidavits, however, fail to set forth fully the relationship of the Griegos with their attorneys, such as any attempts by the Griegos in the seven months prior to judgment to keep apprised of the course of the litigation. This lapse is of particular interest in light of the affidavit of Padilla's attorney, which states that Bailey told him that (1) he thought he had been fired in the fall of 1988 as a result of a dispute over his bill, (2) he gave the Griegos a copy of their file at that time, and (3) Deschamps had told him that he had given the Griegos a copy of his file in the fall of 1988 and closed his office file.

The record in this case shows that the district court did not abuse its discretion in determining that Defendants had failed to establish adequate grounds under Rule 1-060(B) to set aside the summary judgment.

III. CONCLUSION

For the above reasons, we affirm the summary judgment entered by the district court. No costs are awarded.

ALARID, C.J., and MINZNER, J., concur.

831 P.2d 603

CONCERNED RESIDENTS FOR NEIGHBORHOOD INC., et al., Petitioners-Appellees,

v.

RAY SHOLLENBARGER, Director, Alcohol and Gaming Division of the Mew Mexico Division of Licensing and Regulation, Respondent-Appellant,

v.

OLD TOWN LIQUOR SHOPPE, INC., Real Party in Interest-Appellant.

No. 10932.

Court of Appeals of New Mexico.

Sept. 10, 1991.

Nancy Augustus, Albuquerque, for petitioners-appellees.

Henry F. Narvaez, Keleher & McLeod, P.A., Albuquerque, Lorenzo F. Garcia, Elizabeth Woldman, Jones, Snead, Wertheim, Rodriguez & Wentworth, P.A., Santa Fe, for real party in interest-appellant Old Town Liquor Shoppe, Inc.

Tom Udall, Atty. Gen., Linda R. Bonnefoy, Asst. Atty. Gen., Santa Fe, for respondent-appellant Ray Shollenbarger.

OPINION

BIVINS, Judge.

Appellants Shollenbarger, as Director of the Alcohol and Gaming Division of the New Mexico Department of Regulation and Licensing (director), and Old Town Liquor Shoppe, Inc. (the shoppe) appeal from a writ of mandamus entered by the district court prohibiting the director from transferring a liquor license. On appeal, the director and the shoppe raise three issues: 1) whether the district court erred in the issuance of a writ of mandamus; 2) whether the district court erred in allowing the presentation of additional evidence at the mandamus hearing; and 3) whether whole record review of the administrative proceedings compels affirmance of the administrative hearing officer's decision. We reverse the district court.

FACTS

The shoppe filed an application to transfer the location of its liquor license to a new location in Albuquerque's northeast heights. Concerned Residents for Neighborhood, Inc. (the residents) opposed the transfer of the license on several grounds. One of those grounds was that the liquor license would be located less than three hundred feet away from the Sweetheart Day Care Center (day care) which the residents contended is a school.

In September of 1987, the Alcohol and Gaming Division of the New Mexico Division of Licensing and Regulation (the division) conducted a public hearing on the proposed transfer to determine whether preliminary approval or disapproval should be given. The division is charged with the enforcement of the state's Liquor Control Act, NMSA 1978, Sections 60-3A-1 through 60-8A-19 (Repl.Pamp.1987 and Cum.Supp.1990). At that hearing, the residents presented evidence in support of its claim that day care was a school. Based on the evidence presented at the hearing, the division's hearing officer determined that there was no evidence that the transfer of the license would be detrimental to the health, safety, or morals of the community. The hearing officer also determined that day care was not a school within the meaning of the state liquor regulations. This finding was based on day care's lack of certification and accreditation. As a result of the hearing officer's findings, the director gave preliminary approval for the license transfer.

Notice of the director's preliminary approval was given to the City of Albuquerque (the city). Thereafter, the city conducted an administrative hearing in accordance with its applicable ordinances. The city's hearing officer likewise determined that the transfer would not be detrimental to the community's health, safety, and morals and that day care was not a school. The city's hearing officer also concluded that the license should be transferred. At that point, the residents filed suit (suit 1) against the director, the city and its hearing officer, and the city counsel. This suit sought a writ of prohibition, a writ of certiorari, and an appeal under the applicable city ordinance. The director moved for dismissal from suit 1 on the grounds of improper venue since at that time statutory law required that suits against state officers be brought only in the county where their offices are located. The district court dismissed the director as a party to suit 1 on that basis. The district court further issued an alternative writ of prohibition against the city's hearing officer from approving the transfer of the license. Notwithstanding, the director approved the transfer of the license.

A new venue statute later was enacted authorizing the bringing of suits against state officers in the county where the dispute arose. As a result, the residents moved to have the director joined as a party in suit 1. The shoppe then moved to dismiss suit 1 on the grounds that the director, a necessary party, had previously been dismissed from the suit. In an effort to avoid dismissal of suit 1, the residents filed a second law suit (suit 2) against the director only and then moved to have suits

1 and 2 consolidated. In suit 2, the residents sought a writ of prohibition and review and, in the alternative, a writ of certiorari. The district court dismissed suit 1 without prejudice on the grounds that the director could not be joined in the suit. The residents proceeded only with suit 2 against the director on the basis that he was the only one who could afford them complete relief since he had already approved the license transfer.

At the hearing on suit 2, the residents orally moved to amend their pleadings to seek a writ of mandamus. There was no objection and the motion was granted. Also at that hearing, the residents sought to present new evidence. The shoppe objected, arguing that the hearing should be limited to the administrative record. The residents, however, had failed to provide the district court with the complete record of the previous administrative proceedings. Nevertheless, the district court allowed the presentation of new evidence by the residents concerning whether day care was a school.

The district court found that, since there was no statutory appeal from a transfer of the location of a liquor license, the residents had no adequate remedy at law and, therefore, a writ of mandamus was proper. Contrary to the findings of fact made by the director and the city, the district court found that day care was a school. Lastly, the district court found that the director did not act within the scope of his authority in approving the license transfer and issued a writ of mandamus requiring the director to disapprove the license transfer. The writ was stayed pending this appeal.

DISCUSSION AND ANALYSIS

The director and the shoppe argue that the district court erred in issuing the writ of mandamus. The residents contend that the issuance of the writ was proper because the director had a nondiscretionary duty to disapprove the transfer of the liquor license. The residents contend that the director's nondiscretionary duty to disapprove the transfer arises because day care is a school located within three hundred feet of the shoppe. *See* § 60-6B-10. Furthermore, the residents argue that the director's and the shoppe's argument focuses on procedural matters in order to avoid the merits of this case. We do not agree.

Mandamus lies to compel the performance of a ministerial duty that one charged with its performance has refused to perform. *See State ex rel. Reynolds v. Board of County Comm'rs,* 71 N.M. 194, 376 P.2d 976 (1962).

> The act to be compelled must be ministerial, that is, an act or thing which the public official is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case.

Lovato v. City of Albuquerque, 106 N.M. 287, 289, 742 P.2d 499, 501 (1987). Additionally, Mandamus lies to enforce a clear legal right against one having a legal duty to perform an act and where there is no other plain, speedy, and adequate remedy in the ordinary course of the law. *State ex rel. KNC, Inc. v. New Mexico Dep't of Fin. & Admin., Property Control Div.,* 103 N.M. 167, 704 P.2d 79 (Ct.App.1985). In this case, mandamus was improper for two reasons: because residents were essentially requesting a review on the merits rather than compelling the director to perform a ministerial act that he was required to perform, and because an adequate remedy at law was available. We first address the purpose of mandamus in light of the facts at bar, to establish that a writ of certiorari, not mandamus, is the appropriate vehicle for review where it is alleged that an inferior court or tribunal proceeded improperly. Concluding that a writ of certiorari is appropriate, its availability further precludes issuance of a writ of mandamus.

Hearing officers from both the division and the city held hearings and determined that day care was not a school and that the transfer of the license would not be detrimental to the health, safety, and morals of the community and, therefore, approved the transfer of the license. Thereafter, the director was required to approve the trans-

fer and, in fact, did so. *See* NMSA 1978, § 60–6B–4(I) (Repl.Pamp.1987 and Cum. Supp.1990). In light of the action by the director, the district court was not faced with a situation in which the director refused to perform a ministerial act which he was required to perform. Therefore, the issuance of the writ of mandamus was improper. *See State ex rel. Reynolds v. Board of County Comm'rs.*

The residents contend that *Gavin Maloof & Co. v. Branch,* 80 N.M. 334, 455 P.2d 838 (1969), provides precedent for a writ of mandamus being a proper remedy in a liquor license transfer case. However, the writ of mandamus in that case was for the purpose of compelling the chief of the Division of Liquor Control to ensure that all of the creditors of the licensee were paid prior to approving the transfer. A statutory provision specifically required the chief to ensure payment to such creditors prior to transference. *See State ex rel. Clinton Realty Co. v. Scarborough,* 78 N.M. 132, 429 P.2d 330 (1967). Therefore, mandamus was a proper remedy in that case since it was an attempt to compel the chief to perform a ministerial act which the law statutorily required him to do. *See State ex rel. Reynolds v. Board of County Comm'rs.* However, the case at hand is distinguishable since the director already performed the ministerial act which he was required to do. Rather, the residents sought the writ of mandamus in what amounts to a review of the propriety of the director's action. In light of this distinction, we find the residents' reliance on *Gavin Maloof & Co.* unpersuasive.

After hearing additional evidence, the district court found that day care was a school, a finding contrary to the determination by both the division's and the city's hearing officers. If issues of fact are raised, then mandamus should not issue, since it is only a method by which an existing right is enforced. *See Rivera v. Nunn,* 78 N.M. 208, 430 P.2d 102 (1967); *State ex rel. State Highway Comm'n v. Quesenberry,* 72 N.M. 291, 383 P.2d 255 (1963). The rights of the parties may not be adjudicated by mandamus. *See State ex rel. Black v. Aztec Ditch Co.,* 25 N.M. 590, 185 P. 549 (1919). Since the residents raised a factual issue concerning whether day care was a school, the district court erred in issuing a writ of mandamus.

Moreover, since the proceedings amounted to a review of the propriety of the director's action, the district court's review should have been limited solely to the administrative record. *See Swisher v. Darden,* 59 N.M. 511, 287 P.2d 73 (1955); *see also Rowley v. Murray,* 106 N.M. 676, 748 P.2d 973 (Ct.App.1987). The residents attempt to distinguish *Swisher* by arguing that its holding was dependent on statutory language not present in this case. However, our reading of *Swisher* indicates that the particular statute involved was of little consequence to the decision and what was of consequence were general principles regarding judicial review of administrative action. Lastly, to allow the district court to hear new evidence and make independent findings of fact contrary to those made by the administrative agency would mean ignoring well established precedent dealing with whole record review of administrative decisions. *See Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 767 P.2d 363 (Ct.App.1988). Based on the nature of the remedy of mandamus, as discussed above, as well as the fact that this appeal involves a review of an administrative agency's action, the residents are incorrect in arguing that the real issue in this case is the status of day care.

The director and the shoppe argue that the residents' proper remedy was a writ of certiorari to the district court and rely on *Durand v. New Mexico Comm'n on Alcoholism,* 89 N.M. 434, 553 P.2d 714 (Ct.App. 1976), as support. In *Durand,* the plaintiff was dismissed by the commission on alcoholism and the state personnel board sustained the dismissal. The plaintiff then filed a notice of appeal seeking review of the final order. This court dismissed the appeal for lack of subject matter jurisdiction since neither the personnel board nor the commission were under the Administrative Procedures Act. Plaintiff then filed a motion for reconsideration since the per-

sonnel act did not specify how to appeal from a decision of the board. This court disagreed with plaintiff that it had jurisdiction over administrative appeals and concluded that the proper remedy was a writ of certiorari to the district court. The residents' attempts to distinguish *Durand* are not convincing. As noted in the reply brief, the rationale in *Durand* focuses on the appropriate vehicle for review, not the appropriate judicial forum.

Writs of certiorari are proper whenever it is shown that the inferior court or tribunal has proceeded illegally, and no appeal is allowed or other mode provided for reviewing its proceedings. *Albuquerque Nat'l Bank v. Second Judicial Dist. Court,* 77 N.M. 603, 426 P.2d 204 (1967). In light of the fact that the director granted the requested transfer of the license, when the residents alleged that it was improper to do so, a writ of certiorari was the proper course of action for the residents to take. *See Albuquerque Nat'l Bank v. Second Judicial Dist. Court.* By pursuing a writ of certiorari, the residents could have properly presented their arguments concerning their contention that the director erred in transferring the license. Because residents had an adequate remedy at law, a writ of mandamus was not available. *See State ex rel. KNC, Inc. v. New Mexico Dep't of Fin. & Admin., Property Control Div.*

However, a review of the record reveals that the residents abandoned their request for such a writ. Originally, the residents filed a petition for a writ of prohibition and for review, or, in the alternative, for writ of certiorari. However, during the hearing on their petition, the residents moved to amend their petition to seek a writ of mandamus. The fact that the residents abandoned all of their theories for relief except mandamus is also shown by their requested findings of fact and conclusions of law. Since the remedy of certiorari was available and appropriate under the facts of this case, we do not agree with resident's argument that mandamus was the only remedy available to contest the transfer. *See Ellinwood v. Morales,* 104 N.M. 243, 719 P.2d 821 (Ct.App.1986).

Since the residents could have pursued relief by seeking a writ of certiorari, we also do not agree with their argument that the mandatory duty of the director to approve the hearing officers' determination leads to absurd results by allowing the hearing officers unfettered discretion in the granting of license transfers. On the contrary, a petition for a writ of certiorari acts as a check on the propriety of the division's actions with respect to license transfers. Thus, since certiorari is available, we do not agree with the residents that mandamus is a proper remedy in this case. *See State ex rel. KNC, Inc. v. New Mexico Dep't of Fin. & Admin., Property Control Div.*

Finally, the residents argue that, even if mandamus is not the proper remedy, a review of the record under a petition for certiorari sustains the district court's decision. First, this argument ignores the fact that the record reveals that the residents abandoned their petition for certiorari. Second, this argument also ignores the basic concepts behind whole record review. Whole record review involves a review of all of the evidence to determine whether there is substantial evidence to support the result. *See Tallman v. ABF (Arkansas Best Freight).* Evidence was presented to the hearing officers showing that day care is not an accredited institution and that its employees and owner are not licensed teachers. There was also evidence showing that day care was licensed by the New Mexico Health and Environment Department to operate and maintain a child care center. Based on this, there was substantial evidence to support the conclusion that day care was not a "school" for the purposes of a liquor license transfer. *See* New Mexico Liquor Regulations No. 6B-10.(B) (1984). Since the determination of the status of day care was in the context of the liquor license regulations, we do not find the residents' reliance on *Strosnider v. Strosnider,* 101 N.M. 639, 686 P.2d 981 (Ct.App.1984), persuasive. Additionally, we accord substantial weight to the divi-

sion's interpretation of the Liquor Control Act. *See Klumker v. Van Allred,* 112 N.M. 42, 811 P.2d 75 (1991); *State ex rel. Battershell v. City of Albuquerque,* 108 N.M. 658, 777 P.2d 386 (Ct.App.1989). The residents' reliance on other evidence to support a finding contrary to that of the hearing officers is of no consequence. *See Tallman v. ABF (Arkansas Best Freight); see also In re Application of Plains Elec. Generation & Transmission Coop., Inc.,* 106 N.M. 775, 750 P.2d 475 (Ct.App.1988) (finding of agency considered strong evidence).

Based on the above, we reverse the district court and remand this case with instructions that the district court quash its writ of mandamus prohibiting transfer of the liquor license.

IT IS SO ORDERED.

APODACA and CHAVEZ, JJ., concur.

831 P.2d 608

Gloria M. RODRIGUEZ, Claimant–Appellant,

v.

EL PASO ELECTRIC COMPANY, Employer, and Mountain States Mutual Casualty Company, Insurer, Respondents–Appellees.

No. 13115

Court of Appeals of New Mexico.

April 9, 1992.

Pedro P. Palacios, Las Cruces, for claimant-appellant.

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

OPINION

MINZNER, Judge.

Worker appeals the disposition order of the Workers' Compensation Administration (WCA) dismissing her claim for benefits. Her contentions on appeal can be broken down as follows: (1) the WCA improperly struck her peremptory challenge to Judge Wiltgen, the judge assigned to hear the case; (2) Judge Wiltgen erred by not honoring her Affidavit of Disqualification; and (3) the judge's decision was not supported by substantial evidence. We hold that the WCA should have honored Worker's peremptory challenge and reverse. Accordingly, we need not address Worker's remaining issues.

Worker's claim was assigned to Judge Griego on July 18, 1990. Respondents filed a Notice of Peremptory Challenge to Judge Griego on July 19, 1990. The case was reassigned to Judge Wiltgen on August 2, 1990. Worker filed her notice of peremptory challenge to Judge Wiltgen on August 14, 1990, twelve days after he was assigned to the case. Respondents moved to strike Worker's Notice of Peremptory Challenge on the ground it was untimely filed under Formal Hearing Rule XXIII, New Mexico Department of Labor, Workers' Compensation Division (June, 1989). Worker filed an Affidavit of Disqualification against Judge Wiltgen, who refused to honor the affidavit. Judge Wiltgen subsequently granted Respondents' motion.

While Worker's appeal was pending, we decided that Rule XXIII permits, but does not require, a provisional challenge within ten days of the original judge assignment. *Wineman v. Kelly's Restaurant,* 113 N.M. 184, 184–85, 824 P.2d 324, 324–25 (Ct.App.1991). A party may wait for the subsequent judge assignment, as Worker did in this case, and then file a peremptory challenge to that judge. *Id.* at 185, 824 P.2d at 325. Thus, Worker's failure to disqualify Judge Wiltgen within ten days of Judge Griego's assignment on July 18, 1990, did not bar her subsequent peremptory challenge to Judge Wiltgen. This would end our inquiry were it not for the fact that Worker's challenge to Judge Wiltgen was filed twelve days after the filing of the Notice of Reassignment.

Rule XXIII(C) provides, in pertinent part, as follows:

(1) The right to excuse a Workers' Compensation Judge shall be exercised not later than ten (10) days from the date that the Notice of Judge Assign-

ment is *issued* by the Clerk. The failure to exercise the right within ten (10) days shall constitute a waiver of the right. Any party who is joined after the initial Notice of Judge Assignment shall exercise the statutory right to excuse not later than ten (10) days after the entry of the order joining that party.

* * * * * *

(4) Failure to exercise a peremptory challenge or provisional challenge consistent with the terms of this rule shall constitute a waiver of the right to exercise a peremptory challenge or provisional challenge. [Emphasis added.]

Formal Hearing Rule I(A) provides as follows:

These rules govern the procedure to be followed in formal hearings conducted before Workers' Compensation Judges in the administration of the New Mexico Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law. Except where otherwise provided in these Rules, the Rules of Civil Procedure for the District Courts of New Mexico shall apply.

We initially point out that the basis for Judge Wiltgen's order striking Worker's Notice of Peremptory Challenge was that the notice was not filed within ten days of July 18, 1990, the date of the original Notice of Judge Assignment. Neither Judge Wiltgen nor Respondents suggested below that Worker's notice was untimely because it was not filed within ten days of August 2, 1990, the date Judge Wiltgen was assigned. As stated above, Respondents' interpretation of Rule XXIII was rejected in *Wineman.*

While recognizing the holding in *Wineman,* Respondents still argue that Judge Wiltgen properly struck Worker's Notice of Peremptory Challenge. They contend Worker waived any arguments that Judge Wiltgen improperly refused to honor the peremptory challenge by failing to appear at the August 24, 1990 hearing on their motion to strike. Respondents also assert that Judge Wiltgen correctly struck Worker's peremptory challenge because it was not filed within ten days of his assignment to the case.

We answer Respondents' first contention summarily. It is generally true that parties may not complain about actions taken at hearings of which they had notice but did not attend. *See, e.g., Marinchek v. Paige,* 108 N.M. 349, 352, 772 P.2d 879, 882 (1989) (entry of default judgment not a violation of due process where party's counsel had notice of hearing but did not attend). At the same time, any actions taken by a judge subsequent to a proper peremptory challenge are void. *See Borrego v. El Guique Community Ditch Ass'n,* 107 N.M. 594, 597, 762 P.2d 256, 259 (1988); *Wineman,* 113 N.M. at 186, 824 P.2d at 326. Assuming that Worker's peremptory challenge was timely filed, Judge Wiltgen could not proceed with the hearing on the motion to strike. *See id.; see also Sundance Mechanical & Util. Corp. v. Atlas,* 109 N.M. 683, 686, 789 P.2d 1250, 1253 (1990) (one jurisdictional element necessary to validity of every judgment is the power or authority to decide the particular matter presented).

Worker also argues that her challenge to Judge Wiltgen was timely, even though it was filed twelve days after the Notice of Reassignment was filed. We take special note of her contention that under SCRA 1986, 1–006(D) (Cum.Supp. 1991), she was entitled to an additional three-day mailing period because the notice of Judge Wiltgen's assignment was served on her attorney by mail. Rule 1–006(D) would only apply if the WCA's Formal Hearing Rules do not otherwise provide. Formal Hearing Rule I(A). Respondents contend that Rule XXIII expressly provides otherwise, and that the challenge to Judge Wiltgen was properly stricken because it was untimely.

We cannot agree with Respondents that Rule XXIII expressly provides that a notice of peremptory challenge must be *filed* within ten days after the notice of judge assignment is *filed.* Instead, the rule states that the right to challenge a

judge shall be exercised within ten days after the notice of judge assignment is *issued* by the clerk. Rules and regulations adopted by the WCA pursuant to NMSA 1978, Section 52–5–4 (Repl.Pamp.1991) should be definite and certain so the parties know what is expected of them. *See Wineman,* 113 N.M. at 185, 186, 824 P.2d at 325, 326. In interpreting WCA rules, we give effect to the plain meaning of the words used in the rules. *Id.; see also State v. Eden,* 108 N.M. 737, 741, 779 P.2d 114, 118 (Ct.App.1989).

Our Rules of Civil Procedure allow a party to file a peremptory challenge to a judge within ten days of "mailing by the clerk of notice of assignment or reassignment of the case to a judge." SCRA 1986, 1–088.1(B)(1)(b) (Cum.Supp.1991). Since the clerk is authorized to serve the notice of judge assignment by mail, a party would presumably have an additional three days under Rule 1–006(D) to file his or her peremptory challenge. *Compare Trujillo v. State,* 90 N.M. 666, 667, 568 P.2d 192, 193 (1977) (applying three-day rule to the requirement that counsel has ten days from the date of the clerk's notice to file a memo in opposition to summary disposition) *with Socorro Livestock Mkt., Inc. v. Orona,* 92 N.M. 236, 237, 586 P.2d 317, 318 (1978) (holding that three-day rule only applies when the event starting time running is service). Other states have construed provisions similar to ours to allow additional time for mailing in cases of challenges to judges. *See State v. Schaffer,* 112 Idaho 1024, 739 P.2d 323, 326 (1987); *State v. Seidschlaw,* 304 N.W.2d 102, 104–05 (S.D. 1981); *Duran v. State,* 113 Ariz. 135, 547 P.2d 1049, 1050 (1976) (en banc).

■ Rule XXIII differs from Rule 1–088.1 in that the former speaks in terms of the clerk's issuance of the notice of judge assignment. However, the Formal Hearing Rules do not define "issue." "Issue" has been defined as "[t]o send forth; to emit; to promulgate; * * * [t]o send out, to send out officially; * * * [w]hen used with reference to writs, process, and the like the term is ordinarily construed as importing delivery to the proper person, or to the proper officer for service, etc." *Black's Law Dictionary* 830 (6th ed. 1990); *Popnoe v. Corbin,* 215 S.W.2d 197, 198 (Tex.Civ.App.1948); *see also State v. Ruffins,* 109 N.M. 668, 669, 789 P.2d 616, 617 (1990) (definition of "issue" in context of forgery statute); *Klutts v. Jones,* 20 N.M. 230, 248, 148 P. 494, 499 (1915) ("issue" means to emit or send forth). We believe that, in the context of Rule XXIII, "issue" contemplates that the clerk will mail or otherwise send out the notice of judge assignment or reassignment. *Cf. Socorro Livestock Mkt., Inc.,* 92 N.M. at 236, 586 P.2d at 317 (three-day mailing period did not apply where event starting time running was entry of judgment). In fact, the parties do not dispute that the notice of Judge Wiltgen's assignment was served by mail in this case. Since the formal hearing rules do not define "issue" or otherwise set out how parties are to be informed of a notice of judge assignment, we conclude that Rule 1–006(D) applies, and Worker had thirteen days to file her Notice of Peremptory Challenge. *See* Formal Hearing Rule I(A).

We express no opinion regarding the WCA's authority to enact a rule requiring parties to file their challenges within ten days of the filing of the judge assignment. We simply hold that the WCA must use clearer language than that used in Rule XXIII if that is its intent. *Wineman,* 113 N.M. at 186, 824 P.2d at 326.

■ We hold that the three-day mailing period of Rule 1–006(D) applies to peremptory challenges exercised under WCA Formal Hearing Rule XXIII. Because Worker's challenge was filed within thirteen days of the filing of the notice of Judge Wiltgen's assignment to the case, the challenge was timely. Accordingly, all actions taken by Judge Wiltgen subsequent to the challenge were void. We reverse the WCA's disposition order denying worker benefits and remand this case to the WCA for further proceedings consistent with this opinion. We decline to award Worker at-

torney fees for this appeal at this time because the amount of her recovery, if any, remains to be determined. In addition to its award of attorney fees below, if any, we direct the new workers' compensation judge to award Worker attorney fees for this appeal if she obtains compensation benefits. *See Nelson v. Nelson Chem. Corp.*, 105 N.M. 493, 497, 734 P.2d 273, 277 (Ct.App.1987).

IT IS SO ORDERED.

PICKARD and FLORES, JJ., concur.

831 P.2d 976

Edward J. KUEMMERLE and Lora L. Kuemmerle, Plaintiffs–Appellants,

v.

UNITED NEW MEXICO BANK AT ROSWELL, N.A., a national banking association, Defendant–Appellee.

No. 19836.

Supreme Court of New Mexico.

May 5, 1992.

Cusack, Jaramillo & Associates, Timothy J. Cusack, Roswell, for plaintiffs-appellants.

Hinkle, Cox, Eaton, Coffield & Hensley, Stuart D. Shanor and Gregory S. Wheeler, Roswell, for defendant-appellee.

OPINION

BACA, Justice.

Plaintiffs-appellants Edward and Lora Kuemmerle appeal the judgment of the trial court in favor of defendant-appellee United New Mexico Bank at Roswell (the "Bank"). Appellants raise three issues for our consideration: (1) Whether the Bank's security interest in the inventory attached and was perfected prior to the attachment of appellants' landlords' lien; (2) whether the Bank has a valid purchase money security interest, and, if so, whether the Chumley lease subordinates appellants' landlords' lien to the Bank's security interest; and (3) whether the landlords' lien waiver executed by Mr. Kuemmerle is effective against both appellants. We affirm.

I

In January of 1987, appellants leased a building to certain individuals, the Chumleys and Pattons (the "Chumleys"), to operate a grocery store, the Sunset Market (the "Market"). The Chumleys secured financing for their business from the Bank and gave the Bank a promissory note and security interest in furniture, fixtures, equipment, and inventory. The lease agreement (the "Chumley lease") contained a term that subordinated appellants' landlords' lien to the rights of any purchase money security interest holder "in trade fixtures and any other personal property and equipment installed by [the Chumleys] in the leased premises * * * *" In addition, appellant Mr. Kuemmerle, but not Mrs. Kuemmerle, signed a landlords' lien waiver in favor of the Bank.

In January of 1988, the Chumleys negotiated to sell the Market to the Daniels and the Daniels negotiated with the Bank to secure financing for their purchase of the business. In anticipation of the loan closing, the Bank requested that the Daniels obtain the Kuemmerles' signatures on a lien waiver form. On February 3, the lien waiver form was returned to the Bank with a signature that purported to be the signature of Mr. Kuemmerle. The next day, the Bank and the Daniels closed their loan transaction, which was evidenced by two promissory notes in the amounts of $81,062.63 and $20,000.00. The notes provided that the purchase money nature of the loans would not be affected by extension, renewal, consolidation, or refinancing of the loans. To secure the larger note, the Daniels executed a security agreement in favor of the Bank that created a security interest in the furniture, fixtures, equipment owned or subsequently acquired, and in the inventory and proceeds from such inventory. On February 12, the Chumleys and the Daniels consummated the sale of the Market. The Bank filed the financing statements in Chaves County on March 31, and with the Secretary of State on April 6. The Daniels operated the Market without an agreement with appellants from the date of their purchase of the Market until April 8, when the Daniels and appellants entered into an assumption agreement whereby the Daniels assumed the Chumley lease with the Kuemmerles with minor modifications.

The Daniels ordered their inventory from a wholesaler who would segregate the Daniels' order at the warehouse, identify the goods as the Daniels, and require payment from the Daniels one week prior to shipment. The inventory was sold and replaced approximately every forty days.

The Daniels' loans were consolidated and renewed by the Bank on May 11 and the Bank accepted additional collateral, changed the interest rate to current market rate, and extended further credit to the Daniels. The Bank did not file new financing statements in conjunction with the refinancing. In July, the Daniels failed to pay

the rent due to appellants and failed to provide insurance as required by the lease. The Daniels were evicted from the premises and appellants obtained a default judgment against the Daniels for the back rent and insurance payments. At the time of the eviction, the Daniels owed the Bank $121,210.21 on the loans. Appellants conceded that, under the lease assumption agreement, their landlords' lien was subordinated to the Bank's purchase money security interest in the furniture, fixtures, and equipment. However, appellants contended that their landlords' lien was prior to the Bank's security interest in the inventory. The Bank and appellants agreed that the inventory should be sold by the Bank and the proceeds held until the respective priority rights could be determined. The Bank liquidated these assets and retained $38,966.47 in escrow and appellants instituted the instant action for a declaratory judgment concerning the parties' priorities to the funds in escrow.

The trial court found that the Bank was entitled to the proceeds on three different theories, any one of which, if correct, would support affirmance. First, the trial court concluded that the Bank had a security interest in the inventory purchased by the Daniels after April 6 and that this security interest attached before the inventory was delivered to the premises. Because the appellants' landlords' lien could not attach to the inventory until the inventory reached the premises, the trial court concluded that the Bank's security interest was superior to appellants' landlords' lien. Second, the trial court found that the subordination clause in the Chumley lease subordinated appellants' lien to the Bank's purchase money security interest. Third, the trial court found that the lien waivers executed by Mr. Kuemmerle were effective against both appellants. Appellants disagreed and this appeal ensued.

II

New Mexico recognizes that the priority between a landlords' lien and an Article 9 security interest is not covered by the statutory provisions of the Uniform Commercial Code—Secured Transactions, NMSA 1978, §§ 55-9-101 to -507 (Repl.Pamp.1987 & Cum.Supp.1991). *National Inv. Trust v. First Nat'l Bank in Albuquerque*, 88 N.M. 514, 516, 543 P.2d 482, 484 (1975). In such a case, the common law doctrine of "first in time, first in right" controls the priorities between the parties. *See id.* at 515, 543 P.2d at 483. Thus, the critical inquiry in this appeal is whether the Bank's security interest in the Daniels' inventory attached prior to the attachment of appellants' landlords' lien. *See id.*

A

Citing *Chessport Millworks, Inc. v. Solie*, 86 N.M. 265, 522 P.2d 812 (Ct.App. 1974), and *Gathman v. First American Indian Land, Inc.*, 74 N.M. 729, 398 P.2d 57 (1965), appellants contend that their landlords' lien attached when they agreed to lease the building to the Chumleys in January of 1987, and, by virtue of their assumption agreement with the Daniels, their lien continued to be valid. In the alternative, appellants contend that their landlords' lien attached on February 3, 1988, because the assumption agreement, entered on April 8, with the Daniels was back dated and obligated the Daniels under the lease from the beginning of February. In either case, appellants conclude that their landlords' lien attached before the Bank's security interest was perfected by the Bank's filing of the financing statement on April 6.

By statute, a landlord is given a lien "on the property of their tenants which remains in the house rented, for the rent due, or to become due by the terms of any lease * * * *" NMSA 1978, § 48-3-5 (Repl.Pamp.1987). In general, a landlords' lien attaches at the beginning of the tenancy for any rent that will come due during the tenancy. *National Inv. Trust*, 88 N.M. at 515, 543 P.2d at 483. However, as *National Investment Trust* makes clear, the lien does not attach to the tenant's property until after the property is brought onto the premises. *Id.* As a consequence, appellants' landlords' lien in the Daniels' in-

ventory could not have attached until the inventory was delivered to the Market.

B

The Bank contends that its security interest in the Daniels' inventory was perfected on April 6 when it filed its financing statement and that appellants' landlords' lien did not attach until appellants and the Daniels entered into the lease agreement on April 8. In the alternative, the Bank argues that its security interest attached and was perfected when the inventory was segregated for shipment by the Daniels' supplier and that appellants' landlords' lien did not attach until the inventory reached the Market. Under either theory, the Bank concludes that, because its security interest attached before appellants' landlords' lien, it has priority over the proceeds of the sale.

A security interest attaches when the last of three events occurs: (1) the debtor signs a security agreement; (2) the debtor is given value; and (3) the debtor has rights in the collateral. NMSA 1978, § 55–9–203 (1) & (2) (Repl.Pamp.1987). Under NMSA 1978, Sections 55–9–302 & –303 (Repl.Pamp.1987), a security interest is perfected only after it attaches and a financing statement has been filed. If the financing statement is filed before the security interest attaches, the security interest is perfected upon attachment. NMSA 1978, § 55–9–303.

In the instant case, the Daniels signed a security agreement on February 4, 1988, and on the same day, the Bank extended credit to the Daniels, thereby giving value to the debtors. *See* NMSA 1978, § 55–1–201(44) (Cum.Supp.1991). However, the Bank's security interest could not attach on that day because the Daniels did not have rights in the collateral. At the earliest, the Bank's security interest attached to the inventory on February 12, when the Daniels and the Chumleys consummated the sale of the Market and the Daniels gained rights in the inventory. *See* James J. White & Robert S. Summers, *Uniform Commercial Code* § 22–6 (3d ed. 1988). This security interest as to the inventory in the Market on February 12 was perfected when the Bank filed the financing statement on April 6.

While the Bank's security interest in the initial inventory attached on February 12 and was perfected on April 6, evidence presented at trial indicates that the inventory was sold and replaced approximately every forty days. Appellants argue that the Bank's security interest attached only to the initial inventory and not to after-acquired inventory because the financing statement does not mention after-acquired inventory.[1] Appellants conclude that because the security interest does not include after-acquired inventory, they are entitled to the disputed funds by virtue of their landlords' lien. The Bank, however, argues that the financing statement was intended to cover after-acquired inventory and that the security interest in such inventory attached and was perfected on April 6 when the financing statement regarding the initial inventory was filed. In the alternative, the Bank argues that its security interest attached when the Daniels gained rights in the collateral, *i.e.*, when the Daniels' supplier segregated the inventory for shipment, and that appellants' landlords' lien did not attach until the same inventory was delivered to the Market. In either case, the Bank concludes that its security interest attached before appellants' landlords' lien attached, and, thus, its security interest has priority over appellants' landlords' lien.

While we have never decided whether a clause granting a security interest in inventory also covers after-acquired inventory, other courts have addressed this issue. A majority of the courts addressing this issue have concluded that a security interest in inventory also includes after-acquired inventory unless the security agreement clearly indicates the contrary result is intended. *See In re McBee*, 714 F.2d 1316, 1331 (5th Cir.1983) (applying Texas law);

1. In pertinent part, the financing statement read: "This financing statement covers the following types (or items) of property: * * * Entire inventory of merchandise together with all proceeds derived therefrom. Said * * * inventory is located at [the Market]."

American Employers Ins. Co. v. American Sec. Bank, N.A., 747 F.2d 1493, 1501 (D.C.Cir.1984) (applying Maryland law); *In re Page*, 16 U.C.C.Rep.Serv. (Callaghan) 501, 504–05 (Bankr.M.D.Fla.1974); *In re Nickerson & Nickerson, Inc.*, 329 F.Supp. 93, 96 (D.Neb.), *aff'd.*, 452 F.2d 56 (8th Cir.1971); *In re Sims Office Supply, Inc.*, 83 B.R. 69, 73 (Bankr.M.D.Fla.1988); *In re American Family Mktg. Corp.*, 92 B.R. 952, 953 (Bankr.M.D.Fla.1988); *In re Gary & Connie Jones Drugs, Inc.*, 35 B.R. 608, 611 (Bankr.D.Kan.1983); *Get It Kwik of Am., Inc. v. First Alabama Bank of Huntsville, N.A.*, 361 So.2d 568, 573 (Ala. Civ.App.1978); *Frankel v. Associates Fin. Svcs. Co.*, 281 Md. 172, 377 A.2d 1166, 1168 (1977). These courts often apply an objective test to determine whether the security agreement contemplated after-acquired inventory and a subjective test to determine whether the parties intended to include after-acquired inventory in their agreement. *See, e.g., American Employers Ins. Co.*, 747 F.2d at 1500 (citing James J. White & Robert S. Summers, *Handbook of the Law of the Uniform Commercial Code* 912 (2d ed. 1980)). However, some courts reject this approach and require an explicit after-acquired clause to appear in the security agreement. *See In re Middle Atl. Stud Welding Co.*, 503 F.2d 1133, 1136 (3d Cir. 1974) (security interest in accounts does not cover after-acquired accounts); *In re Balcain Equip. Co.*, 80 B.R. 461, 462 (Bankr. C.D.Ill.1987) (security interest in inventory does not cover after-acquired inventory); *In re Nightway Transp. Co.*, 96 B.R. 854, 859 (Bankr.N.D.Ill.1989) (security interest in accounts receivable does not cover after-acquired accounts receivable).

We agree with the reasoning of those courts that find that the term "inventory" in a security agreement contemplates not only existing inventory but also after-acquired inventory. The Code allows the use of security interests in after-acquired property to secure an obligation. *See* NMSA 1978, § 55–9–204 (Repl.Pamp.1987). Inventory is defined in the Code as goods that "are held by a person who holds them for sale * * *." NMSA 1978, § 55–9–109(4) (Repl.Pamp.1987). This definition of inventory anticipates that the inventory will change from day to day in the normal operation of a business such as a retail store. In rejecting an argument similar to that of appellants' argument in this case, the court in *Get It Kwik of America* stated:

> Needless to say, any reasonable secured party would be fully aware that [a retail sales] business presupposes a constant change in the inventory. Therefore, it is obviously unreasonable to assume that anyone would have received or acquired or intended to acquire a security interest in an inventory with the rigid limitation that it should be limited to the same items which made up the inventory on the date the document was executed.
>
> This approach is consistent with the general liberal philosophy of the U.C.C. and is certainly the prevailing and accepted commercial practice in financing retail merchandising businesses.

361 So.2d at 573–74 (quoting *In re Page*, 16 U.C.C.Rep.Serv. (Callaghan) 501, 504 (Bankr.M.D.Fla.1974)). A description of collateral in a financing statement "is sufficient whether or not it is specific if it reasonably identifies what is described." NMSA 1978, § 55–9–110 (Repl.Pamp.1987). The description of collateral in the financing statement in the instant case as the "entire inventory of merchandise together with all proceeds derived therefrom" is sufficient to give another creditor notice of the security interest in after-acquired inventory. *See American Employers Ins. Co.*, 747 F.2d at 1500–01. Thus, viewed objectively, the term "inventory," by its very nature, includes after-acquired inventory.

In addition, the facts of the instant case show that the Daniels and the Bank intended the security interest to cover after-acquired inventory. The note signed by the Daniels stated that the security for the loan was "[a]ll inventory * * * which I own now or may own in the future, which I will sell * * *." Thus, subjectively, the parties to the security agreement intended to have all inventory, including after-acquired inventory, secure the note. Finally, even

though the financing statement as filed did not specifically include after-acquired inventory, we hold that it was sufficient to include after-acquired inventory.

One final issue that we must address is when the security interest in after-acquired collateral attaches. Under NMSA 1978, Section 55–9–203, a security interest cannot attach until the buyer has rights in the collateral. This, by itself, would indicate that a security interest in after-acquired inventory could not attach until the buyer either has received or paid for the inventory. However, inventory as defined above includes after-acquired inventory. Because inventory is a single entity, we hold that a security interest in after-acquired inventory attaches at the time it attaches to the initial inventory. *See* White & Summers, *supra,* § 22–6. In the instant case, the Bank's security interest in inventory attached on February 12, 1988.[2]

III

An application of the principles discussed in Sections II A and B, *supra,* shows that the Bank's security interest in the Daniels' inventory attached on February 12, 1988. Appellants' landlords' lien attached when the inventory was delivered to the Market. Because substantial evidence in the record supports the trial court's finding that the inventory turned over every forty days, *see Kueffer v. Kueffer,* 110 N.M. 10, 12, 791 P.2d 461, 463 (1990), the inventory in the store at the time of foreclosure would have been delivered to the store after the attachment of the Bank's security interest. Therefore, the Bank's security interest attached before appellants' landlords' lien attached and, thus, has priority over appellants' landlords' lien. Because we find that the Bank's security interest in the inventory attached before appellants' landlords' lien attached, we do not address the other issues raised by appellants.

The judgment of the trial court is AFFIRMED.

IT IS SO ORDERED.

FRANCHINI and FROST, JJ., concur.

831 P.2d 981

Alvin SMITH, Plaintiff–Appellant,

v.

Roger COX, Defendant–Appellee.

No. 19916.

Supreme Court of New Mexico.

May 5, 1992.

Rehearing Denied June 18, 1992.

2. Even if we were to hold that a security interest did not attach until the Daniels had rights in the after-acquired inventory, *see National Investment Trust,* 88 N.M. at 515, 543 P.2d at 483, the result in the instant case would be the same. Under that analysis, the Bank's security interest in after-acquired inventory would attach when the Daniels gained rights in the inventory, *i.e.,* when the inventory was segregated for shipment from the Daniels' supplier. Appellants' landlords' lien would not attach to the same inventory until it was delivered to the Market at some later date. Thus, in either case, the Bank's security interest attached before appellants' landlords' lien and the Bank has priority in the proceeds.

Mettler & LeCuyer, P.C., Earl Mettler, Albuquerque, for plaintiff-appellant.

The Payne Law Firm, H. Vern Payne, Marcia Lubar, Albuquerque, for defendant-appellee.

OPINION

BACA, Justice.

In 1986, appellant Alvin Smith successfully sued FDC Corporation receiving a judgment for $54,134.00 plus costs. That judgment was subsequently affirmed on appeal in *Smith v. FDC Corp.*, 109 N.M. 514, 787 P.2d 433 (1990). In March of 1987, while the Smith suit was pending, FDC Corporation liquidated its corporate assets and ceased doing business. No formal dissolution proceedings were ever initiated. When Smith sought to collect the judgment amount, he discovered that the corporation was insolvent.

Thereafter, Smith filed this action alleging that appellee Roger Cox, a director, an officer and sole shareholder of the FDC Corporation, was liable to Smith for the amount FDC owed him on the grounds that Cox failed to comply with New Mexico's dissolution statutes, and that Cox's payment of $62,601.39 to himself as a creditor during the liquidation of FDC's assets constituted an impermissible preference. In

addition, Smith's complaint requested that a trust be imposed upon assets distributed to Cox and others during liquidation. The trial court granted Cox's motion to dismiss and entered its order dismissing Smith's complaint with prejudice for failure to state a claim upon which relief can be granted pursuant to SCRA 1986, 1–012(B)(6) (Cum. Supp.1991). We reverse.

Appellant presents us with several arguments for reversal, but only his claim of an impermissible preference merits further discussion. Specifically, we do not agree with appellant's first contention that the dissolution statutes impose personal liability for noncompliance. Nor has the appellant convinced us to align ourselves with a minority of jurisdictions in adopting the trust fund doctrine.

Appellant argues that Count II of his complaint stated a valid cause of action under the common law rule on corporate liquidation.[1] Appellant maintains that the insolvent FDC Corporation's payment on its debt to appellee Cox, its own officer, constituted an impermissible preference. A "preference" is a payment of corporate assets made while the corporation is insolvent or on the verge of insolvency which has the effect of permitting the corporate insider (director or officer) to receive a greater share of his/her debt than the general creditors of the corporation, who prior to the payment had a claim of similar priority. 18B Am.Jur.2d *Corporations* § 2155 (1985).

In the instant case, Cox was president of FDC Corporation in 1986 and 1987. Between the years 1984 and 1987, Cox made the FDC Corporation a number of unsecured loans totalling $579,500.00. When the FDC Corporation ceased doing business in March 1987, Cox liquidated its assets. All debts to other outside creditors were settled, but no arrangements were made for Smith's pending lawsuit against FDC. Cox then made payments from FDC to himself for a total sum of $62,601.39 on the outstanding loans. For the purpose of this appeal, we shall assume that the corporate obligation to Cox was legitimate and that FDC Corporation was insolvent when the payments were made to Cox. Appellant contends that such preferential treatment gives rise to a common law cause of action and that the trial court erred in dismissing his complaint. We agree.

The New Mexico Business Corporation Act does not address the subject of preferences in the dissolution of a corporation, thus we must look to common law principles. The majority of jurisdictions do not allow an insolvent corporation to prefer its own directors and officers. 15A William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* §§ 7468–7469 (perm. ed. rev. vol. 1990) [hereinafter *Fletcher Cyc. Corp.*]; 19 C.J.S. *Corporations* § 753 (1990); 18B Am.Jur.2d *Corporations* § 2158 (1985). Though a few of the decisions sustaining this rule have been based upon the trust fund doctrine or a state statute prohibiting preferences, *see e.g., Burroughs v. Fields,* 546 F.2d 215 (7th Cir.1976); *Delia v. Commissioner,* 362 F.2d 400 (6th Cir.1966), most of the decisions rely upon a theory that the directors and officers as fiduciaries cannot be allowed to use their position and superior inside knowledge to benefit themselves at the expense of third-party creditors. *E.g., Epcon Co. v. Bar B Que Baron Int'l Inc.,* 32 Colo.App. 393, 512 P.2d 646 (1973); *Poe & Assocs., Inc. v. Emberton,* 438 So.2d 1082 (Fla.Dist.Ct.App.1983); *Kirk v. H.G.P. Corp.,* 208 Kan. 777, 494 P.2d 1087 (1972); *Robar Dev. Corp. v. Minutello,* 268 Pa.Super. 406, 408 A.2d 851 (1979). According to 15A *Fletcher Cyc. Corp.* Section 7469:

> When a corporation becomes insolvent and can no longer continue in business, the directors and other managing officers occupy a fiduciary relation towards creditors by reason of their position and

1. While we recognize that NMSA 1978, Section 56–9–1, et seq. specifically addresses questions of preferential transfers, we have omitted any discussion of this statute because the parties failed to raise it at any time—in the proceedings below or on appeal. While there is no apparent conflict between the result reached in our opinion and this particular statute, nonetheless, we do note that this opinion does not purport to change or affect Section 56–9–1 et seq.

their custody of the assets. Therefore, directors and officers who are also creditors of the insolvent corporation cannot, by conveyance, mortgage, pledge, confession of judgment, or otherwise secure to themselves any preference or advantage over other creditors. The most that they can claim, in the absence of a prior perfected interest or priority claim, is the right to come in and share pro rata with the creditors in the distribution of the assets * * *. This is especially true with respect to a preexisting debt.

Generally, the rule prohibiting preferences to directors is not founded upon the trust fund doctrine, but upon the theory that it is inequitable that directors, whose knowledge of conditions and power to act for the corporation give them an advantage, should be permitted to protect their own claims to the detriment of others * * *. In most jurisdictions, the rule is sustained on the basis of the fiduciary relation occupied by officers in their duty to wind up the affairs of an insolvent corporation and to pay the debts incurred. (Footnotes omitted.)

Appellee argues that New Mexico should adopt the minority position which allows insolvent corporations to prefer its own directors. *See* 15A *Fletcher Cyc. Corp.* § 7470; 19 C.J.S. *Corporations,* § 753; 18B Am.Jur.2d *Corporations* § 2159. Under the minority view, however, preferences are only permissible if the corporate insiders are bona fide creditors and there is no evidence of fraud. 15A *Fletcher Cyc. Corp.* § 7470. In addition, there is a difference of opinion in the jurisdictions allowing such preferences, some holding that a preference to an insider may only be given in return for a contemporaneous loan or advance to the corporation. *Id.* In other words, those courts have further modified the minority rule to prevent an insolvent corporation from granting a preference to its own directors to satisfy their preexisting debts. *Boyd v. Boyd & Boyd, Inc.,* 386 N.W.2d 540, 543 (Iowa Ct.App.1986); *Land Red-E-Mixed Concrete Co. v. Cash Whitman, Inc.,* 425 S.W.2d 919 (Mo.1968). Still other states have statutes regulating transactions between the corporation and interested directors which are likewise intended to reduce the risk of insider abuse. *See* 15A *Fletcher Cyc. Corp.* § 7470.

Notwithstanding the additional requirements and the use of protective measures intended to prevent insider abuse, the minority position has been strongly and justifiably criticized. *Id.* We hold that fashioning oneself a preference at the expense of other creditors is unfair and contrary to the principles of open and honest dealing. *Poe & Assocs.,* 438 So.2d at 1084; *see also* Annotation, *Right of a Corporation to Prefer Creditors,* 19 A.L.R. 320 (1922) (supplemented by 38 A.L.R. 90 (1925); 48 A.L.R. 479 (1926); 56 A.L.R. 207 (1928); 62 A.L.R. 738 (1929)). Therefore, we conclude that the better view is that of the majority because the rule against preferential treatment is better calculated to prevent fraud and to promote the principles of fair, honest, and open dealing.

A director or officer of a corporation may become a secured creditor when the loan is made in good faith to a solvent corporation. 15A *Fletcher Cyc. Corp.* § 7467. However, when a corporation is insolvent, the corporate insiders may not secure their past indebtedness—thereby protecting themselves and injuring other creditors. 15A *Fletcher Cyc. Corp.* § 7469. Therefore, absent a legitimate priority claim or a prior perfected interest, the corporate insider may only share pro rata in the distribution of assets to *all the creditors. Id.*

Appellee contends that the courts prohibiting preferential treatment of an officer or director have done so only where there was evidence of fraudulent intent or bad faith on the part of the corporate officer. We disagree. Proof of a preference for a corporate insider does not depend on the showing of fraud or bad faith, but upon the showing of a violation of the fiduciary relation of the directors. *B & S Rigging & Erection, Inc. v. Wydella,* 353 N.W.2d 163, 168 (Minn.Ct.App.1984). When officers of an insolvent corporation give themselves a preferential payment, there is a presumption that such officers took an unfair advantage of their insider positions and spe-

cial knowledge. *Robar Dev. Corp.*, 408 A.2d at 853–854. We hold that the corporate insiders have the burden of showing that the payment to themselves was proper, and not preferential in nature. *Id.* If that burden is not met, we recognize that the corporate creditor may seek to set aside the preference and may follow the corporation's assets into the hands of one who is not a good faith holder. *Boyd v. Boyd & Boyd*, 386 N.W.2d at 543; *see also* 18B Am.Jur.2d *Corporations* §§ 2166–2168 (explaining creditors' remedies).

Appellee next argues that his status as a shareholder places him in the same position as any other general creditor and absent any statutory prohibition, fraud, collusion, or bad faith, the corporation may prefer its shareholders. While there is authority holding that a corporation may prefer a stockholder who is also a creditor, *see* 15A *Fletcher Cyc. Corp.*, Section 7484, when an insolvent corporation prefers the sole, dominant, or influential stockholder who has authority over the corporate decision, the preference has been deemed invalid. *Delia v. Commissioner*, 362 F.2d at 402; 15A *Fletcher Cyc. Corp.*, § 7484; 18B Am.Jur.2d *Corporations* § 2157. In the instant case, Cox was the sole shareholder and the president of the FDC Corporation. We cannot ignore that Cox had a fiduciary duty to wind up the affairs of the insolvent corporation, and as such had both inside information and a controlling voice in the corporate affairs. Therefore, despite Cox's status as a shareholder, he may not fashion for himself a preference at the expense of other creditors.

Nor do we agree with appellee's assertion that there should be no recovery because appellant's claim against FDC Corporation was not final, but merely pending. Appellee argues that NMSA 1978, Section 53–16–11 (Repl.Pamp.1983), the statute addressing a corporation's distribution of assets upon dissolution, can be read to require payment by the corporation of all final debts before making any provisions for any pending claims. However, nothing in that statute or in the New Mexico Business Corporation Act suggests that the legislature intended that final claims have priority over contingent claims. At the time FDC's assets were distributed, Smith had a contingent claim with no precise amount owing. Nonetheless, it is clear that appellee Cox had knowledge of the lawsuit and knew that the corporation would have no assets to pay any ensuing judgment amount. *See Robar Dev. Corp.*, 408 A.2d at 853 (holding that a corporation could not dissolve and distribute its assets without providing for contingent claims). Smith's pending lawsuit did constitute a corporate obligation for which the corporation was required to make adequate provisions toward its payment. § 53–16–11(E). Based on the circumstances of this case, the burden is on appellee Cox, as the corporate insider, to demonstrate why he should be paid before Smith.

In accordance with the foregoing discussion, we hold that the complaint does state a common law cause of action for impermissible preferential treatment of a corporate insider. Therefore, we reverse and remand for further proceedings consistent with our ruling.

IT IS SO ORDERED.

MONTGOMERY and FROST, JJ., concur.

831 P.2d 985

Dianna LEWIS, Personal Representative of the Estate of Thomas F. Lewis, Deceased, and Dianna Lewis, conservator of the Estate of Thomas J.B. Lewis, Christie Anna F.J. Lewis, and Faith M.A. Lewis, all minors, Plaintiffs–Appellants,

v.

DAIRYLAND INSURANCE COMPANY, a foreign corporation, and American Reliable Insurance Company, a foreign corporation, Defendants–Appellees.

No. 19721.

Supreme Court of New Mexico.

May 15, 1992.

Wilson & Rank, Frank K. Wilson, Rory L. Rank, Alamogordo, for appellants.

Miller, Stratvert, Torgerson, & Schlenker, P.A., Mick I.R. Gutierrez, Las Cruces, for appellee Dairyland Ins.

Klecan, Childress & Huling, Mark J. Klecan, Albuquerque, for appellee American Reliable.

OPINION

FROST, Justice.

The issue that we address in this case is whether the several statutory beneficiaries in a wrongful death action are entitled to recover pursuant to underinsured motorist insurance policies the per-person or per-accident limits of coverage. In granting summary judgment to the insurers, the trial court held that recovery could be had only for the per-person coverage. We affirm.

In September 1988, Thomas F. Lewis was killed when his motorcycle collided with an underinsured automobile in Otero County, New Mexico. At the time of his death, decedent insured his motorcycle with Dairyland Insurance Company and also insured a second vehicle with American Reliable Insurance Company. Each policy provided split uninsured motorist coverage [1] of $25,000 for each person and $50,000 for each accident.

Plaintiff, decedent's widow, was appointed personal representative of the estate and conservator of the estates of three surviving minor children, all statutory beneficiaries under New Mexico's wrongful death provisions, NMSA 1978, Sections 41–2–1, –3 (Repl.Pamp.1989). With the consent of Dairyland and American Reliable, plaintiff settled with the tortfeasor's insurance carrier for the liability policy limit of $25,000. Dairyland and American Reliable each paid the $25,000 per-person limit, less the respective setoffs from the negligent driver's liability payment, and denied plaintiff's claim for benefits up to the $50,000 per-accident limit. In a complaint for declaratory judgment, plaintiff sought to recover the per-accident limit by urging that, under the wrongful death statutes, each beneficiary was entitled to assert separate claims against decedent's underinsured motorist coverage. All parties moved for summary judgment, with the district court granting the insurers' motions. In reviewing the summary judgment, we consider only the undisputed facts and determine whether, under those facts, summary judgment was proper as a matter of law. *Fleming v. Phelps-Dodge Corp.*, 83 N.M. 715, 716, 496 P.2d 1111, 1112 (Ct.App.1972).

The dispositive issue is whether the trial court erred in concluding as a matter of law that the beneficiaries identified in the wrongful death statutes have one col-

1. Our uninsured motorist statute, NMSA 1978, Section 66–5–301(B) (Repl.Pamp.1989), includes underinsured motorist coverage as part of the uninsured coverage. *American States Ins. Co. v. Frost,* 110 N.M. 188, 190, 793 P.2d 1341, 1343 (1990).

lective right of action, rather than separate, divisible rights of action as urged by plaintiff. The insurers submit that a wrongful death gives rise to one indivisible claim that is, in this case, subject to the per-person limit of liability. We agree and hold that our wrongful death statutes permit only one claim for damages for the death of one person.

Section 41–2–1 states:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, * * * and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain *an action* and recover damages in respect thereof, then * * * the person who * * * would have been liable, if death had not ensued, shall be liable to *an action* for damages, notwithstanding the death of the person injured.

(Emphasis added.) Section 41–2–3 states:

> Every such action * * * shall be brought by and in the name or names of the personal representative or representatives of such deceased person * * *. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: provided, he or she shall have left a husband, wife, child, father, mother, brother, sister or child or children of the deceased child * * *.

We have no quarrel with plaintiff's contention that she and the surviving children are entitled to damages under the wrongful death statutes. Plaintiff's premise, however, that each beneficiary has a separate, divisible claim, is faulty. Beneficiaries are not the proper plaintiffs. *Moncor Trust Co. v. Feil,* 105 N.M. 444, 446, 733 P.2d 1327, 1329 (Ct.App.), *cert. denied,* 105 N.M. 421, 733 P.2d 869 (1987). The personal representative is entitled to recover damages on behalf of the statutory beneficiaries. *Stang v. Hertz Corp.,* 81 N.M. 69, 77, 463 P.2d 45, 53 (Ct.App.1969), *aff'd,* 81 N.M. 348, 467 P.2d 14 (1970). The right of action depends "upon the right of the person injured, had he [or she] not died as a consequence of [the] injury, to maintain an action for personal injuries." *Id.* 81 N.M. at 351, 467 P.2d at 17. Here, as a result of the accident, Section 41–2–1 preserved decedent's right to claim underinsured motorist benefits provided by Dairyland and American Reliable and transmitted it to the personal representative. *See id.* at 79, 463 P.2d at 55; *see also Lumley v. Farmers Ins. Co.,* 716 S.W.2d 455, 457 (Mo.Ct.App. 1986) (wrongful death statutes provide for one indivisible claim for death of one person, which remains the same whether enforced by the surviving spouse, minor children, or others named in the statute).

Plaintiff urges this court to invalidate on public policy grounds any limitation on wrongful death beneficiaries to single per-person recovery. Plaintiff relies on the Ohio Supreme Court case of *Wood v. Shepard,* 38 Ohio St.3d 86, 526 N.E.2d 1089 (1988), which held that "each person entitled to recover damages pursuant to [Ohio's wrongful death statute] for wrongful death, and who is an insured under an underinsured motorist provision of an insurance policy, has a separate claim and such separate claims may not be made subject to the single person limit of liability in the underinsured motorist provision." *Id.* 526 N.E.2d at 1094.

The *Wood* court based its holding on the language in Ohio's wrongful death statute "that the surviving spouse, the children, and the parents of the decedent are 'all ... rebuttably presumed to have suffered damages by reason of the wrongful death.'" *Id.* at 1092 (quoting Ohio Rev.Code Ann. § 2125.02 (Baldwin 1987)). Our statutes do not create such a presumption. Section 41–2–3 reserves for the fact finder the determination of damages "taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties * * * and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default."

Furthermore, the coverage provided by the policy in *Wood* was more inclusive than the coverage provided by decedent's policies. The policy in *Wood* allowed recovery "for all damages resulting from any one accident." *Id.* at 1091 n. 2. Here, each

policy limits damages in clear and unambiguous language. The American Reliable policy states that "[t]he **Bodily Injury** limit for **each person** is the most **we** will pay for **Bodily Injury** suffered by any one **person** in any one **accident.**" The Dairyland policy states that "[t]he limit for 'each person' is the limit for all claims by all persons for *damages* from bodily injury to one person" and "[t]he maximum amount we'll pay * * * to any one person is the limit of Uninsured Motorist Insurance for 'each person.'" Under both policies, the per-accident limit applies only when bodily injury or death of two or more persons occurs in one accident.

Finally, plaintiff asserts that a restriction on uninsured motorist coverage, such as the per-person limit for one wrongful death, violates the policy behind the uninsured motorist statute. Plaintiff suggests we borrow the analysis set out in *Stinbrink v. Farmers Insurance Co. of Arizona,* 111 N.M. 179, 803 P.2d 664 (1990), which addressed whether punitive damages are included in damages one is "legally entitled to recover" as that phrase is used in the uninsured motorist statute. *Id.* at 180, 803 P.2d at 665. Plaintiff contends that by merely substituting the words "damages up to the per-occurrence limit of liability" for "punitive damages," the per-occurrence limit should be recoverable since such damages were not unambiguously excluded in the policy. *Stinbrink,* however, fails to support plaintiff's argument since only the personal representative has a cause of action to recover damages. The case presents no issue whether the policy attempts to exclude any entitlement the personal representative might have under the wrongful death provisions. Further, plaintiff's contention lacks merit in light of the public policy supporting "the right of the parties to freely contract within the context of an insurance policy." *Id.* We will not rewrite the parties' contract.

Decedent and his spouse purchased $25,000 per-person uninsured/underinsured motorist coverage under each policy in the event of the death of an insured. Given these amounts of coverage, along with our holding concerning the wrongful death claim, plaintiff, as the personal representative, is entitled to recover only the per-person limit under each policy. The district court's ruling to limit coverage to the per-person amount is consistent with the policy underlying our statutes requiring uninsured/underinsured motorist insurance and is correct as a matter of law. Our holding eliminates the need to address the issue raised by plaintiff on whether the policy was ambiguous in limiting damages to the named insured and his spouse.

Based upon the above, the summary judgment is affirmed.

IT IS SO ORDERED.

RANSOM, C.J., and MONTGOMERY, J., concur.

831 P.2d 990

In the Matter of the ESTATE OF Harold D. HEETER, Deceased.

David L. HEETER, Petitioner–Appellant,

v.

Agnes T. HEETER, Respondent–Appellee.

No. 11862.

Court of Appeals of New Mexico.

March 18, 1992.

Certiorari Denied April 22, 1992.

Anthony B. Jeffries, Albuquerque, for petitioner-appellant.

Michael Allison, Albuquerque, for respondent-appellee.

OPINION

BLACK, Judge.

Harold and Ruth Heeter were married in 1937 or 1938. In 1977 they executed a joint will (Harold and Ruth Will). Ruth Heeter died in 1982. Harold married Respondent, Agnes Wickel, in 1984. Harold and Agnes executed a joint will in 1985 (Harold and Agnes Will). Harold died in 1987.

We discuss whether (1) the district court erred in declining to admit the Harold and Ruth Will to probate; (2) the court erred in finding that the properties held in the joint accounts belonged to Agnes; and (3) the court erred in failing to determine that the Harold and Agnes Will is an irrevocable contract.

Petitioner, the son of Harold and Ruth Heeter, filed this action to have the joint will of Harold and Ruth admitted to probate and declared an irrevocable contract. He also sought to have certain accounts titled in the names of Harold and Agnes "as joint tenants with right of survivorship" included in Harold's estate. Alternatively, if these joint accounts were not included in Harold's estate, Petitioner sought a declaratory judgment that the joint will of Harold and Agnes is a contractual will, and he sought an injunction to prohibit Agnes from conveying property so as to defeat the Harold and Agnes Will. The district court denied probate of the Harold and Ruth Will, found that the joint accounts were the property of Agnes, and refused to enter the declaratory and injunctive relief. We affirm.

FACTS

At the time he married Agnes, and for some years prior to that, Harold had a bank account at Sunwest Bank. Petitioner was a joint tenant on that account and apparently remained so until Harold died. Upon Agnes's marriage to Harold, Agnes was added to this joint tenancy account. At the time of Harold's death, he and Agnes also held a Sunwest certificate of deposit in joint tenancy with a right of survivorship.

Prior to his marriage to Agnes, Harold also acquired several shares of publicly traded companies. (His primary asset was his local business, American Trailer Leasing, Inc.) Harold's investments were held in an account at E.F. Hutton in his name alone until March 1985. On March 6, 1985, Harold signed the documents necessary to place these stocks in an account naming Agnes as a joint tenant with the right of survivorship. At the time of the creation of the joint account at E.F. Hutton, Harold discussed the effect of joint tenancy with his stockbroker, who told him: " 'Now you know, Harold, when you do this, [if] something happens to either one of you, the survivor gets all the securities.' " Harold's response was quite specific: " 'Yes, I understand that, and I have made provision for all that in my will.' "

The same week he created the joint account at E.F. Hutton, Harold consulted an attorney regarding preparation of a joint will. Harold and Agnes Heeter met with the attorney about a week before signing the will, but Agnes testified she felt Harold had previously discussed the will with the attorney. Agnes testified that she and Harold told the attorney that "what Harold had—his business would go to the children and what I had, together with my jewelry, which was my house, would go to my daughter." Agnes further testified that the joint tenancy accounts were never discussed with the attorney.

THE HAROLD AND RUTH WILL

Petitioner bases his argument that the Harold and Ruth Will was contractual and irrevocable on the following language:

> So that there may be no presumption of revocation of this Will by us, and in the event that either copy cannot be found after the death of the last of the surviving Testators, we do hereby declare that we will not revoke this Will except by a later Will, expressly revoking this Will, or by the destruction of both executed copies hereof. The production after the death of the last of the surviving Testators of either copy of this Last Will and Testament will be prima facie evidence that this Last Will and Testament is in full force and effect at the time of the death of the last of the surviving Testators.

A contract to make a will must be clearly proved. *McDonald v. Polansky,* 48 N.M. 518, 153 P.2d 670 (1944). To establish a contractual will under New Mexico's version of the Uniform Probate Code, Petitioner had the burden of proving compliance with NMSA 1978, Section 45-2-701 (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). Section 45–2–701 defines the criteria which must be met in order to uphold a contract to make a will:

> A. A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of the Probate Code, can be established only by:
>
> (1) provisions of a will stating material provisions of the contract;
>
> (2) an express reference in a will to a contract; or
>
> (3) a writing signed by the decedent evidencing the contract.
>
> B. The execution of a joint will or contemporaneously executed wills does not create a presumption of a contract not to revoke the will or wills, unless otherwise expressed in both the joint will or the contemporaneously executed wills.

The Harold and Ruth Will does not meet these criteria. While there is no question it is a joint and contemporaneously executed will, neither of these facts creates a presumption of a contract not to revoke. § 45–2–701(B); *see also In re Estate of Thwaites,* 173 Mich.App. 697, 434 N.W.2d 214 (1988).

Nor do we think that the previously quoted provision of the Harold and Ruth Will was intended to create a contract to make non-revocable wills. Indeed, the provision's purpose is stated in the initial clause, "[s]o that there may be no presumption of revocation of this Will by us, and in the event that either copy cannot be found." When duplicate wills are executed, failure to produce both originals normally raises a rebuttable presumption of revocation. *Kelly v. Donaldson,* 456 So.2d 30 (Ala.1984); *In re Estate of Mettee,* 237 Kan. 652, 702 P.2d 1381 (1985). We think the intent of the language relied on by Petitioner is to clearly rebut this legal presumption.

Finally, even if the language of the Harold and Ruth Will upon which Petitioner relies complied with the statutory requirements and evidenced a clear intent to create an irrevocable contract, it is not absolute. This clause allows revocation of the Harold and Ruth Will "by a later Will, expressly revoking this Will, or by the destruction of both executed copies hereof." In fact, Harold executed a later will (the Harold and Agnes Will) "expressly revoking this Will." Even if the Harold and Ruth Will could be regarded as contractual, then, the contract did not prevent revocation, but merely limited how it could be effected. *See McKinnon v. Baker,* 220 Neb. 314, 370 N.W.2d 492, 494 (1985) (language of will contract making wills irrevocable " 'so long as the other shall live' " limited revocability only until death of the first spouse).

The district court ruled it did not have "jurisdiction over the Will of Harold D. Heeter and his first wife Ruth P. Heeter and [it] is not controlling as to the joint tenancy accounts." While it is not entirely clear what the district court meant by "jurisdiction," we do not find the Harold and Ruth Will to be contractual and irrevocable. The trial court will not be reversed on appeal when it has arrived at a correct result for the wrong reason. *State ex rel. State Highway Dep't v. Strosnider,* 106 N.M. 608, 747 P.2d 254 (Ct.App.1987). We therefore find the Harold and Ruth Will was not contractual, that Harold expressly revoked it by executing the Harold and Agnes Will, and we affirm the district court's refusal to probate the Harold and Ruth Will.

JOINT ACCOUNTS

The district court concluded that Harold Heeter was a successful businessman and that he understood that the property placed in joint tenancy would go to Agnes upon his death. The record contains substantial evidence to support this finding. The trial court's findings will not be reversed if they are supported by substantial evidence. *Mitchell v. Mitchell,* 104 N.M. 205, 216, 719 P.2d 432, 443 (Ct.App.), *cert. denied,* 104 N.M. 84, 717 P.2d 60 (1986).

The same week he retained an attorney to prepare the Harold and Agnes Will, Harold Heeter placed all his publicly traded stocks into joint tenancy with Agnes.

Agnes testified that prior to creating the accounts, Harold had explained to her the meaning of joint tenancy with right of survivorship. At the time of the transfer, Harold's stockbroker specifically informed him, "when you do this, if something happens to either one of you the survivor gets all the securities." Harold's response indicated a clear understanding of this as well as his intention regarding his new will.

Petitioner argues that the district court "should have considered the evidence of Harold Heeter's intent at the time that the joint accounts were created." However, he offers no citation to anything in the record which would indicate Harold's intent was contrary to the conversation with his stockbroker which was the foundation for the district court finding. This court will not search the record to find evidence to support an appellant's claims. *Poorbaugh v. Mullen,* 99 N.M. 11, 653 P.2d 511 (Ct.App.), *cert. denied,* 99 N.M. 47, 653 P.2d 878 (1982).

Moreover, Petitioner concedes that Agnes was reluctant to marry Harold and give up her military benefits until Harold reassured her that he had the means to support her. Agnes also testified at trial that Harold wanted her to have the joint E.F. Hutton account. We find substantial evidence to support the district court's conclusion and it must be upheld. *See Jim v. Budd,* 107 N.M. 489, 760 P.2d 782 (Ct.App. 1987).

Petitioner attempts to shift the burden of proof by arguing that *Menger v. Otero County State Bank,* 44 N.M. 82, 98 P.2d 834 (1940), holds "that the establishment of a joint tenancy account does not by itself create a right of survivorship without a determination of the intent of the grantor and finding of a completed gift." This is not a correct view of the law. Once a joint account is established, the law presumes a right of survivorship. *Barham v. Jones,* 98 N.M. 195, 647 P.2d 397 (1982). After the proponent of joint tenancy introduces an instrument creating title in joint tenants, the opponent must come forward with evidence to the contrary. *In re Estate of Fletcher,* 94 N.M. 572, 613 P.2d 714 (Ct. App.), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980). Petitioner is correct that the presumption created by the introduction of the accounts in the names of Harold and Agnes as joint tenants with rights of survivorship created only a rebuttable presumption, but the burden was clearly on Petitioner to rebut that presumption. Evidence of Harold's dominance alone also does not defeat the presumption created when the parties opened a joint tenancy account. *Cf. In re Estate of Morrow,* 91 N.M. 81, 570 P.2d 912 (1977) (even the act of one joint tenant in withdrawing all the money from a joint account does not destroy the joint estate). Complete surrender of dominion and control is not required before a party is entitled to rely on the presumption of a right of survivorship created by a joint tenancy. *Kinney v. Ewing,* 83 N.M. 365, 368, 492 P.2d 636, 639 (1972). Moreover, there is sufficient evidence to support a finding of a gift in the fact that Harold opened and funded the accounts with a full understanding of the meaning of joint tenancy. *See Brown v. Dougherty,* 74 N.M. 80, 390 P.2d 665 (1964).

Petitioner contends that Harold's response to his stockbroker's statement regarding joint tenancy indicates an intent contrary to making a gift. Petitioner emphasizes the fact that "[v]irtually simultaneously with creation of the joint account at E.F. Hutton, Harold Heeter was making arrangements for preparation and execution of his last will and testament, jointly with Agnes T. Heeter." Petitioner argues that this statement, together with the statements to his attorney that he wanted "his children to have the property jointly, subject to the trust for Agnes," indicates Harold did not intend the joint accounts to convey a present gift to Agnes, but rather to pass under the will.

Initially, we note that the majority of Harold's estate consisted of his interest in the stock and assets of American Trailer Leasing Company and this was in fact the only "property" which he specifically identified in his discussions with the attorney preparing his will. Under the Harold and Agnes Will this property will indeed pass to

the children, subject to the trust for Agnes, so we see nothing inconsistent in Harold's statements to his attorney and the fact he had previously placed his other assets in joint accounts.

Secondly, it appears that Harold may have also intended to pass some of his property to his children through joint tenancy. After Ruth's death, but prior to his marriage to Agnes, Harold added his son David to his Sunwest checking account as a joint tenant with a right of survivorship. While there was testimony that David was added as a joint tenant for convenience, there is no explanation as to why this form would be more convenient. Nor does it seem consistent with Harold's later, clearly expressed understanding of the significance of joint tenancy on his estate plans. Petitioner did not contend below, and does not on appeal, that he obtained an interest in the Sunwest checking account, but rather that Harold created all the joint tenancy accounts for purposes of convenience. The district court found otherwise and we find substantial evidence to support its finding.

Finally, there is nothing inherently inconsistent between a testator's expressing an intent to dispose of his estate in a certain fashion and later establishing a joint survivorship account with a family member. In *Thompson v. Barngrover*, 101 N.M. 216, 680 P.2d 356 (Ct.App.1984), we held that evidence of the testatrix's continuing intent to distribute her property according to the terms of her will did not, standing alone, rebut the presumption that a joint account creates a right of survivorship.

THE HAROLD AND AGNES WILL

Petitioner's last argument is that the Harold and Agnes Will is an irrevocable contract. This will disposed of those items of Harold's property not held in joint tenancy as follows:

> All of the property owned by HAROLD D. HEETER he hereby gives, devises and bequeaths to his children named above, in equal shares, subject to the following life care provision:
>
> A. In the event that Harold D. Heeter is survived by Agnes T. Heeter, the personal representative shall use for the support, maintenance and necessary medical care of Agnes T. Heeter a sum necessary to support her in the style which she is presently enjoying.
>
> B. For this purpose, ⅓ of the estate of Harold D. Heeter shall be held in trust by Sunwest Bank to be used for the purpose set out in paragraph A above.
>
> C. After the death of Agnes T. Heeter, if any portion of said sum set aside for her support and maintenance and medical care is left on hand, that sum shall be divided equally between the children of Harold D. Heeter.

Everything Agnes receives from Harold under this will provision is held in trust and, upon Agnes's death, is divided equally between Petitioner and his sister. Since we previously affirmed the trial court's finding that the Sunwest bank account and certificate of deposit as well as the E.F. Hutton account passed by law to the joint tenant, Agnes, by right of survivorship, a determination that the Harold and Agnes Will is irrevocable would have no practical or legal effect. On appeal, error will not be corrected if it will not change the result. *Wright v. Brem*, 81 N.M. 410, 467 P.2d 736 (Ct.App.1970).

CONCLUSION

We hold the Harold and Ruth Will does not meet the criteria for irrevocable wills set forth in Section 45–2–701, and we affirm the district court's refusal to probate this will in light of the subsequent express revocation in the Harold and Agnes Will. We also affirm the district court's finding that Harold Heeter understood the legal effect of creating the joint accounts with a right of survivorship in Agnes. Finally, since it will not change the result, we decline to determine whether the Harold and Agnes Will establishes a contract not to revoke.

Judgment affirmed.

IT IS SO ORDERED.

DONNELLY and FLORES, JJ., concur.

831 P.2d 995

Betty BIERNER, Plaintiff–Appellant,

v.

STATE of New Mexico, TAXATION AND REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION, Defendant–Appellee.

Alrundus HART, Plaintiff–Appellee,

v.

STATE of New Mexico, TAXATION AND REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION, Defendant–Appellant.

Nos. 12730, 12814.

Court of Appeals of New Mexico.

March 26, 1992.

Mary Y. C. Han, Albuquerque, for plaintiff-appellant Betty Bierner.

Tom Udall, Atty. Gen., Lewis J. Terr, Sp. Asst. Atty. Gen., Taxation and Revenue Dept., Motor Vehicle Div., Santa Fe, for defendant-appellee State of N.M. (No. 12814).

Nancy Hollander, Freedman, Boyd, Daniels, Peifer, Hollander & Guttmann, P.A., Albuquerque, for plaintiff-appellee Alrundus Hart.

Tom Udall, Atty. Gen., Frank D. Katz, Sp. Asst. Atty. Gen., Taxation and Revenue Dept., Santa Fe, for defendant-appellant State of N.M. (No. 12730).

OPINION

HARTZ, Judge.

We have consolidated these two appeals on our own motion because they raise the same question: To revoke a driver's license under the Implied Consent Act, NMSA 1978, §§ 66–8–105 to –112 (Repl. Pamp.1987), does the State have to establish that the licensee's blood alcohol content (BAC) was at least .1 percent by weight at the time the licensee was driving? We hold that it does not. The State needs to prove only that the licensee's BAC equaled or exceeded the statutory limit at the time the licensee took a blood alcohol test in accordance with the Implied Consent Act.

The Motor Vehicle Division of the Taxation and Revenue Department (MVD) revoked the licenses of both Alrundus Hart and Betty Bierner (Licensees) pursuant to Section 66–8–112 after each was arrested for driving under the influence of alcohol, in violation of NMSA 1978, Section 66–8–

102 (Cum.Supp.1991), and then given a breath alcohol test that indicated a BAC of at least .1 percent. Hart's two breath tests were administered approximately 47 minutes after he had last driven his vehicle; Bierner's test was administered approximately one hour and 18 minutes after she had last driven. Each appealed to the district court.

District Judge Albert S. Murdoch reversed the revocation of Hart's license. He found that Hart's "blood alcohol level could either rise or dec[r]ease between the time he was driving and the time the officer administered the breath alcohol tests," and held that the "blood alcohol content of the driver must relate back to the time he was actually driving and not to the time of testing in order to sustain a license revocation pursuant to NMSA § 66–8–112." The State had offered no evidence relating Hart's BAC at the time of his breath tests to his BAC at the time he was driving. District Judge Gerard W. Thomson, on the other hand, sustained the revocation of Bierner's license. He held that the MVD was not required to prove Bierner's BAC at the time she was driving.

DISCUSSION

The Implied Consent Act directs law enforcement officers to administer a blood or breath test for BAC when they have reasonable grounds to believe that a person was driving while under the influence of intoxicating liquor or a drug. § 66–8–107(B). The person may refuse to take the test, but such refusal is ground for revocation of the person's driver's license. *See* § 66–8–111(A), (B). If the test is administered and indicates that the driver's BAC exceeds .1 percent by weight, the law enforcement officer who requested or directed the administration of the test must immediately serve upon the driver a written notice of revocation and of a right to a hearing. § 66–8–111.1. The officer should then take the driver's license, issue a temporary license valid for 30 days, and send the MVD the seized license and a signed statement regarding the test result and reasonable grounds to arrest the driver. *Id.* The revocation is effective 30 days after notice of revocation. § 66–8–112(A). Section 66–8–112 then provides in pertinent part as follows:

B. Within ten days after receipt of notice of revocation pursuant to Subsection A of this section, a person whose license or privilege to drive is revoked or denied or his agent may request a hearing. Failure to request a hearing within ten days shall result in forfeiture of the person's right to a hearing * * *. A date for the hearing shall be set by the director, if practical, within thirty days after receipt of notice of revocation. The hearing shall be held in the county in which the offense for which the person was arrested took place.

C. The director [of MVD] may postpone or continue any hearing on his own motion or upon application from the person and for good cause shown for a period not to exceed ninety days from the date of notice of revocation and provided that the director extends the validity of the temporary license for the period of the postponement or continuation.

D. At the hearing, the director or his agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers.

E. The hearing shall be limited to the issues:

(1) whether the law enforcement officer had reasonable grounds to believe that the person had been driving a motor vehicle within this state while under the influence of intoxicating liquor;

(2) whether the person was arrested;

(3) whether this hearing is held no later than ninety days after notice of revocation; and either

(4)(a) whether the person refused to submit to a test upon request of the law enforcement officer; and

(b) whether the law enforcement officer advised that the failure to submit to a test could result in revocation of his privilege to drive; or

(5)(a) whether the chemical tests were administered pursuant to the provisions of the Implied Consent Act; and

(b) the test results indicated a blood alcohol content of one-tenth of one percent or more by weight if the person is eighteen years of age or older * * *.

F. The director or his designee shall enter an order either rescinding or sustaining the revocation or denial of the person's license or privilege to drive if he finds that the law enforcement officer had reasonable grounds to believe the driver was driving a motor vehicle while under the influence of intoxicating liquor or drug, that the person was arrested, that this hearing is held no later than ninety days after notice of revocation and that the person either refused to submit to the test upon request of the law enforcement officer after the law enforcement officer advised him that his failure to submit to the test could result in the revocation of his privilege to drive or that a chemical test was administered pursuant to the provisions of the Implied Consent Act and the test results indicated a blood alcohol content of one-tenth of one percent or more by weight if the person is eighteen years of age or older * * *. If one or more of the above are not found by the director, the person's license shall not be revoked.

G. A person adversely affected by an order of the director may seek review within thirty days in the district court in the county in which the offense for which the person was arrested took place. The district court, upon thirty days' written notice to the director, shall hear the case. On review, it is for the court to determine only whether reasonable grounds exist for revocation or denial of the person's license or privilege to drive based on the record of the administrative proceeding.

The statute requires that "the test results indicated a blood alcohol content of one-tenth of one percent or more by weight." § 66–8–112(F). The statutory language makes no reference to BAC at the time the licensee was driving.

Licensees argue, however, that Section 66–8–112(F) should be read in light of Section 66–8–102(C), which states:

It is unlawful for any person who has one-tenth of one percent or more by weight of alcohol in his blood to drive any vehicle within this state.

Section 66–8–102(C) is one of a class of statutes enacted throughout the country which are called "per se statutes" because the criminal violation is established by the BAC without any evidence of impairment. We accept Licensees' contention that our per se statute requires a finding of the BAC at the time the defendant was driving. The uniform jury instruction promulgated by our supreme court for Section 66–8–102(C) states as essential elements of the crime:

1. The defendant drove a motor vehicle;

2. *At that time,* he had one-tenth of one percent or more by weight of alcohol in his blood[.] [Emphasis added.]

SCRA 1986, 14–4503 (Cum.Supp.1991). Licensees suggest that the purpose of Section 66–8–112 is to revoke the licenses of those drivers who violate Section 66–8–102(C). That being the case, in their view, a driver's license cannot be revoked unless the State proves that the BAC *at the time of driving* equaled or exceeded .1 percent. The BAC at the time the test is administered would thus be relevant only insofar as that BAC can be related to the licensee's BAC at the time he or she was driving. In short, Licensees ask us to read into Section 66–8–112 a requirement that is not expressed in that section but that appears in Section 66–8–102(C).

We reject Licensees' argument. Although we will read the requirements of one portion of a statute into the requirements of another portion in order to avoid an irrational construction of the statute, *see Barela v. Midcon of N.M., Inc.,* 109 N.M. 360, 785 P.2d 271 (Ct.App.1989), we will not engage in such statutory construction when there is a plausible reason for a difference in the requirements under the two statutory provisions. *See Simmons v. McDaniel,* 101 N.M. 260, 680 P.2d 977 (1984). In this case, there is a reason for the difference between the criminal provisions of Section 66–8–102(C) and the li-

cense-revocation provisions of Section 66–8–112 that is more than plausible—it is compelling.

As the above-quoted portions of Section 66–8–112 show, license-revocation proceedings are intended to be greatly expedited. *See State v. Bishop,* No. 12,836, slip op. at 6 (N.M.Ct.App. Mar. 18, 1992) (license-revocation proceeding is "a summary administrative proceeding designed to handle license revocation matters quickly"). The hearing must ordinarily be set within 30 days after receipt of the notice of revocation, § 66–8–112(B), and can be postponed no later than 90 days from the date of notice of revocation. § 66–8–112(C). We have held that failure to conduct a hearing within 90 days of the licensee's arrest deprives MVD of authority to revoke the license. *Weber v. Department of Motor Vehicles State of New Mexico,* 112 N.M. 697, 818 P.2d 1221 (Ct.App.1991). The purpose of this speed is to protect the public by promptly removing from the highways those who drive while intoxicated. To make it possible for the MVD to conduct the numerous necessary hearings within the time constraints of the Implied Consent Act, the legislature could reasonably decide to limit the issues to be considered at such a hearing. Indeed, Section 66–8–112(E) begins with the words, "The hearing shall be limited to the issues:" and lists five issues. In particular, the legislature could properly decide that it did not want hearings prolonged by the testimony of experts and other witnesses that may be necessary to connect the blood alcohol test result with the licensee's BAC at the time he or she was driving.

Of course, we would be reluctant to assume that the legislature established license-revocation procedures in which the issues were so limited that drivers were treated with substantial unfairness. But the statutory provisions create no such unfairness. The only "improper" result that Licensees suggest could follow from our construction of Section 66–8–112 is that one whose license is revoked pursuant to Section 66–8–112 may not have violated Section 66–8–102(C). They point out that because it may take a while for ingested alcohol to enter the bloodstream, the BAC may increase during a period of time after the individual has ceased drinking. Thus, one whose test result indicates a BAC of .1 percent or more may have had a lower BAC when he or she was driving.

The fallacy in this argument is that Licensees assume that the State has no interest in revoking the license of anyone whose BAC while driving was less than .1 percent and who therefore had not violated Section 66–8–102(C). They ignore the more general public interest in halting *all* driving while under the influence of alcohol. Section 66–8–102(A) states, "It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state." Given the purpose of punishing and deterring violations of Section 66–8–102(A), the legislature could reasonably determine that there is little risk of an "improper" license revocation by restricting evidence at a revocation hearing to the licensee's BAC at the time the test is administered.

Just because one has a BAC of less than .1 percent does not mean that one is not too intoxicated to drive. The legislature has stated that a BAC of less than .05 percent by weight creates a presumption that one was not under the influence of intoxicating liquor, but if the BAC is between .05 percent and .1 percent, "no presumption shall be made that the person either was or was not under the influence of intoxicating liquor." § 66–8–110(B)(2). License revocation under Section 66–8–112 requires not only the necessary test result but also proof that the law enforcement officer had "reasonable grounds to believe the driver was driving a motor vehicle while under the influence of intoxicating liquor or drug." § 66–8–112(F)(1). Proof of probable cause, together with a test result indicating a BAC of .1 percent or more, creates ample justification for revocation of a driver's license on the ground that the licensee was driving while intoxicated. Moreover, even if the licensee had consumed liquor so soon before the arrest that his or her BAC had not increased sufficiently to impair driving ability, the legislature could justify

license revocation on the ground that people should not be driving right after ingesting so much liquor. We are aware of no public service announcements suggesting that one who wishes to drink and drive should drink quickly and promptly hop behind the wheel.

Thus, the legislature could properly decide that limiting the issues in a revocation proceeding to those set forth in Section 66–8–112(E) would rarely, if ever, result in a license revocation contrary to public policy. Indeed, a much more likely effect of limiting the issues at the revocation hearing is that licenses will not be revoked from some persons who drive while intoxicated; if the BAC at the time of the test is less than .1 percent, then the license cannot be revoked no matter what other evidence there may be of impaired driving.

Case law in other jurisdictions supports our conclusion. First, although there is a split of authority, in those jurisdictions that have enacted per se criminal statutes which require a certain BAC at the time the defendant was driving, the opinions that have analyzed the issue most thoroughly hold that the state makes a prima facie case by presenting the result of the blood alcohol test, even without any evidence relating the test result back to the BAC at the time of driving. *Ransford v. District of Columbia,* 583 A.2d 186 (D.C.1990); *Haas v. State,* 567 So.2d 966 (Fla.Dist.Ct.App.1990); *State v. Larson,* 429 N.W.2d 674 (Minn.Ct. App.1988); *State v. Kubik,* 235 Neb. 612, 456 N.W.2d 487 (1990); *see State v. Taylor,* 132 N.H. 314, 566 A.2d 172 (1989).[1] *Contra Desmond v. Superior Court,* 161 Ariz. 522, 779 P.2d 1261 (1989) (en banc)[2]; *State v. Geisler,* 22 Conn.App. 142, 576 A.2d 1283 (1990), *vacated on other grounds,* —— U.S. ——, 111 S.Ct. 663, 112 L.Ed.2d 657 (1991); *State v. Ladwig,* 434 N.W.2d 594 (S.D. 1989); *State v. Dumont,* 146 Vt. 252, 499 A.2d 787 (1985). One court has even held that relation-back evidence is not admissible to defend against a charge of unlawfully operating a motor vehicle with a BAC of .1 percent or more. *State v. Tischio,* 107 N.J. 504, 527 A.2d 388 (1987), *appeal dismissed,* 484 U.S. 1038, 108 S.Ct. 768, 98 L.Ed.2d 855 (1988). If a conviction for driving with a BAC above a certain level can be sustained solely on evidence of a subsequent blood alcohol test, without any relation-back evidence, then it is reasonable for the legislature to enact an expedited procedure that permits license revocation based solely on such a test.

Moreover, our holding agrees with that of the Arizona Supreme Court in a case that is directly on point. In *Desmond* the Arizona court had held that the Arizona criminal statute required evidence relating the test result to the defendant's BAC while driving. In *State ex rel. Ross v. Nance,* 165 Ariz. 286, 798 P.2d 1295 (1990) (en banc), the court interpreted its license-revocation statute which stated:

> "The scope of the hearing for the purposes of this section shall include only the issues of whether the officer had reasonable grounds to believe the person was driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor, whether the person was placed under arrest for a violation of § 28–692, *whether a test was taken, the results of which indicated an alcohol concentration of 0.10 or more,* whether the testing method used was valid and reliable and whether the test results were accurately evaluated. The results of the test shall

1. Several of these opinions suggest a requirement that the blood-alcohol test be performed within a reasonable time after the defendant was driving. We need not decide whether Section 66–8–112 requires that the test be given within a reasonable time of the arrest, because Licensees have not raised the issue. We fail to see, however, how delaying the test beyond a "reasonable time" could prejudice the licensee. The only way in which the BAC after a long delay could exceed the BAC while driving is if the licensee consumed alcohol between the time of the arrest and the time of the test, a rather bizarre possibility.

2. The Arizona Legislature has effectively overruled the *Desmond* result by redefining the offense as having a BAC of at least .1 percent within two hours of driving. *See Cacavas v. Bowen,* 168 Ariz. 114, 811 P.2d 366 (Ct.App. 1991).

be admitted on establishing the requirements listed in § 28–692.03 * *."

Id. 798 P.2d at 1296–97 (quoting Ariz.Rev. Stat. § 28–694(E)). The court held:

> We believe A.R.S. § 28–694 mandates a bright-line rule that administrative suspensions are appropriate when the test results in a reading of 0.10 or more at the time of the test, without regard to a projected reading at the time of driving. This interpretation rationally serves the legislative purpose of expeditiously suspending the licenses of those with test results of 0.10 or more, rather than waiting until and unless the driver is convicted of [driving under the influence].

Id. at 1298 (footnote omitted); *see also Knapp v. Miller,* 165 Ariz. 527, 799 P.2d 868 (Ct.App.1990).

Licensees urge us to follow *Collins v. Director of Revenue,* 691 S.W.2d 246 (Mo. 1985) (en banc). Although *Collins* requires that license revocation be based on the licensee's BAC while driving, the Missouri statute, unlike New Mexico's explicitly requires a finding relating to the licensee's BAC while driving. *Collins* is not authority contrary to our holding. Mo.Rev.Stat. § 302.505 (1986).

To sum up, Section 66–8–112 contains no requirement that the blood alcohol test result relate back to the time that the licensee was driving, and there is no need to add such a requirement to rationalize the statute. On the contrary, omission of a relation-back requirement enables the State to provide expedited hearings without causing unfairness to licensees.

Our discussion of the purposes and justifications for not imposing a relation-back requirement answers Licensees' contention that Section 66–8–112, as we construe it, would violate due process.

CONCLUSION

We affirm the district court's affirmance of the license revocation of Bierner and reverse the district court's reversal of the license revocation of Hart.

IT IS SO ORDERED.

DONNELLY and PICKARD, JJ., concur.

832 P.2d 394

Kim KNOWLES, Plaintiff-Appellant,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, An insurance corporation, Defendant-Appellee.

No. 19992.

Supreme Court of New Mexico.

May 13, 1992.

Catron, Catron & Sawtell, P.A., Michael T. Pottow, Santa Fe, for plaintiff-appellant.

Civerolo, Hansen & Wolf, P.A., Bruce T. Thompson, Donald G. Bruckner, Jr., Albuquerque, for defendant-appellee.

OPINION

BACA, Justice.

Plaintiff-appellant Kim Knowles appeals the trial court's grant of summary judgment in favor of defendant-appellee United Services Automobile Association ("USAA"). We reverse.

I.

On April 1, 1989, USAA issued a personal umbrella policy to appellant that provided both excess liability and basic coverage insurance to appellant. The umbrella policy covered "injury or damage for which [appellant] becomes legally liable" and included coverage for wrongful eviction. The policy obligated USAA to defend against any suit brought against appellant for damages covered under the policy's basic coverage. The policy, however, contained a number of exclusions to its basic coverage, including an exclusion for injury that was "expected or intended" by appellant.

During the term of the policy, Edward Montoya filed a complaint against appellant (the "Montoya complaint") alleging that appellant placed a locked gate across a road on appellant's property that interfered with Montoya's use of an easement across appellant's property. After Montoya instigated his suit for damages and injunctive relief, appellant tendered the defense to USAA, and USAA declined to defend. After Montoya dismissed his claim for damages, appellant instituted the instant action to recover defense costs incurred in the suit filed by Montoya. Both appellant and USAA agreed that no factual dispute existed, and both made motions for summary judgment. In his motion for summary judgment, appellant claimed that the Montoya complaint alleged facts that triggered the umbrella policy's coverage and that Montoya's claim for damages did not fall within one of the policy's exclusions. In its motion for summary judgment, USAA claimed that Montoya's claim was an expected or intended result of appellant's actions and thereby excluded from coverage. The trial court granted USAA's motion and this appeal followed.

II.

The only issue raised by this appeal is whether USAA had a duty to defend appellant in the lawsuit brought against him by Montoya. The duty to defend is distinct from the duty to indemnify. *Insurance Co. of N. Am. v. Wylie Corp.*, 105 N.M. 406, 409, 733 P.2d 854, 857 (1987). The duty to defend is a contractual obligation emanating from the insurance policy, *see id.*, and arising when "the injured [third] party's complaint states facts which bring the case within the coverage of the policy, not whether [the injured third party] can prove an action against the insured for damages." *American Employers' Ins. Co. v. Continental Casualty Co.*, 85 N.M. 346, 348, 512 P.2d 674, 676 (1973) (quoting 1 Rowland H. Long, *The Law of Liability Insurance* § 5.02 (1973)). In the instant case, the umbrella policy requires USAA to defend appellant against "any suit for damages ... even if groundless or if fraudulent" if the basic coverage provisions of the policy apply. Thus, the issue on appeal is resolved by determining whether the basic coverage provisions of the umbrella policy cover damages as alleged by the Montoya complaint and whether the policy excludes coverage.

A.

The umbrella policy obligates USAA to "pay for injury or damage for which [appellant] becomes legally liable" provided that such liability arises from an occurrence taking place while the policy is in effect. The policy defines "injury" to include "wrongful eviction." The policy provides both excess liability protection for occurrences for which appellant has primary insurance and basic coverage to insure against "liability occurrences that are not covered by primary insurance." However, the basic coverage provision "applies only if [the occurrences] are not excluded in this policy." The policy lists a number of exclusions including an exclusion for "injury or damage which is expected or intended by an insured."

Appellant contends that the facts alleged in the Montoya complaint constitute an action for wrongful eviction because Montoya alleged that he was deprived of his use of an easement as a result of appellant's actions. *See, e.g., 487 Elmwood, Inc. v. Hassett*, 107 A.D.2d 285, 486 N.Y.S.2d 113, 116 (1985) (encroachment on easement is partial eviction). Because the Montoya complaint

alleged a wrongful eviction, appellant argues that the basic coverage provisions of the umbrella policy are applicable. On appeal, USAA does not contest that the allegations in the Montoya complaint constituted a claim for wrongful eviction but rather contends that the policy covers only negligent wrongful eviction and not wrongful eviction resulting from appellant's intentional acts. Thus, the issue on appeal is resolved by interpreting the exclusionary clauses of the umbrella policy.

B.

As outlined above, the policy attempts to exclude coverage for "injury or damage which is expected or intended by an insured." Appellant argues that he did not subjectively expect or intend the harm alleged in the Montoya complaint as evidenced by his affidavit submitted in support of his motion for summary judgment. Because exclusionary clauses must be narrowly construed, *King v. Travelers Insurance Co.*, 84 N.M. 550, 556, 505 P.2d 1226, 1232 (1973), appellant concludes that the basic coverage exclusions do not exclude coverage. In the alternative, appellant argues that the policy provisions extending coverage for wrongful eviction and then excluding coverage for damage "intended or expected by the insured" create an ambiguity that should be construed against USAA. *See Stanback v. Westchester Fire Ins. Co.*, 68 N.C.App. 107, 314 S.E.2d 775 (1984).

USAA contends that New Mexico law allows an insurance policy to exclude injuries arising from intentional acts so long as the exclusionary clause is clear and does not conflict with statutory law, *Safeco Insurance Co. of America v. McKenna*, 90 N.M. 516, 519, 565 P.2d 1033, 1036 (1977), and that the exclusionary clause in question here is clear. USAA cites cases from other jurisdictions holding that an insurance policy insuring against specified intentional acts while excluding other intentional acts relieves the insurer of a duty to defend the insured against the excluded acts. *See, e.g., Shapiro v. Glens Falls Ins. Co.*, 39 N.Y.2d 204, 383 N.Y.S.2d 263, 264–65, 347 N.E.2d 624, 625–26 (1976) (insurance carrier relieved of duty to defend where policy excluded coverage of intentional acts by insured). USAA argues that because the law presumes that a person intends the foreseeable results of his or her intentional acts, *Deseret Federal Savings Ass'n v. United States Fidelity & Guarantee Co.*, 714 P.2d 1143, 1146 (Utah 1986), damages claimed in the Montoya complaint are excluded from coverage even though appellant thought that he had a legal right to erect the gate. *See Red Ball Leasing, Inc. v. Hartford Accident & Indem. Co.*, 915 F.2d 306, 311 (7th Cir.1990) (repossession of leased trucks by leasing company under mistaken belief that lessee was in default is intentional act excluded from coverage under policy). Finally, USAA contends that, while ambiguities are construed in favor of the insured, *Foundation Reserve Insurance Co. v. McCarthy*, 77 N.M. 118, 119, 419 P.2d 963, 964 (1966), the clause at issue here is not ambiguous.

The obligation of the insurer is a question of contract law and will be determined by reference to the terms of the insurance policy. *Safeco Ins. Co.*, 90 N.M. at 520, 565 P.2d at 1037. An insurance contract should be construed as a "complete and harmonious instrument designed to accomplish a reasonable end." *Id.* A clause in an insurance policy is ambiguous if it is " 'reasonably and fairly susceptible of different constructions.' " *Sanchez v. Herrera*, 109 N.M. 155, 159, 783 P.2d 465, 469 (1989) (quoting *Levenson v. Mobley*, 106 N.M. 399, 401, 744 P.2d 174, 176 (1987)). When an insurance contract is ambiguous, it must be construed against the insurance company as the drafter of the policy. *King*, 84 N.M. at 555, 505 P.2d at 1231. Exclusionary clauses in insurance policies are to be narrowly construed, *id.* at 556, 505 P.2d at 1232, with the reasonable expectations of the insured providing the basis for our analysis. *Sanchez*, 109 N.M. at 159, 783 P.2d at 469. However, an insurance policy may exclude injuries arising from intentional acts so long as the exclusionary clause is clear and does not conflict with statutory law. *Safeco Ins. Co.*, 90 N.M. at 519, 565 P.2d at 1036.

While we have not yet addressed the issue, numerous other courts have examined insurance policy clauses that purport to exclude injuries expected or intended by the insured. *See* James L. Rigelhaupt, Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured,* 31 A.L.R. 4th 957 (1984 & Supp.1991). These cases are split as to whether or not, as a matter of law, such clauses are ambiguous. *Id.* at 972. A case cited to us by both appellant and USAA that we find persuasive is *United Services Automobile Ass'n v. Elitzky,* 358 Pa.Super. 362, 517 A.2d 982 (1986). In *Elitzky,* the Elitzkys purchased a homeowner's policy from the insurer that provided coverage for bodily injury and property damages subject to an exclusionary clause that negated coverage for damage "expected or intended by the insured." During the term of the policy, the Elitzkys were sued by Judge Bruno for malicious defamation and intentional infliction of emotional injury for their alleged "malicious, intentional and reckless conduct" during prior litigation over which Judge Bruno had presided. The insurer filed an action for a declaratory judgment seeking a determination that it would not be obligated to defend or indemnify the Elitzkys because the damages alleged by Judge Bruno were caused by the Elitzkys' intentional conduct and were thus excluded by the policy. The trial court, in denying the declaratory judgment, held that because Judge Bruno's causes of action were based on intentional torts, damages arising from the Elitzkys' acts were excluded by the policy. The trial court concluded that the insurer did not have a duty to defend the Elitzkys. *Id.* 517 A.2d at 984–85.[1]

On appeal, the Superior Court of Pennsylvania interpreted the phrase "expected or intended" as used in the homeowner's policy. Prior to concluding that, in the context of interpreting an insurance contract, the terms "expected" and "intended" were synonymous, *id.* at 991, the *Elitzky* court discussed three possible interpretations of "intended" in exclusionary clauses. The first interpretation was that an exclusionary clause only excludes coverage for the harm caused when the insured acted with specific intent to cause the damage. *Id.* at 986 (citing *Pachucki v. Republic Ins. Co.,* 89 Wis.2d 703, 278 N.W.2d 898 (1979)). The court declined to adopt this interpretation, because "[s]uch an approach would award wrong-doers by affording them insurance coverage just because their plans went slightly awry," and could create problems of proof.[2] *Id.* 517 A.2d at 988. The second interpretation focused on whether the insured committed an intentional act and, if so, the exclusionary clause excludes coverage for injuries that are the "natural and probable consequence" of the intentional act. *Id.* at 986 (citing *Argonaut Southwest Ins. Co. v. Maupin,* 500 S.W.2d 633 (Tex.1973)). The second interpretation was rejected by the *Elitzky* court because it improperly interjected tort principles into what was essentially an issue of contract interpretation. *Id.* 517 A.2d at 988. The third interpretation was that an exclusionary clause excludes harm of the same general type as the insured intended. *Id.* at 987 (citing *Riverside Ins. Co. v. Wiland,* 16 Ohio App.3d 23, 474 N.E.2d 371 (1984)). The court adopted this approach because it was consonant with policies underlying insurance law. *Id.* According to the court, this approach balances the policy of construing ambiguous clauses in favor of the insured against an insurance company's right to not insure against harm deliberate-

1. The court declined to determine whether the insurer would be required to indemnify the Elitzkys because the issue was not ripe for determination. *Id.*

2. The problem of proof that the *Elitzky* court discussed was that of proving that the subjective intent of the insured was to cause the specific injury that occurred. *Id.* at 988. "An insured would be entitled to coverage unless he admitted that he intended the precise injury which occurred. We hope it is not too jaundiced a view of human nature to express doubt that such testimony would be forthcoming." *Id.* In the instant case, we are presented with the converse fact situation. Here, appellant claims that the exclusionary clause should not preclude coverage because appellant asserts that he did not intend to cause the specific harm that resulted.

ly caused by the insured. *Id.* In addition, this approach fosters the public policy that an insured not be encouraged to act wrongfully because of knowledge that such an act is insured. *Id.*

The exclusionary clause in question in the instant case excludes "injury or damage which is expected or intended by an insured." We are persuaded by the rationale of the *Elitzky* court that the exclusionary clause at issue in the instant case should be construed to exclude harm of the same general type as intended by the insured. We adopt this approach because we believe that it is consistent with the rationales of our prior cases and it "affords maximum coverage to insured persons," *Elitzky,* 517 A.2d at 988, thereby giving effect to the reasonable expectations of the insured. *Sanchez,* 109 N.M. at 159, 783 P.2d at 469.

In construing the exclusionary clause under the facts of this case, we conclude that appellant intended or expected harm of the same general type as was alleged by the Montoya complaint. The Montoya complaint alleged that appellant placed, reinforced, and locked the gate to exclude others from using the road or entering the property. The requisite intent necessary for an intentional tort such as wrongful eviction is "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Restatement (Second) of Torts* § 8A (1965). While appellant may not have intended or expected to cause any harm to Montoya, he desired to limit access to the road. Thus, the harm alleged in the Montoya complaint was of the same general type as that expected or intended by appellant. Thus, coverage for appellant's acts was apparently excluded from coverage by the policy's exclusionary clause. Because basic coverage was excluded, USAA would not, under this interpretation, have a duty to defend appellant. This interpretation, however, does not end our inquiry; we must also determine whether the exclusionary clause is repugnant to the insuring clause.

III.

As just noted, while USAA would not have a duty to defend appellant if the insurance contract is construed as above, we also must determine whether the exclusionary clause, as construed, irreconcilably conflicts with the insuring clause. *See Federal Ins. Co. v. Century Fed. Sav. & Loan Ass'n,* 113 N.M. 162, 824 P.2d 302 (1992); *Insurance Co. of N. Am. v. Wylie Corp.,* 105 N.M. at 410, 733 P.2d at 858; *King,* 84 N.M. at 555, 505 P.2d at 1231. In construing exclusionary clauses, we must endeavor to give effect to the reasonable expectations of the insured. *Federal Ins. Co.,* 113 N.M. at 168–69, 824 P.2d at 308–09 (and cases cited therein). In *Federal Insurance Co.,* we examined a specific exclusionary clause in the insurance policy that would have nullified the policy's broad grant of coverage. *Id.* at 163–65, 824 P.2d at 303–05. Because the exclusionary clause was in irreconcilable conflict with the insuring clause, we refused to enforce the repugnant exclusionary clause. To enforce the repugnant exclusionary clause would have "deprive[d] the insured of the insurance coverage which the insured reasonably understood was afforded by the policy for which premiums were paid." *Id.* at 169, 824 P.2d at 309.

As in *Federal Insurance Co.,* the effect of the exclusionary clause at issue in the instant case is to nullify a broad grant of coverage. The policy promises to cover "injury or damage for which an insured becomes legally liable," including those damages arising from wrongful eviction and other intentional torts such as libel, slander, defamation, invasion of privacy, assault, battery, and malicious prosecution. The policy promises to provide excess liability insurance for those risks that appellant was required to insure under his primary liability insurance and basic coverage for occurrences not covered by primary insurance. While the coverage sections of the policy occupy only several paragraphs, the policy exclusions cover nearly two and one half pages of the six page agreement. In addition, the title of the policy, "Personal

Umbrella Policy," connotes broad coverage. The exclusion of coverage for acts intended or expected by appellant is repugnant to the insuring clause that promises broad coverage for injuries arising from wrongful eviction. The reasonable expectations of the insured can be upheld only if the repugnant clause is not given effect. *See Federal Ins. Co.*, 113 N.M. at 169, 824 P.2d at 309.

We hold that the clause excluding coverage for "expected or intended" harm is repugnant to the clause offering coverage for wrongful eviction, and, as such, is ineffective to preclude coverage in this case. Because the exclusionary clause is ineffective and the Montoya complaint alleged sufficient facts to fall within the coverage provisions of the policy, we hold that USAA had a duty to defend appellant. The order of the district court is reversed and this action is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

MONTGOMERY and FROST, JJ., concur.

832 P.2d 399

Richard SCHROTH, Plaintiff-Appellee,

v.

NEW MEXICO SELF-INSURER'S FUND, Defendant-Appellant.

No. 20122.

Supreme Court of New Mexico.

May 21, 1992.

Felker, Ish, Hatcher, Ritchie, Sullivan & Geer, Scott P. Hatcher, Santa Fe, for defendant-appellant.

Victor A. Titus, Farmington, for plaintiff-appellee.

OPINION

FRANCHINI, Justice.

This is an appeal from a declaratory judgment which found coverage under the New Mexico Self-Insurer's Fund's (NMSIF) contract of insurance for uninsured motorist benefits. Following a nonjury trial, the court entered its declaratory judgment on July 15, 1991, ruling that Richard Schroth may pursue uninsured motorist benefits from NMSIF. NMSIF appeals the court's judgment. We affirm.

I.

On September 9, 1987, while employed by the City of Farmington (City), Schroth was involved in a motor vehicle collision with Robert L. Homrich. Schroth reported the accident to the City's Risk Management Department and an accident report was made. Terry Darby, the City's safety officer, investigated the accident. The City was self-insured with respect to workers' compensation coverage and to date has paid Schroth various workers' compensation benefits, including all of his medical bills. At the time of the accident, NMSIF provided auto and general liability coverage to the City and its employees. NMSIF's insurance policy included uninsured motorist benefits for the employees of the City. The auto and general liability coverage contained the following notice provision: "You must see to it that we are notified as soon as practicable of an 'occurrence' which may result in a claim."

The City's Risk Management Department had a policy of not notifying insurers of an occurrence until the insured obtained legal counsel and made an uninsured motorist claim. In this particular case, there was no indication of a potential uninsured motorist claim because the accident was not the City's fault, there was no liability exposure, property damage was below the deductible, and the City was self-insured for workers' compensation. Also, the police report of the accident had indicated that Homrich was insured. On April 29, 1989, the City learned that Homrich was uninsured. Schroth did not realize he had an uninsured motorist claim until he was named as an involuntary plaintiff in the City's subrogation suit against Homrich. After consulting a lawyer, Schroth sent notice to NMSIF within sixty days of being informed Homrich was uninsured. Additionally, the City notified NMSIF of the claim on November 30, 1989. NMSIF did not invoke their reservation of rights when first notified of the claim.

II.

The trial court found that no evidence was produced to support any claim of prejudice against NMSIF concerning the seven month interval between the knowledge of a possible claim of the City and the actual notice. Additionally, the trial court concluded that under the terms of the policy, the City should have given notice on April 29, 1989, when it became aware that Homrich was uninsured. The specific issues on appeal are whether adequate notice was provided to NMSIF under the terms of the policy, and whether NMSIF was prejudiced by any delay.

III.

The purpose of uninsured motorist coverage is to place the injured policyholder in the same position as if the tortfeasor was insured. *Chavez v. State Farm Mut. Auto. Ins. Co.,* 87 N.M. 327, 329, 533 P.2d 100, 102 (1975) (quoting *Bartlett v. Nationwide Mut. Ins. Co.,* 33 Ohio St.2d 50, 294 N.E.2d 665, 666 (1973)). As with uninsured motorist coverage in general, compliance with conditions precedent to recovery is often liberally construed so as to effect the statutory purpose. 12A Mark S. Rhodes, *Couch Cyclopedia of Insurance Law* § 45:629 (2d.Ed.1981). Applying a liberal construction to the policy language, we agree with the trial court that notice should have been given on April 29, 1989, and not after the date of the accident.

The policy in question states: "You must see to it that we are notified as soon as practicable of an *'occurrence' which may result in a claim."* (emphasis added). We find this sentence to be ambiguous as to what "occurrence" means and we will construe that ambiguity in favor of the insured. *Mountain States Mut. Casualty Co. v. Northeastern New Mexico Fair Ass'n,* 84 N.M. 779, 782, 508 P.2d 588, 591 (1973).

NMSIF contends that the "occurrence" was the auto accident and notice should have been given after the accident. We disagree. Notice requirements for uninsured motorist claims do not become operative until an insured reasonably believes such a claim exists. *Finney v. Farmers Ins. Co.,* 21 Wash.App. 601, 586 P.2d 519, 524 (1978), *aff'd,* 92 Wash.2d 748, 600 P.2d 1272 (1979) (en banc). Conditions only become operative when the insured, acting as a reasonably prudent person, believed he would have an uninsured motorist claim. *Thomas v. Grange Ins. Ass'n,* 5 Wash.App. 820, 490 P.2d 1316, 1319 (1971). The evidence established that the City did not give formal notice soon after the accident because they justifiably believed that no claim for uninsured motorist coverage would be made and that Schroth's only claim would be covered by workers' compensation. Furthermore, it was the policy of the City's Risk Management Department not to notify insurers of an occurrence until the insured obtained legal counsel and made an uninsured motorist claim. The insurance policy did not contain a requirement that every accident have a claim notice completed and sent to NMSIF. We agree with the trial court that the language of this policy gives the insured the discretion to decide what may or may not result in a claim.

The trial court's interpretation of the policy is bolstered by the meaning of the phrase "as soon as practicable." This term has been interpreted to mean a reasonable time, dependent upon the facts and circumstances of the case. 13A Mark S. Rhodes, *Couch Cyclopedia of Insurance Law* § 49:120 (2d.Ed.1982); *see also Motor State Ins. Co. v. Benton,* 35 Mich.App. 287, 192 N.W.2d 385, 387 (1971), *State Farm Mut. Auto Ins. Co. v. Burgess,* 474 So.2d 634, 636 (Ala.1985). We agree with the Tennessee Court of Appeals that "[t]he term 'practicable' not only means reasonable, but has the additional connotation of what might be termed common or 'horse' sense. Being practicable about a matter means eliminating the purely formal or useless acts which serve no real or valid purpose." *Transamerica Ins. Co. v. Parrott,* 531 S.W.2d 306, 314 (Tenn.Ct.App. 1975). In *Transamerica,* the court held that notice "as soon as practicable" is "from the time the insured knew or should have known that the event for which coverage is sought might reasonably be expected to produce a claim against the insurer." *Id.* Because the accident was not the City's fault, there was no liability exposure, property damage was below the deductible, the City was self-insured for workers' compensation, and the police report incorrectly indicated that Homrich was insured, the City did not know, nor should it have known, that the accident might reasonably be expected to produce a claim. Thus, the language in the policy supports the trial court's finding that notice should have been given on April 29, 1989, and not after the date of the accident.

IV.

NMSIF also argues that they were prejudiced by the twenty-seven month delay of the City in giving notice. The City notified NMSIF of the claim on November 30, 1989. Because we agree with the trial court that notice should have been given on April 29, 1989—the date the City became aware that Homrich was uninsured—the delay at most was seven months.

"Whether the delay in giving notice is reasonable in view of all circumstances is a question of fact for determination by the trier of the facts." *Hartford Accident & Indem. Co. v. Day,* 359 F.2d 484, 486 (10th Cir.1964). The trial court did not address whether the seven month delay was reasonable. The court instead addressed whether NMSIF was prejudiced by the delay.

In *Roberts Oil Co. v. Transamerica Ins. Co.,* 113 N.M. 745, 833 P.2d 222 (1992), we recently held that "even when there has been a substantial and material breach of the insured's obligation and a resulting failure of a condition precedent to the insurer's liability, the breach and nonoccurrence of condition does not discharge the insurer absent a showing that the insurer has been substantially prejudiced." *Id.* at 750, 833 P.2d at 227. Here, the trial court found that "[n]o evidence was produced to support any claim of prejudice against [NMSIF] concerning the seven month interval between the knowledge of a possible claim of the City of Farmington, on April 29, 1989, and the actual notice of the claim on November 30, 1989." The court also found that any prejudice was a result of NMSIF's failure to invoke their reservation of rights when first notified by the City, and its failure to immediately investigate the case thereafter.

We will not disturb findings made by the trial court that are supported by substantial evidence. *Elephant Butte Resort Marina, Inc. v. Wooldridge,* 102 N.M. 286, 291, 694 P.2d 1351, 1356 (1985). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 291, 694 P.2d at 1356. This court will indulge all reasonable inferences and resolve all disputed facts in favor of the trial court's findings. *Tapia v. Panhandle Steel Erectors Co.,* 78 N.M. 86, 89, 428 P.2d 625, 628 (1967). In any event, historically, NMSIF would have handled this matter the same way even if notified sooner. Earlier notification would not have changed any of the basic facts. Additionally, NMSIF had no written rules or policy for reporting accidents. Thus, there is substantial evidence to support the trial court's finding that the delay did not result in any prejudice to NMSIF. Finally, because the trial court found no prejudice, there is no need for us to address whether or not the seven month delay was reasonable.

For the above reasons, the judgment of the trial court is affirmed.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

832 P.2d 402

In the Matter of Ronald E. DEUTSCH, Esq.

No. 20242.

Supreme Court of New Mexico.

May 28, 1992.

Sally E. Scott, Deputy Chief Disciplinary Counsel, Albuquerque, for Disciplinary Bd.

Ronald E. Deutsch, pro se.

OPINION

PER CURIAM.

This matter is before the Court following a suspension and a subsequent order to show cause why respondent Ronald E. Deutsch should not be disbarred. *See* Rules Governing Discipline, SCRA 1986, 17–101 to –316 (Repl.Pamp.1991).

In 1991, Deutsch was the subject of a disciplinary proceeding in Texas, where he was licensed to practice law. In that proceeding, Deutsch was charged with misappropriating more than $130,000 in client funds from his trust account. While the Texas disciplinary proceeding was pending, Deutsch moved the Texas Supreme Court to accept his resignation in lieu of discipline. As required by Texas procedure, the State Bar Grievance Committee, before which the disciplinary action pending against Deutsch was initiated, filed a concurring motion with the Texas Supreme Court setting forth findings of fact and conclusions of law concerning the alleged misconduct by Deutsch. *See* Supreme Court of Texas, State Bar Rules, art. X, § 15 (1988).

The Grievance Committee concluded as a matter of law that, in five separate client matters, Deutsch had violated various provisions of the Texas Code of Professional Responsibility, Supreme Court of Texas, State Bar Rules, art. X, § 9 (1988), in force and effect at the time of his conduct: DR 1–102(A)(3) (prohibiting illegal conduct involving moral turpitude); DR 1–102(A)(4) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 9–102(B)(1) (requiring lawyer to promptly notify a client of the lawyer's receipt of client funds, securities, or other properties); and DR 9–102(B)(3) (requiring lawyer to render appropriate accounts to a client concerning funds, securities, or other properties of the client coming into the lawyer's possession). The Grievance Committee further concluded as a matter of law that Deutsch should make restitution totalling more than $136,000.

In a sixth matter, the Grievance Committee concluded Deutsch had violated the Texas Disciplinary Rules of Professional Conduct, Supreme Court of Texas, State Bar Rules, art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) (1991), in force and effect at the time of his conduct in that matter: Rule 8.04(a)(2) (prohibiting commission of a serious crime or other criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); Rule 8.04(a)(3) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 1.14(a) (requiring lawyer to hold funds belonging to a client or third person that are in the lawyer's possession in a separate account designated as a "trust" or "escrow" account); and Rule 1.14(b) (requiring lawyer to notify promptly a client or third person of the lawyer's receipt of funds in which the client or third person has an interest). The

Grievance Committee concluded no restitution was required in the sixth matter. Deutsch apparently had accounted belatedly to the client for the funds in question.

By order dated November 18, 1991, the Texas Supreme Court, in conformity with Texas procedure, stated that it considered the Grievance Committee's findings of fact and conclusions of law conclusively established for all purposes and accepted Deutsch's resignation. The Texas State Bar Rules specifically provide that acceptance by the court of resignation made in the face of a pending disciplinary proceeding "shall be tantamount to disbarment for the purpose of reinstatement." Supreme Court of Texas, State Bar Rules, art. X, § 15 (1988).

On or about December 4, 1991, New Mexico disciplinary counsel, pursuant to the provisions of Rule 17–210, filed a Petition for Reciprocal Discipline in this Court on the basis of the Texas discipline. On December 12, 1991, rather than impose the identical discipline, in this case disbarment, this Court suspended Deutsch pending further proceedings and ordered him to notify his clients of his suspension as required by Rule 17–212.

On December 18, 1991, Deutsch filed a pleading entitled Respondent's Petition for Stay of Suspension and Motion for Modification of Order. This petition was set for hearing before the Court on January 22, 1992. At the time of the hearing, Deutsch attempted to surrender his New Mexico law license. The resignation he tendered, however, did not comply with the provisions of this Court's rule concerning applications to resign during the pendency of disciplinary proceedings. *See* SCRA 1986, 17–209. The Court granted Deutsch two weeks to file the pleadings required to ask this Court to consider granting him permission to resign. Further, it having been brought to the Court's attention that Deutsch had not yet notified his clients of his suspension, he was directed to complete the notice process set forth in Rule 17–212 within the same two-week period.

On February 7, 1992, disciplinary counsel filed a Verified Motion for an Order to Show Cause, alleging that although she had provided Deutsch, at his request, with draft versions of the application and affidavit required to effect resignation in lieu of discipline, Deutsch had neither submitted the documentation nor complied with the notice requirements within the two-week time period set by this Court on January 22. Disciplinary counsel asked this Court to issue an order directing Deutsch to appear and show cause why he should not be held in contempt of court or disbarred. A show cause hearing was scheduled for March 4.

On or about February 25, 1992, Deutsch filed a response alleging that he had been out of town and did not receive the draft resignation documents which were sent by certified mail. Deutsch also alleged that he had, as of that time, completed the resignation documents and tendered them to disciplinary counsel and given notice of his "resignation" to his clients. He advised this Court that he would be unable to appear on March 4 and asked the Court to accept his resignation. For the convenience of Deutsch, the March 4 hearing was rescheduled for March 18 and notice was sent to him by the clerk of this Court at his address of record.

Subsequently, disciplinary counsel filed a supplement to the previously filed motion for an order to show cause. In this supplement, she advised the Court that contrary to his representations, Deutsch had not completed the resignation documents. Specifically, Deutsch had returned the required signed affidavit to disciplinary counsel, but it was not notarized as required by Rule 17–209(B). Disciplinary counsel advised that the resignation documents had been sent back to Deutsch at his address of record, with an explanation of the defect. Disciplinary counsel also reported that Deutsch still had not given notice to all of his clients and had not satisfied the requirements of Rule 17–212 regarding documents to be furnished to the Court and disciplinary counsel concerning the notice process.

When this matter came on for hearing on March 18, disciplinary counsel

appeared, but Deutsch did not.[1] Nor did Deutsch submit the required resignation documentation. This Court then took under advisement the request of disciplinary counsel that Deutsch be disbarred.

Deutsch originally was suspended by this Court. Since the order of suspension, however, he has failed or refused to abide by the orders of this Court that he comply with the notice requirements of Rule 17–212. Further, he has failed to appear before this Court as ordered on March 18, 1992, and has failed to show cause why discipline identical to that imposed in Texas should not be imposed here. These factors, together with the extremely serious nature of Deutsch's misconduct in Texas, convince us that it is now appropriate, pursuant to Rule 17–210, to impose discipline identical to that imposed by the State of Texas. Deutsch's resignation in the face of a pending disciplinary proceeding in Texas is, according to Texas State Bar Rules, tantamount to disbarment. This Court previously has held that disbarment is the appropriate sanction when the attorney has engaged in misconduct involving misrepresentation and moral turpitude in the misappropriation of client funds. *In re Duffy,* 102 N.M. 524, 525, 697 P.2d 943, 945 (1985).[2] We therefore find it appropriate to impose the identical discipline imposed in Texas and disbar Ronald E. Deutsch from the practice of law in the State of New Mexico.

IT IS THEREFORE ORDERED that Ronald E. Deutsch be and hereby is disbarred from the practice of law pursuant to SCRA 1986, 17–206(A)(1), 17–210, effective the date this order is filed.

IT IS FURTHER ORDERED that within ten (10) days from the effective date of his disbarment Deutsch shall file with this Court evidence of his compliance with Rule 17–212 and shall serve a copy of his affidavit of compliance upon disciplinary counsel.

IT IS FURTHER ORDERED that this opinion be published in both the *New Mexico Reports* and the State Bar of New Mexico *Bar Bulletin.*

IT IS SO ORDERED.

832 P.2d 405

Ida VIGIL, as Personal Representative of the Estate of Robert P. Vigil, Deceased, Plaintiff–Appellant,

v.

Juanita MARTINEZ, Individually; Manuel E. Sandoval, Individually; Robert Squaglia, Individually, Defendants–Appellees.

No. 12131.

Court of Appeals of New Mexico.

March 18, 1992.

1. We note that Deutsch has complained that he did not receive correspondence and notices concerning this matter because he was out of state. The record reflects all communications from the clerk of this Court and disciplinary counsel were sent to his address of record. All New Mexico attorneys have an obligation to apprise this Court and the State Bar of an official address of record at which the attorney will regularly receive mail. This is certainly no less true of attorneys involved in disciplinary proceedings. This Court previously has indicated that due process requirements are satisfied in disciplinary proceedings by providing notice by mail to a respondent-attorney at his address of record. To hold otherwise would encourage attorneys to "disappear at any critical juncture of a disciplinary proceeding." *In re Steere,* 112 N.M. 205, 207, 813 P.2d 482, 484 (1991).

2. We express no opinion on whether it would have been appropriate to allow Deutsch to resign, since he never furnished the Court with the documentation required to invoke the Court's consideration of the question.

Luis B. Juarez, Las Vegas, for plaintiff-appellant.

Janet Clow, M. Karen Kilgore, White, Koch, Kelly & McCarthy, P.A., Santa Fe, for defendants-appellees.

OPINION

HARTZ, Judge.

While on supervised probation, Toby R. Sanchez, Jr., (Probationer) murdered Robert P. Vigil (Victim) during the night of May 26–27, 1987. Plaintiff is the personal representative of Victim's estate. Defendant Juanita Martinez was Probationer's probation officer. Manuel Sandoval was Martinez's supervisor and head of the Las Vegas probation office, where Martinez worked. Robert Squaglia was state director of probation. Plaintiff sued Defendants under the Federal Civil Rights Act, 42 U.S.C. Section 1983 (1988), and the New Mexico Tort Claims Act, NMSA 1978, Sections 41–4–1 to –27 (Repl.Pamp.1986). The district court dismissed the first amended complaint (the Complaint), holding that the Complaint failed to state a claim under the Civil Rights Act and that Defendants were immune under the Tort Claims Act. We agree and affirm.

CIVIL RIGHTS CLAIM

When we review an order dismissing a complaint for failure to state a claim, we assume the truth of the allegations of the complaint. *Bottijliso v. Hutchison Fruit Co.*, 96 N.M. 789, 635 P.2d 992 (Ct. App.1981). According to the Complaint, on May 26, 1987, Probationer, Victim, and several others spent the late afternoon and evening together and consumed a large amount of alcohol. They retired to a mobile home, where all but Probationer went to sleep. During the night Probationer murdered Victim by slitting his throat. The Complaint alleges that the murder was caused by Martinez's gross negligence and callous indifference to the supervision of Probationer. Martinez's alleged misconduct included failing to place Probationer under strict probation, failing to place Probationer in a 30–day inpatient alcoholism treatment program as required by his sentence, failing to periodically screen Probationer for substance and alcohol use as required by the sentence, failing to monitor Probationer to ensure compliance with the conditions of probation, failing to maintain personal contact with Probationer and conduct a field visit, failing to obtain from

Probationer written verification of compliance with the conditions of his probation, and failing to monitor Probationer's health needs, including his use of asthma medication, and to advise Probationer of the risk of temporary insanity from combining use of the asthma medication and alcohol. The Complaint alleges that Defendant Sandoval caused the murder by his gross negligence and callous indifference in the supervision of Defendant Martinez and that Defendant Squaglia caused the murder by his gross negligence and callous indifference in supervising Probationer and directing the work of Defendants Sandoval and Martinez.

To recover under Section 1983, Plaintiff must allege acts and omissions of Defendants that deprived him of a federal right. *See Garcia v. Las Vegas Medical Ctr.*, 112 N.M. 441, 443–44, 816 P.2d 510, 512–13 (Ct.App.1991). Plaintiff has not suggested the violation of any federal right other than the right to due process protected by the Fourteenth Amendment to the United States Constitution.

The Complaint, however, does not allege facts that constitute a violation of due process. The essence of Plaintiff's claim is that Defendants did not take proper steps to protect Victim from Probationer. The Complaint does not allege, and Plaintiff's briefs on appeal do not suggest, that Defendants in any way restricted Victim's freedom to act to protect himself. Because the State did not limit the freedom of action of Victim, it did not violate his right to due process.

This conclusion is compelled by the United States Supreme Court decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). When Joshua DeShaney was four years old, his father beat him so severely that he will probably spend the rest of his life in an institution for the profoundly retarded. He sued several social workers, other local officials, Winnebago County, and its Department of Social Services because of their failure to take action despite their knowledge of the threat to him posed by his father. Although the Department of Social Services had entered into an agreement with Joshua's father in which he promised to cooperate in various measures designed to protect Joshua, evidence of serious child abuse continued to accumulate. Indeed, after learning of the injuries that were the subject of the lawsuit, one social worker said, " " 'I just knew the phone would ring some day and Joshua would be dead.' " " *Id.* at 209, 109 S.Ct. at 1010 (Brennan, J., dissenting). Nonetheless, this evidence did not prompt the department to take further action.

The *DeShaney* Court ruled, however, that Joshua was not protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." The Court reasoned as follows:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means * * * * Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

Id. at 195–96, 109 S.Ct. at 1003. The Court summarized by saying, "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. at 1004. The Court distinguished cases in which it had required the state to provide services on the ground that:

> [T]hey stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being * * * * The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 199–200, 109 S.Ct. at 1005. That rationale did not apply in *DeShaney* because "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201, 109 S.Ct. at 1006; *see California First Bank v. State,* 111 N.M. 64, 75–76, 801 P.2d 646, 657–58 (1990).

Here, Probationer's freedom may have been restricted by his conditions of probation, but Victim's freedom of action was not limited by the State. Therefore, the alleged failure of the State to protect Victim did not violate the Due Process Clause of the Federal Constitution.

We are supported in our view by cases from other jurisdictions that have considered similar situations. *See Henke v. Superior Court,* 161 Ariz. 96, 775 P.2d 1160 (Ct.App.1989) (*DeShaney* bars civil rights claim by children who were molested by paroled child molester); *Garcia v. Superior Court,* 50 Cal.3d 728, 268 Cal.Rptr. 779, 789 P.2d 960 (Cal.1990) (en banc) (*DeShaney* bars civil rights claim based on killing of woman by paroled convicted murderer); *Dimas v. County of Quay, N.M.,* 730 F.Supp. 373 (D.N.M.1990) (Parker, J.) (no cause of action under Section 1983 for victim of rape by prisoner on work release); *Lee v. Gateway Inst. & Clinic,* 732 F.Supp. 572 (W.D.Pa.1989) (no cause of action under Section 1983 based on killing by released mental patient), *aff'd,* 908 F.2d 963 (1990).

Post-*DeShaney* cases in which courts have held that a cause of action has been stated for injury caused by a person in state custody have involved victims whose freedom of action was restricted by the government. *Cornelius v. Town of Highland Lake, Ala.,* 880 F.2d 348 (11th Cir. 1989) (inmates on work release injured town clerk at her place of work), *cert. denied,* 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *Swader v. Virginia,* 743 F.Supp. 434 (E.D.Va.1990) (inmate attacked child of prison employee who was required to maintain residence on prison property); *see Wood v. Ostrander,* 879 F.2d 583 (9th Cir.1989) (officer stranded plaintiff in high-crime area late at night by having plaintiff's car towed), *cert. denied,* — U.S. —, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990). *But see de Jesus Benavides v. Santos,* 883 F.2d 385 (5th Cir. 1989) (no cause of action under Section 1983 for jailer injured by inmate).

We hold that Plaintiff failed to state a claim for relief under Section 1983.

STATE TORT CLAIMS ACT

Plaintiff also seeks relief under the New Mexico Tort Claims Act. Under the Act, public employees acting within the scope of duty are granted immunity from liability for any tort except as waived by the Act. § 41–4–4(A). The only basis for waiver suggested by Plaintiff is NMSA 1978, Section 41–4–12 (Repl.Pamp.1989), which waives immunity for certain conduct by law enforcement officers while acting within the scope of their duties. The Tort Claims Act defines "law enforcement officer" as:

> [A]ny full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor[.]

NMSA 1978, § 41–4–3(D) (Cum.Supp.1991).

New Mexico precedents have stated that this definition includes the county sheriff, his deputies, and jailers at the county jail, *Methola v. County of Eddy,* 95 N.M. 329, 622 P.2d 234 (1980), and the director of a county detention center, *Abalos v. Bernal-*

illo County Dist. Atty.'s Office, 105 N.M. 554, 734 P.2d 794 (Ct.App.1987), but does not include the state secretary of corrections and the warden of the state penitentiary, *Anchondo v. Corrections Dep't,* 100 N.M. 108, 666 P.2d 1255 (1983). The United States District Court for the District of New Mexico has held that guards at the state penitentiary are not law enforcement officers within the meaning of the state Tort Claims Act. *Osborn v. Governor of N.M.,* Civil 80–178 (1983) (Campos, J.). Defendants have also cited to us an unpublished memorandum opinion and calendar notice issued by this court, but these have no precedential value and should not have been cited. SCRA 1986, 12–405(C); *State v. Gonzales,* 110 N.M. 218, 794 P.2d 361 (Ct.App.1990), *aff'd,* 111 N.M. 363, 805 P.2d 630 (1991).

What are the duties of Defendants? Plaintiff relies on a statute that gives corrections department employees (which include probation and parole officers) certain powers of peace officers. NMSA 1978, Section 33–1–10 (Repl.Pamp.1990), states in pertinent part:

> A. * * * [A]ny employee of the corrections department who has at the particular time the principal duty to hold in custody or supervise any person accused or convicted of a criminal offense or placed in the legal custody or supervision of the corrections department, shall have the power of a peace officer with respect to arrests and enforcement of laws when on the premises of a New Mexico correctional facility or while transporting a person committed to or under the supervision of the corrections department; when supervising any person committed to or under the supervision of the corrections department anywhere within the state; or when engaged in any effort to pursue or apprehend any such person....
>
> ....
>
> C. As used in this section, "supervising" includes the performance of the following official duties by probation and parole officers of the corrections department:
>
> (1) field investigations;
>
> (2) surveillance;
>
> (3) searches and seizures conducted alone or in cooperation with a state or local law enforcement agency; and
>
> (4) security during the course of a probation or parole revocation hearing or proceeding or any other hearing or appearance required by law.

Defendants rely largely on an affidavit by Defendant Martinez filed in the district court. Of course, once Defendants rely on matters outside the pleadings, their motion is no longer a proper motion to dismiss for failure to state a claim under SCRA 1986, 1–012(B)(6), but the motion can still be considered as one for summary judgment under SCRA 1986, 1–056. *See Transamerica Ins. Co. v. Sydow,* 97 N.M. 51, 54, 636 P.2d 322, 325 (Ct.App.1981). Because Plaintiff did not contest the affidavit, which was submitted to the district court three-and-a-half months before the hearing on the motion, we assume its truth for the purpose of reviewing the district court's order. *Cf. Santistevan v. Centinel Bank of Taos,* 96 N.M. 734, 737, 634 P.2d 1286, 1289 (Ct.App. 1980) ("To treat a motion to dismiss as a motion for summary judgment without permitting the adverse party a reasonable opportunity to present pertinent material is error."), *rev'd in part on other grounds,* 96 N.M. 730, 634 P.2d 1282 (1981).

The affidavit states:

> 2. My principal duties as a probation and parole officer consist of evaluating individuals convicted by the court to determine and recommend suitability for probation or incarceration, to provide community-based supervision of adult and juvenile parolees and adult probationers, and at the direction of the courts and the Adult and Juvenile Parole Boards to insure reintegration of clients into the mainstream of acceptable community behavior patterns and successful completion of probation or parole....
>
> 3. * * * A probation and parole supervisor's principal responsibilities are to administer the operation of a district probation and parole office, to supervise and evaluate the performance of the staff of probation and parole officers and sup-

porting personnel, and to implement and maintain departmental policies and procedures.

Attached to the affidavit were the state personnel office job descriptions for probation and parole officers and for probation and parole supervisors. The job description for probation/parole officer is as follows:

PURPOSE

To evaluate individuals convicted by the courts, to determine and recommend suitability for probation or incarceration; to provide community based supervision of adult and juvenile parolees and adult probationers. At the direction of the courts and the adult and juvenile parole boards, to ensure reintegration of clients into the mainstream of acceptable community behavior patterns and successful completion of probation or parole.

RESPONSIBILITIES

Any one position may not include all of the duties listed nor do the listed examples include all of the duties which may be found in positions of this class.

Under general guidance and direction, incumbents-

1. document activities and communication with clients;
2. provide all clients with counseling, crisis intervention and assistance in job seeking and placement;
3. provide juvenile clients with counseling and assistance related to family relations, school performance and suitable uses of free time;
4. plan and administer programs of intensive supervision and services for special clients identified by an objective needs and risk assessment;
5. refer clients to other agencies for needed services;
6. participate in other agencies' staffing of shared cases;
7. monitor clients' progress and general conduct;
8. enforce conditions of probation or parole;
9. investigate, prepare and write social reports and investigative reports;
10. interview witnesses and victims;
11. coordinate and participate in violation hearings;
12. testify before courts and parole boards;
13. classify clients by risks, needs, and client management classification system;
14. make visits to client's home, place of employment and place of incarceration or hospitalization;
15. schedule and conduct urinalysis and breath analyzer tests as required[.]

The job description for probation/parole supervisor states:

PURPOSE

To administer the operations of a district office: to supervise and evaluate the performance of a staff of probation/parole officers and supporting personnel: to implement and maintain departmental policies and procedures.

RESPONSIBILITIES

Any one position may not include all of the duties listed nor do the listed examples include all of the duties which may be found in positions of this class.

Under general guidance and direction, incumbents-

1. oversee the operations of a district probation/parole office
2. prepare, justify and administer a district office budget;
3. review and approve all work products generated for the courts, parole boards and other agencies;
4. implement all policies and procedures of the department and field services division;
5. assume temporarily the duties of either probation/parole officers or area supervisor during their absence;
6. approve requests for all types of employee leave;
7. assign work to probation/parole officers and supporting personnel;
8. conduct monthly caseload audits;
9. conduct statistical analyses;
10. prepare and write monthly statistical reports;

11. supervise a caseload of clients, as required;

12. prepare and write presentence reports, violation reports and other reports on caseloads as required;

13. maintain a district office log of arrests;

14. interview, select and hire probation/parole officers and supporting personnel;

15. train probation/parole officers and supporting personnel;

16. call, coordinate and conduct meetings;

17. attend court hearings and parole board hearings;

18. have frequent contact with offenders who are under the legal control of the Corrections Department; and

19. perform other related work as required[.]

The question before us is whether the principal duties of Defendants are those set forth in the statutory definition of "law enforcement officer." In particular, are Defendants' principal duties: (1) "to hold in custody any person accused of a criminal offense," (2) "to maintain public order," or (3) "to make arrests for crimes"? § 41–4–3(D). We note that "principal duties" are "those duties to which employees devote the majority of their time." *Anchondo,* 100 N.M. at 110, 666 P.2d at 1257. Also, the language of the definition is to be read in light of the traditional duties of law enforcement officers. *Id.* We consider in turn each of the three duties mentioned in the statutory definition.

Although for some purposes one might say that a probationer or parolee is in state custody, *see* NMSA 1978, § 31–21–10(D) (Repl.Pamp.1990) (person on parole remains in the "legal custody of the institution from which he was released"), probation and parole officers do not hold their clients in custody within the traditional meaning of the term as applied to law enforcement officers. We note that the statute relied upon by Plaintiff, Section 33–1–10, distinguishes between holding a person in custody and supervising a person. Supervising is what probation and parole officers do. Similarly, our criminal statutes distinguish (1) assisting in the escape of a person held in lawful custody or confinement, NMSA 1978, § 30–22–11 (Repl.Pamp.1984), from (2) aiding or encouraging a person to abscond from parole or probation, NMSA 1978, § 30–22–18 (Repl.Pamp.1984). None of the responsibilities set forth in Defendants' job descriptions refers to restricting the freedom of movement of clients. At best, holding persons in custody is a minor incident of Defendants' jobs. Moreover, the statutory definition refers to holding in custody any person "*accused* of a criminal offense." § 41–4–3(D) (emphasis added). Persons on probation or parole have already been convicted. Those who have been convicted are not ordinarily referred to as "accused." For this reason, the United States District Court for the District of New Mexico held that prison guards do not come within the definition of law enforcement officers under the Tort Claims Act. *Osborn v. Governor of N.M.* We agree that a person who has been convicted is no longer an "accused" for the purposes of Section 41–4–3(D).

Maintenance of public order also is only incidental to the duties of probation and parole officers. Their chief function is rehabilitation. As stated in NMSA 1978, Section 31–21–4 (Repl.Pamp.1990):

> The Probation and Parole Act [31–21–3 to 31–21–19 NMSA 1978] shall be liberally construed to the end that the treatment of persons convicted of crime shall take into consideration their individual characteristics, circumstances, needs and potentialities as revealed by case study, and that such persons shall be dealt with in the community by a uniformly organized system of constructive rehabilitation under probation supervision instead of in an institution, or under parole supervision when a period of institutional treatment is deemed essential in the light of the needs of public safety and their own welfare.

Although one would hope that the efforts of probation and parole officers would im-

prove public order by helping probationers and parolees to become good citizens, the same could be said of the efforts of those employed in education and social services. As previously noted, we are to construe the phrase "maintain public order" as it has been traditionally interpreted in the law enforcement context. Insofar as probation and parole officers maintain public order by trying to rehabilitate their clients, they are not maintaining public order in the same sense that police officers, sheriff's deputies, and other traditional law enforcement officers are said to maintain public order. We therefore hold that maintenance of public order, within the meaning of Section 41–4–3(D), is not a principal duty of probation and parole officers or their supervisors.

Finally, although probation and parole officers have some powers of arrest beyond those of other citizens, *see* § 33–1–10, the exercise of this power is not even mentioned specifically in Defendants' job descriptions. Making arrests for crime is not a principal duty of Defendants.

Taken all together, holding in custody persons accused of criminal offenses, maintaining public order, and making arrests for crime do not constitute duties to which Defendants are to devote the majority of their time. Thus, we hold that the district court properly ruled that Defendants were not law enforcement officers under Section 41–4–3(D) and that therefore the waiver of immunity in Section 41–4–12 does not apply to them.

CONCLUSION

We affirm the judgment of the district court.

IT IS SO ORDERED.

PICKARD and BLACK, JJ., concur.

832 P.2d 412

CITY OF ALBUQUERQUE, Petitioner–Appellant,

v.

Daniel SANCHEZ, Respondent–Appellee.

No. 13350.

Court of Appeals of New Mexico.

April 1, 1992.

Debra J. Moulton, Butt, Thornton & Baehr, P.C., Albuquerque, for petitioner-appellant.

Edward F. Snow, Albuquerque, for respondent-appellee.

OPINION

APODACA, Judge.

This court's opinion, filed March 11, 1992, is withdrawn on the court's own motion and the following opinion is substituted in its place.

The City of Albuquerque (employer) appeals from the workers' compensation judge's (judge) order designating Dr. Emmett Thorpe, the health care provider selected by Daniel Sanchez (worker), as worker's health care provider. Employer argues on appeal that Rule WCA 91–1(VI), Miscellaneous Proceedings and Questions of Fact (May 1991), is inconsistent with NMSA 1978, Section 52–1–49 (effective January 1, 1991) (Repl.Pamp.1991), because the regulation (1) treats an objection to notice of change of health care provider as a request to change health care provider and (2) places the burden on the objector to prove that the new doctor's care is unreasonable before the new doctor has treated a worker. Based on these alleged inconsistencies, employer claims the Workers' Compensation Administration's (WCA) regulation must be declared void because the WCA was without authority to enact it and because, when read together with the statute, its meaning is uncertain. Employer also claims it was denied procedural due process because it was not allowed to present evidence, that the notice by worker of worker's selection of health care provider was inadequate, and that the judge lacked jurisdiction to appoint worker's chosen health care provider.

We reject each of employer's contentions and hold that an order denying a request to change health care providers is a final, appealable order and that Rule WCA 91–1(VI) is consistent with Section 52–1–49 and therefore valid. Because we hold that Rule WCA 91–1(VI) is consistent with Section 52–1–49, employer's other claims (that the regulations were beyond the authority of the WCA to enact and are so uncertain as to be void for vagueness) also fail. We also hold that worker's notice of his selection of health care provider substantially complied with the statute and that the judge had statutory authority to designate a health care provider. Employer's due process claim is not properly before us, so we do not consider it. For these reasons, we affirm the judge's order.

BACKGROUND

Section 52–1–49 mandates that an employer will provide an injured worker reasonable and necessary health care services and establishes the procedures by which the worker's health care provider is selected and changed. The pertinent sections of the statute state:

> B. The employer shall initially either select the health care provider for the injured worker or permit the injured worker to make the selection. Subject to the provisions of this section, that selection shall be in effect during the first sixty days from the date the worker receives treatment from the initially selected health care provider.
>
> C. After the expiration of the initial sixty-day period * * *, the party who did not make the initial selection may select a health care provider of his choice. Unless the worker and employer otherwise agree, the party seeking such a change shall file a notice of the name and address of his choice of health care provider with the other party at least ten days before treatment from that health care provider begins * * * * This notice may be filed on or after the fiftieth day of the sixty-day period * * * *
>
> D. If a party objects to the choice of health care provider made pursuant to Subsection C of this section, then he shall file an objection to that choice pursuant to Subsection E of this section with a workers' compensation judge within three days from receiving the notice. He shall also provide notice of that objection to the other party. If the employer does not file his objection within the three-day period, then he shall be liable for the cost

of treatment provided by the worker's health care provider until the employer does file his objection and the workers' compensation judge has rendered his decision as set forth in Subsection F of this section * * * *

E. If the worker or employer disagrees with the choice of the health care provider of the other party at any time, including the initial sixty-day period, and they cannot otherwise agree, then he shall submit a request for a change of health care provider to a workers' compensation judge * * * *

F. The request shall state the reasons for the request and may state the applicant's choice for a different health care provider. The applicant shall bear the burden of proving to the workers' compensation judge that the care being received is not reasonable. The workers' compensation judge shall render his decision within seven days from the date the request was submitted. If the workers' compensation judge grants the request, he shall designate either the applicant's choice of health care provider or a different health care provider.

Worker was injured on February 10, 1991. Employer designated Dr. Peter Stern as worker's health care provider. On May 22, 1991, worker notified employer that he was designating Dr. Thorpe of Lovelace Medical Center as his treating physician and that his first appointment with the doctor was on May 30, 1991. Employer objected to this designation on June 24, 1991, and moved to strike worker's letter of May 22, 1991. A hearing was held June 28, 1991.

At the hearing, employer argued that the letter was deficient because it did not include the county of the accident; the nature of the injury; the name of the prior health care provider; the name, address and telephone number of the proposed new health care provider; and the specific language required by Rule WCA 91-1(VI). Employer also argued that its notice of objection to worker's selection of health care provider should not be treated as a request to change health care providers and instead that, after an objection was filed, worker was responsible for filing a request to change health care providers, and thus the burden of showing that the care being given by employer's doctor was unreasonable. Employer made no effort to submit evidence to support its argument that changing doctors would be detrimental to worker.

The judge found that worker had notified employer of his selection of a health care provider on May 22, 1991, and that employer had failed to meet its burden of proof that care from Dr. Thorpe was unreasonable. The judge therefore ordered that Dr. Thorpe would be worker's primary physician.

APPEALABILITY OF THE ORDER

As a threshold issue, we address whether the judge's order denying employer's request to change health care providers is a valid, appealable order. The general rule is:

> In deciding whether an order is final and appealable, the determinative question is whether there is anything remaining to be done or whether the trial court, within its power, has fully disposed of the case. [Citations omitted.]

Luevano v. Group One, 108 N.M. 774, 776, 779 P.2d 552, 554 (Ct.App.1989). In making this determination, this court looks to the substance, rather than the form, of the order, and gives the order a practical, rather than technical, construction. *Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 824 P.2d 1033 (1992); *Los Ranchos de Albuquerque v. Shiveley,* 110 N.M. 15, 791 P.2d 466 (Ct.App.1989).

In this case, worker had not yet filed a claim for benefits. Thus, the only proceedings before the WCA were the proceedings concerning the change of health care providers. As a result, the judge's order fully disposed of all issues between the parties that were brought before the judge. Additionally, the effect of holding that the judge's order denying employer's request to change health care providers is not final would be that the parties would never be entitled to review of the order. *Cf. Maitlen v. Getty Oil Co.,* 105 N.M. 370, 733

P.2d 1 (Ct.App.1987) (effect of ruling that a dismissal without prejudice on grounds of prematurity in a workers' compensation case is not final would be that worker would never be entitled to review of trial court's determination that he was receiving full benefits). We thus conclude that we have jurisdiction to consider this appeal. We express no opinion on the question of whether the order in this case would have been final and appealable if a claim for benefits was also pending before the WCA.

VALIDITY OF RULE WCA 91-1(VI)

Employer does not claim that the judge's ruling was arbitrary and capricious or unsupported by substantial evidence. Instead, employer attacks the validity of the judge's interpretation of the statute. Worker, on the other hand, argues that employer failed to preserve the issue of the validity of Rule WCA 91-1(VI) because it did not raise those arguments below. *See* SCRA 1986, 12-216; *Barnett v. Cal M, Inc.*, 79 N.M. 553, 445 P.2d 974 (1968); *State v. Gonzales*, 110 N.M. 218, 794 P.2d 361 (Ct.App.1990), *aff'd*, 111 N.M. 363, 805 P.2d 630 (1991). The principal purpose of the rule requiring a party to preserve error is to alert the trial judge to the claimed error and to accord the trial court an opportunity to correct the matter. *Madrid v. Roybal*, 112 N.M. 354, 815 P.2d 650 (Ct. App.1991). Although employer did not explicitly attack Rule WCA 91-1(VI) in the proceedings below, employer's proposed findings presented its interpretation of Section 52-1-49 in detail and contradicted the judge's interpretation, which was based on Rule WCA 91-1(VI). Under these circumstances, we conclude that employer's objections sufficiently raised the issue of the appropriate interpretation of Section 52-1-49, as reflected in Rule WCA 91-1(VI), to preserve the argument on appeal.

To determine whether Rule WCA 91-1(VI) is consistent with Section 52-1-49, we must interpret the statute. In doing so, we first summarize the relevant principles of statutory interpretation. The reviewing court's central concern is to determine and give effect to the intent of the legislature. *State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 749 P.2d 1111 (1988). In determining that intent, we look primarily to the language of the statute, *id.*, and give effect to the statute as written. *Zamora v. CDK Contracting Co.*, 106 N.M. 309, 742 P.2d 521 (Ct.App.1987). Unless the legislature indicates otherwise, we give the words of the statute their ordinary meaning. *State ex rel. Klineline v. Blackhurst.* When the statute is unambiguous, we will not resort to any other means of interpretation. *Security Escrow Corp. v. State Taxation & Revenue Dep't*, 107 N.M. 540, 760 P.2d 1306 (Ct.App.1988).

The WCA's regulations provide that "[a] party may, pursuant to statute, give notice of his or her intent to change from the initially selected health care provider to any other health care provider enumerated in Section 52-4-1 NMSA 1978, as amended. Such notices shall only be effective if they conform to Subsections (2) or (3) of this section." Rule WCA 91-1(VI)(C)(1). The party to whom notice is given may object to the notice and "[s]uch objection shall be deemed to be a Request for Change of Health Care Provider." Rule WCA 91-1(VI)(D)(1); *see also* Rule WCA 91-1(VI)(E)(2). Alternatively, "[a]t any time, either party may file a Request for Change of Health Care Provider with the Workers' Compensation Administration." Rule WCA 91-1(VI)(E)(1). "The party filing the Request for Change of Health Care Provider or filing an Objection to a Notice of Change of Health Care Provider bears the burden of proving that the care being received, or proposed to be received, is not reasonable." Rule WCA 91-1(VI)(E)(5).

Employer claims that the WCA's regulations and the judge incorrectly treated employer's objection to worker's selection of a health care provider as a request for change of health care provider, *see* Rule WCA 91-1(VI)(D)(1) and (E)(2), because, as employer interprets Section 52-1-49, it was actually worker who was requesting a change of health care provider. We disagree with employer's interpretation.

Section 52-1-49 establishes two methods for changing worker's health care provider.

Under both, the initial selection is made by either the employer or the worker. § 52–1–49(B). The selection is valid for sixty days after the date of the worker's injury. *Id.* After the sixty-day period expires, the party that did not make the initial selection can notify the other party of his choice of a health care provider. § 52–1–49(C). The party that made the initial selection can then object "pursuant to Subsection E." § 52–1–49(D). Alternatively, a request for change of health care provider can be filed at any time. § 52–1–49(E).

Employer argues that "[t]he effect of the filing of the objection [pursuant to Subsection D] by the initial selector is not indicated in the statute." This argument ignores the plain language of Subsection D, which states that the objection shall be filed "pursuant to Subsection E of this section." Subsection E states that a party objecting to the other's choice of health care provider can submit a request for change of health care provider at any time. Thus, an objection made under Subsection D is the same as a request for change of health care provider made under Subsection E. We hold that the judge's ruling (that he would treat employer's objection as a request for change of health care provider) and WCA Rule 91–1(VI)(D)(1), which provides that objections will be treated as requests for change of health care provider, both comply with the statute.

Employer next maintains that the judge incorrectly placed the burden on employer to prove that worker's selected physician was unreasonable. It argues that, by objecting to worker's selection of health care provider, employer was not requesting a change of health care provider but, rather, requesting that the same provider continue. Employer claims it was worker who wanted to change health care providers. Thus, according to employer's argument, if a request for change in health care providers had to be made, worker was responsible for doing so. Therefore, employer contends, the burden was on worker to prove that the doctor selected by employer was unreasonable. As we understand this argument, employer essentially desires to treat worker's notice to *it* (of worker's selection of a new doctor) as a request for change of health care provider or, alternatively, require worker to file a request to change health care providers once employer has objected. We do not believe this interpretation is supported by the language of the statute.

Section 52–1–49(B) states expressly that the initial selection of a worker's health care provider "shall be in effect during the first sixty days from the date the worker receives treatment from the initially selected health care provider." This language provides a definite time limit on the duration of the effectiveness of the initial selection, indicating that the initial selection does not continue indefinitely or until the worker demonstrates that the care being received is unreasonable, as employer urges. Rather, if an employer makes the initial selection, at the end of this sixty-day period the worker can select a health care provider "of his choice." § 52–1–49(B). Thus, a worker has unfettered discretion to choose his or her own physician at that time without considering the reasonableness of the existing care.

Section 52–1–49(D) places the burden of objecting to a party's notice of changing health care providers at the end of the initial sixty-day period on the party that initially chose worker's health care provider. If an employer fails to object within three days of receiving a notice of change of health care provider from a worker, the employer is liable for the treatment rendered by the worker's doctor. *See* § 52–1–49(D). The only way in which an employer can avoid paying for the care the worker receives from the new health care provider is to object within three days of receiving the notice. We believe this provision demonstrates the legislature's intent that a party's selection of a health care provider under Section 52–1–49(C) would result in an *automatic* replacement of the initially selected health care provider with the newly chosen one. The objecting party, by objecting, would basically be requesting a change to the originally selected health care provider, not opposing the other party's request for a change, as employer would

have us hold. We conclude that the judge correctly placed the burden of proving the unreasonableness of the care provided on the objecting party, which, in this appeal, was employer. Because the judge's interpretation of Section 52–1–49 was in accord with Rule WCA 91–1(VI), we further hold that the regulation is consistent with the statute.

Our interpretation of Section 52–1–49 is supported by the history of the statute. Before the section was amended in 1990, a worker had no right to participate in the selection of his treating physician, but only had the option of rejecting the selection made by the employer. *See* § 52–1–49(A) (1987 N.M. Laws ch. 235, § 21); *Bowles v. Los Lunas Schools,* 109 N.M. 100, 781 P.2d 1178 (Ct.App.1989). This placed New Mexico in the minority of jurisdictions in that the worker played no part in the selection of his doctor. *See* 2 Arthur Larson, *Workmen's Compensation Law,* § 61.12(a) (1989) [Larson] ("[u]nder most statutes the employee may choose his own physician, with the authorization of the administrative authority").

The legislature substantially rewrote Section 52–1–49 in 1990, and, in doing so, we believe, indicated an intent to change the existing law. *Cf. Martinez v. Research Park, Inc.,* 75 N.M. 672, 410 P.2d 200 (1965) (adoption of statutory amendments is evidence of intention to change existing law). Under Section 52–1–49, as presently written, both the worker and the employer have input into the selection of worker's health care provider, and either can object to the selection made by the other and obtain review of the selection. Thus, both the value of allowing the worker to have a doctor he trusts and the need to ensure that the care received by the worker is appropriate and reasonable are accommodated. *See* 2 Larson § 61.12(b). Employer's proposed interpretation of the statute would result in nullifying the legislature's intent. We thus reject it.

Because we hold that Rule WCA 91–1(VI) is consistent with Section 52–1–49, we reject employer's contentions that the regulation is not authorized and therefore void. *See* NMSA 1978, 52–5–4(A) (Repl.Pamp.1991) (director has authority to adopt reasonable rules and regulations, and, if not inconsistent with the law, the rules and regulations are binding on the administration of the Workers' Compensation Act). We likewise reject employer's claim that Rule WCA 91–1(VI) must be declared void for uncertainty because, when read with Section 52–1–49, it cannot be determined what the agency intended with a reasonable degree of certainty. A regulation is unconstitutional if it is so vague that persons of common intelligence must guess at its meaning and would differ in its application. *Kerr–McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n,* 98 N.M. 240, 244, 647 P.2d 873, 877 (Ct.App.1982). Employer's argument rests on a supposed inconsistency that we have held does not exist. Additionally, both Section 52–1–49 and Rule WCA 91–1(VI) state that there are two procedures for changing health care providers, that an objection to notice of change of health care provider will be treated as a request to change health care provider, and that the objecting party has the burden of showing that the proposed care is unreasonable. Because we are able to interpret the statute and the regulations with reasonable certainty, we hold that Rule WCA 91–1(VI) is constitutional.

DUE PROCESS CLAIM

Employer next argues that the regulations deny due process because the objector is not allowed to present evidence. Employer did not attempt to have evidence admitted at the hearing before the judge. Thus, the issue is not properly before us. However, even if the issue was properly before us, employer's argument must fail because the rule does indeed allow evidence to be presented. *See* Rule WCA 91–1(V)(A)(5) (hearing procedure allows for parties to present evidence).

SUFFICIENCY OF WORKER'S NOTICE

Employer contends that worker's notice was fatally defective because it did not provide all of the information required by Rule WCA 91–1(VI)(C)(4) and was not

given at least ten days before worker first saw the new physician, as required by Section 52–1–49(C). The judge found that worker's notice of change of health care provider was filed on May 22, 1991. This finding was substantially in conformance with employer's requested finding of fact 3.

It is true that worker's notice did not contain all of the information required by Rule WCA 91–1(VI). However, the rule did not apply to worker's notice because it was not effective until May 29, 1991, and worker's notice was given to employer on May 22, 1991, a week before. Therefore, worker's notice was governed by the statute, with which it substantially complied. Section 52–1–49(C) requires the notice to include the name and address of the new treating physician. Worker's letter informed employer that he was designating "Dr. Thorpe at Lovelace Medical Center" as his treating physician. This information adequately informed employer of the name and location of worker's doctor.

Employer concedes that the regulations were not in effect at the time worker sent his notice, but argues that worker should have complied in any event because the regulations had been published before that time. However, employer cites no authority for this proposition. Issues not supported by cited authority will not be reviewed on appeal. *See* SCRA 1986, 12–213(A)(3) (contentions must be supported by citation to authority); *In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984).

Employer also argues that worker should be precluded from selecting a new health care provider because worker's notice to employer was sent eight days before worker's first appointment with Dr. Thorpe, rather than ten days before, as required by Section 52–1–49(C). Although we agree that worker did not comply with the ten-day notice requirement, employer has not shown how it was prejudiced by this fact. It could still have objected within three days, as provided for by Section 52–1–49(D), and thereby notified worker of its unwillingness to pay for care received from worker's new doctor. Instead, employer failed to file an objection until nearly a month later. Under the express language of 52–1–49(D), if an employer does not object within three days of receiving the notice, the employer is liable for the cost of treatment by the worker's health care provider until the employer does object and the judge renders a decision. The statute does not state that, in failing to provide notice a full ten days before the first appointment, a worker relinquishes his right to select his own physician. Consequently, we conclude that failure to comply with the ten-day notice requirement did not preclude worker from choosing a new health care provider.

JURISDICTION OF THE WORKERS' COMPENSATION JUDGE

Finally, employer argues that, because no request to change health care providers had been filed by either employer or worker, the judge was without jurisdiction to designate a health care provider. As we understand the argument, employer contends the statute did not authorize the judge to designate a health care provider. The statute granted the judge jurisdiction to hear the objection and expressly provided that the judge should make a decision "as set forth in Subsection F." § 52–1–49(D). That subsection states that, if the judge should grant the request, "he shall designate either the applicant's choice of health care provider or a different health care provider." § 52–1–49(F). We therefore conclude that the judge had authority to designate a health care provider.

CONCLUSION

In summary, we affirm the judge's decision designating Dr. Thorpe as worker's health care provider, based on each of the reasons noted above.

IT IS SO ORDERED.

MINZNER and CHAVEZ, JJ., concur.

832 P.2d 790

In the Matter of Petition for Hearing On Recall of School Board Members.

CAPS and Connie Sharp, Petitioners-Appellants,

v.

BOARD MEMBERS: Ruben B. Alvarado, Jeannette H. Dickerson, Patsy A. Duran and Jose V. Frietze, Respondents-Appellees.

No. 20139.

Supreme Court of New Mexico.

May 28, 1992.

Norman E. Todd, Las Cruces, for appellants.

Simons, Cuddy & Friedman, Charlotte H. Hetherington, Santa Fe, for appellee.

OPINION

FRANCHINI, Justice.

This appeal challenges a district court's decision that recall petitions alleging misfeasance in office by four members of a local school board did not state facts sufficient to allow the recall process to continue. On appeal, petitioners argue that: (1) the district court applied the incorrect definition of misfeasance in reaching the determination that the facts alleged in the petitions were insufficient to allow the recall process to continue; and (2) the petitions contained sufficient facts to support charges of misfeasance in office. We affirm the district court's determination.

I

In August 1991, Appellants Citizens Advocating Public Safety (CAPS) submitted petitions to the Dona Ana County Clerk seeking to recall four members of the Las Cruces Public Schools Board of Education, pursuant to the Local School Board Member Recall Act, NMSA 1978, Sections 22-7-1 to -16 (Repl.Pamp.1989) (the Act). The petitions alleged misfeasance in office due to the board members' choice of a site for a new high school. Specific facts recited in support of the charges of misfeasance included allegations that the site was adjacent to a main artery of travel in Las Cruces, existing city utilities did not extend to the site, and since the site was predominately outside the city limits, fire protection would be provided by volunteer community fire departments.

Upon receipt of the petitions, in compliance with Section 22-7-9.1(A) of the Act, the county clerk filed an application for hearing in the district court requesting the court's determination of whether sufficient facts existed to allow CAPS to continue with the recall process. For purposes of the hearing, the district court accepted all of the facts CAPS alleged in the petitions as true, and after hearing the matter in September 1991, determined that the petitions failed to state sufficient facts to allow CAPS to proceed with the recall process.

II

In New Mexico, the constitutional standard for recall of local school board members requires that "[a] petition for a recall election must cite grounds of malfeasance or misfeasance in office or violation of the oath of office, by the members concerned." N.M. Const. art. XII, § 14. The parties do not dispute the proposition, and we agree, that our constitution provides for recall for cause, and not recall at will. *See In re Recall of Estey,* 104 Wash.2d 597, 707 P.2d 1338, 1340-41 (1985) (distinguishing between recall for cause and recall at will). However, neither the constitution nor the statutory procedures enacted to implement the constitutional mandate define the terms of the articulated standard.

■ In determining the meaning of the word misfeasance, the trial court found guidance in this court's opinion in *Arellano v. Lopez,* 81 N.M. 389, 467 P.2d 715 (1970). Although *Arellano* deals with the definition of malfeasance, misfeasance is discussed by way of contrast and comparison.

> "Misfeasance is sometimes loosely applied in the sense of malfeasance. *Appropriately used, misfeasance has reference to the performance by an officer in his official capacity of a legal act in an improper or illegal manner,* while malfeasance is the doing of an official act in an unlawful manner. *Misfeasance is literally a misdeed or a trespass,* while nonfeasance has reference to the neglect or refusal without sufficient excuse to do that which was an officer's legal duty to do."

Id. at 392, 467 P.2d at 718 (emphasis added) (quoting *State ex rel. Hardie v. Coleman,* 115 Fla. 119, 155 So. 129, 132 (1934)). With regard to discretionary acts, *Arellano* further qualifies the definition of malfeasance in that if the act taken by a public official "is discretionary[,] it must have been done with an improper or corrupt motive." *Id.,* 81 N.M. at 392, 467 P.2d at 718. For purposes of this appeal, it is undisputed that the selection, by a local school board, of a site for a new school is a discretionary act within that board's scope of authority. Following *Arellano* with respect to discretionary acts, the trial court concluded that discretionary acts must be done with improper or corrupt motive to rise to the level of misfeasance in office.

Initially, CAPS urges this court to interpret misfeasance to mean " 'the improper doing of an act an officer might lawfully do; or, in other words, it is the performance of a duty in an improper manner.' " *Bocek v. Bayley,* 81 Wash.2d 831, 505 P.2d 814, 817 (1973) (quoting *State v. Miller,* 32 Wash.2d 149, 201 P.2d 136, 138 (1948)), *overruled by Cole v. Webster,* 103 Wash.2d 280, 692 P.2d 799, 804 (1984). This definition was interpreted to include "action taken which is not in the best interests of the majority of the students and constituents of the school district." *Bocek,* 505 P.2d at 817. This broad interpretation conceivably encompasses recall as a response to all discretionary actions taken by a public official, regardless of motive or motivation. We reject this interpretation as incongruous with New Mexico's constitutional standard of recall for cause.

Cole, relying in part on its companion case *Chandler v. Otto,* 103 Wash.2d 268, 693 P.2d 71 (1984), overrules *Bocek* and limits the right of recall for discretionary acts "insofar as those acts are an appropriate exercise of discretion." *Cole,* 692 P.2d at 802. Thus, *Cole* enunciates an abuse of discretion standard and explains that "[a] clear abuse of discretion may be shown by demonstrating the discretion was exercised in a manner which was manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Id.* CAPS ini-

tially relies on the broad construction of misfeasance in *Bocek,* and fails to note that *Cole* specifically overruled *Bocek.* However, CAPS does recognize that *Cole* limits *Bocek* by adopting an abuse of discretion standard and appears to argue alternatively that we should adopt such a standard.

The *Bocek* definition of misfeasance CAPS propounds is in accord with the definition *Arellano* suggests inasmuch as both identify misfeasance as the performance by a public officer, in his official capacity, of an act the officer might lawfully do, in an improper manner. *Arellano* specifically adds that misfeasance also contemplates performance of a legal act in an illegal manner. The tension between the definition the trial court formulated based on *Arellano,* and the definition CAPS suggests flows from *Bocek,* or alternatively from *Cole* and *Chandler,* arises in the application of misfeasance as a ground for recall where the acts in question are discretionary.

Reading *Arellano* as the trial court did, when a public officer has a right to perform an act which is discretionary, the manner in which the discretion is exercised does not rise to the level of misfeasance unless the discretion is exercised with an improper or corrupt motive. *Bocek* would allow recall proceedings to be instituted for virtually any discretionary act. Alternatively, *Cole* and *Chandler* would allow recall on the basis of discretionary acts where those acts constitute an abuse of discretion. Having previously rejected *Bocek,* we proceed to consider only the abuse of discretion standard as opposed to requiring a showing of an improper or corrupt motive.

CAPS submits that the recall provisions exist not simply to remove office holders who have violated the law or committed an illegal act, but to exercise control over elected officials who have committed an act which is arbitrary, capricious, and an abuse of discretion. Such a standard provides a lower threshold to allow a recall to proceed than does a standard requiring the showing of an improper or corrupt motive. We find this view of the recall provisions dangerously close to allowing recall at will rather than the constitutionally mandated standard of recall for cause. In addition, CAPS ignores the fact that the trial court's reading of *Arellano* does not limit exercise of the right to recall for misfeasance to illegal acts, but rather requires the showing of an improper or corrupt motive in the performance of a legal act in an improper or illegal manner.

While the right to recall school board members is of paramount importance as a guarantee to the electorate of a mechanism providing for the removal of board members whose acts are improper or illegal, the standard applied to justify recall should be sufficiently limited to avoid employing recall as a means of harassment or for purely political or personal purposes. As this court stated in *Arellano,* "malfeasance should never be inferred or elected officials removed from the office to which the public has elected them without strong proof of wilful and knowing wrongdoing." *Id.,* 81 N.M. at 393, 467 P.2d at 719. This observation is equally compelling with regard to misfeasance. We adopt the definition of misfeasance articulated in *Arellano* as discussed herein, and further hold that conduct constituting misfeasance must evince an improper or corrupt motive.

III

Given our resolution of the first issue, we need only deal summarily with CAPS' contention that the petitions contained sufficient facts to support a charge of misfeasance in office. It is clear from the record before us that the issue of the location of a new high school in Las Cruces was controversial. The record also indicates that the school board engaged in a site selection process spanning approximately two years, including consideration of fifteen sites, and a myriad of relevant factors. Moreover, we find nothing in the record indicating that any of the challenged board members acted out of an improper or corrupt motive. We agree with the district court that the petitions do not state sufficient facts to allow CAPS to continue with the recall process.

The judgment of the district court is affirmed.

IT IS SO ORDERED.

BACA and FROST, JJ., concur.

832 P.2d 793

STATE of New Mexico, Plaintiff-Appellee,

v.

Roger N. BISHOP, Defendant-Appellant.

No. 12836.

Court of Appeals of New Mexico.

March 18, 1992.

Certiorari Denied May 19, 1992.

Tom Udall, Atty. Gen., Margaret McLean, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Michael E. Vigil, Marchiondo, Vigil & Voegler, P.A., Albuquerque, for defendant-appellant.

OPINION

ALARID, Chief Judge.

This is an interlocutory appeal by defendant of the district court's order denying his motion in limine to exclude the results of certain breath tests administered to defendant. The sole issue raised by this case is whether the district court erred in refusing to give collateral estoppel effect to the findings made in a previous license revocation appeal to district court. We affirm.

FACTS

Defendant was involved in an automobile accident resulting in the deaths of four people and the injury of three others. After the accident, breath tests were administered to defendant. The results of the tests showed blood alcohol contents of .10, .12, and .12. Defendant was subsequently charged with four counts of vehicular homicide, three counts of causing great bodily injury by vehicle, one count of driving while under the influence of intoxicating liquor, and one count of reckless driving. The state also initiated driver's license revocation proceedings.

Following the Motor Vehicle Division hearing, defendant's license was revoked for ninety days. Defendant appealed the administrative revocation to district court. On appeal, the district court relied solely on the record made at the administrative hearing to reach a conclusion with no new evidence or testimony being presented. This time, however, the state was represented by a special assistant attorney general. Among the findings made by the district court, it found that the "rules and regulations of the Scientific Laboratory Division require that the subject be observed continuously for a period of twenty minutes to insure that the subject does not ingest articles into his mouth, regurgitate, or smoke." The district court further found that the purpose of that requirement "is to ensure a valid test." In addition, the district court found that defendant was not observed for twenty minutes before the breath tests were administered. The district court then concluded that the "breath test given to [defendant] was not administered pursuant to the provisions of the Implied Consent Act because [defendant] was not observed continuously for a period of twenty minutes before the test was administered as required by the regulations adopted by the Scientific Laboratory Division." Based solely on a review of the administrative hearing record, the district court reversed the revocation of defendant's driver's license.

During the subsequent criminal proceedings, defendant filed a motion in limine to exclude the results of the breath tests. The basis of defendant's motion was that the state was precluded by collateral estoppel from relitigating the issue of whether the breath tests were performed pursuant to the provisions of the Implied Consent Act. Defendant further argued that, because collateral estoppel required the district court to accept the previous court's conclusion that the breath tests were not performed pursuant to the provisions of the Implied Consent Act, the state was also precluded from introducing the breath tests results in this case. The district court denied defendant's motion because it did not believe collateral estoppel applied, but it certified its order for interlocutory appeal.

DISCUSSION

This case raises a matter of first impression in New Mexico. Specifically, defendant asks us to decide if factual or legal determinations made in a prior civil proceeding are binding on the parties in a later criminal proceeding through the application of collateral estoppel. The term "crossover collateral estoppel" has been used to describe the application of collateral estoppel from a civil proceeding to a criminal proceeding, or vice versa. *See* Susan W. Brenner, *"Crossing Over:" The Issue–Preclusive Effects of a Civil/Criminal Adjudication Upon a Proceeding of the Opposite Character*, 7 N.Ill.U.L.Rev. 141 (1987).

Other jurisdictions have allowed crossover collateral estoppel from a civil administrative proceeding to a criminal proceeding under certain circumstances. *See, e.g., People v. Sims*, 32 Cal.3d 468, 186 Cal.

Rptr. 77, 651 P.2d 321 (1982). Defendant suggests that cross-over collateral estoppel has been applied from a civil case to a criminal case in New Mexico. *See State ex rel. Sofeico v. Heffernan,* 41 N.M. 219, 67 P.2d 240 (1936). *But see Caristo v. Sullivan,* 112 N.M. 623, 818 P.2d 401 (1991) (habeas corpus proceedings are no longer properly characterized as civil proceedings). We assume, without deciding, that under the proper circumstances cross-over collateral estoppel from a civil proceeding to a criminal proceeding is permitted in New Mexico.

This case is distinguishable from the cases cited above because the underlying civil proceeding at issue in this case was an administrative license revocation hearing. The United States Supreme Court has recognized that factual determinations made in an administrative hearing may be entitled to collateral estoppel effect in a subsequent judicial proceeding. *See United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966). In *People v. Sims,* the California Supreme Court held that administrative determinations may be entitled to collateral estoppel effect in a subsequent criminal proceeding under certain circumstances. The circumstances vary widely. *See id.,* 186 Cal.Rptr. at 84, 651 P.2d at 328. We again assume, without deciding, that under the appropriate circumstances, administrative decisions can be given collateral estoppel effect in a later criminal action. However, the traditional requirements for collateral estoppel must still be satisfied.

Collateral estoppel bars the "relitigation of ultimate facts or issues actually and necessarily decided in a prior suit." *Silva v. State,* 106 N.M. 472, 474, 745 P.2d 380, 382 (1987). For collateral estoppel to apply, the following elements must be present: (1) the party against whom collateral estoppel is asserted must be the same party or be in privity with the party to the original action; (2) the subject matter or the cause of action in the two suits must be different; (3) the ultimate facts or issues must have been actually litigated; and, (4) the issue must have been necessarily determined. *Reeves v. Wimberly,* 107 N.M. 231, 755 P.2d 75 (Ct.App.1988). However, even if the elements of collateral estoppel are otherwise met, the district court may still determine that the application of collateral estoppel would be fundamentally unfair and would not further the aim of the doctrine, which is to prevent endless relitigation of issues. *State v. Silva; Reeves v. Wimberly.* Fundamental fairness requires that the party against whom collateral estoppel is asserted be given a full and fair opportunity to litigate. *State v. Silva.* And it is the district court that is in the best position to decide whether the party against whom the doctrine is used has had a full and fair opportunity to litigate. *Id.*

The district court determined that it would be patently unfair to the state to bind it with determinations made in a prior license revocation hearing. The court's conclusion was based primarily on the fact that the license revocation hearing officer is not a judicial officer and the district attorney's office was not represented during the license revocation hearing. As we stated, it is the district court that is in the best position to determine whether it would be fundamentally unfair to apply collateral estoppel and, thus, whether the state had a full and fair opportunity to litigate during the license revocation hearing. *See State v. Silva.* Our review of the district court's order indicates that it was concerned that the state did not have a full and fair opportunity to litigate during the administrative license revocation hearing. The state simply was not represented during this hearing. Based on these facts, we decline to disturb the district court's determination.

Other jurisdictions have echoed the district court's concerns that the state may not have had a full and fair opportunity to litigate issues during a license revocation proceeding, and it would be unfair to preclude the state from litigating such issues. *See People v. Moore,* 138 Ill.2d 162, 149 Ill.Dec. 278, 561 N.E.2d 648 (1990); *People v. Lalka,* 113 Misc.2d 474, 449 N.Y.S.2d 579 (City Ct.1982). *See also State v. Walker,* 159 Ariz. 506, 768 P.2d 668 (Ct.App.1989)

(prior civil traffic violations hearing); *Lucido v. Superior Court,* 51 Cal.3d 335, 272 Cal.Rptr. 767, 795 P.2d 1223 (1990) (en banc) *cert. denied,* — U.S. —, 111 S.Ct. 2021, 114 L.Ed.2d 107 (1991) (involving prior probation revocation hearing); *State v. Fritz,* 204 Conn. 156, 527 A.2d 1157 (1987) (involving prior department of consumer protection administrative hearing); *State v. Dupard,* 93 Wash.2d 268, 609 P.2d 961 (1980) (en banc) (prior probation revocation hearing). We agree that the summary nature of the typical license revocation hearing may make determinations from such a hearing inappropriate for the application of collateral estoppel. *See People v. Moore; People v. Lalka.* Moreover, because the more serious issues of criminal guilt or innocence are not at stake in an administrative hearing, the state may lack the incentive to fully litigate issues. *Id.; see also State v. Walker; Lucido v. Superior Court.* Allowing defendant to apply collateral estoppel in this case would unnecessarily force the state to be fully represented during future license revocation hearings. License revocation hearings would, in essence, become full-blown trials at which every possible issue regarding the defendant's actions would have to be fully litigated by the state. Given the inherent limitations of administrative adjudications, and the deference we must give to a district court's determination that a party did not have a full and fair opportunity to litigate, *Silva v. State,* we hold that the district court did not err in deciding that collateral estoppel was inapplicable in this case.

Moreover, we believe there are good policy reasons for not applying collateral estoppel. First, if every license revocation hearing carries with it potential collateral estoppel impact on a subsequent criminal action, the state may feel compelled to intervene in every administrative action to effectively protect its interests in some future criminal proceeding. The net effect would be to slow down what should be a summary administrative proceeding designed to handle license revocation matters quickly. *See State v. Walker; Lucido v. Superior Court; People v. Moore; People v. Lalka.* In addition, we agree with those courts that recognize that the integrity of our judicial system requires adjudications of criminal guilt or innocence to be made in a judicial setting, not in an administrative hearing. *Id.; see also People v. Berkowitz,* 50 N.Y.2d 333, 428 N.Y.S.2d 927, 406 N.E.2d 783 (1980) (policy interest of making the correct decision in a criminal trial outweighs the collateral estoppel interest of saving judicial resources).

Despite defendant's urging to the contrary, our review of the administrative hearing does not indicate that the hearing officer acted so much like a prosecutor that the state was in essence represented by counsel. Moreover, the fact that the state was represented by a special assistant attorney general during defendant's district court appeal of the administrative decision carries little weight. By that point in the proceeding, the underlying factual record had been made at the administrative hearing, at which the state was unrepresented. *See In re Gober,* 85 N.M. 457, 513 P.2d 391 (1973) (the district court appeal is confined to the record of the administrative proceeding and is not a trial de novo). We note that another California case relied upon by defendant, *Gonzalez v. Municipal Court,* 196 Cal.App.3d 331, 242 Cal.Rptr. 60 (1987), was ordered not officially published by the California Supreme Court and therefore has no precedential value. *See* Cal.Rules of Court, Rule 977 (West 1991).

■ We also reject defendant's contention that this case raises matters of double jeopardy. The license revocation proceeding did not place defendant in jeopardy. *See United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984); *Ellis v. Pierce,* 230 Cal.App.3d 1557, 282 Cal.Rptr. 93 (1991). Thus, double jeopardy is not at issue here, and only traditional notions of collateral estoppel are properly at issue. *Id.* Accordingly, for the foregoing reasons, we affirm the district court's decision not to apply collateral estoppel in this case. Based on our disposition of this case, we

need not address the other arguments raised by the parties.

IT IS SO ORDERED.

APODACA and HARTZ, JJ., concur.

832 P.2d 797

Frank JOHNSON, as Personal Representative of the Estate of Marjorie Johnson, Deceased, Plaintiff–Appellant,

v.

SEARS, ROEBUCK & COMPANY; Bechtel Constructors Corporation; Cornel Dumitriu, M.D.; Blood Services, Inc., d/b/a Blood Services of New Mexico; Albuquerque Plasma Corporation; United Blood Services; and Yale Blood Plasma, Defendants,

and

St. Joseph Hospital, Inc., Defendant–Appellee.

No. 11836.

Court of Appeals of New Mexico.

April 1, 1992.

Certiorari Denied May 21, 1992.

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

D. James Sorenson, Sorenson & Schutte, P.C., Albuquerque, for defendant-appellee St. Joseph Hosp., Inc.

OPINION

MINZNER, Judge.

Plaintiff, as personal representative of the estate of Marjorie Johnson (Johnson), appeals the district court's dismissal of his claims against St. Joseph Hospital (the hospital), based on the hospital's failure to obtain Johnson's informed consent prior to giving her a blood transfusion. Because we believe that the district court correctly determined that plaintiff's complaint failed to state a claim for which relief can be granted against the hospital, we affirm.

Johnson had a history of urinary tract infections. On January 8, 1985, after suffering from severe symptoms, Johnson underwent bladder suspension surgery and a hysterectomy at the hospital. The day after the surgery, Dr. Dumitriu, who had performed the bladder suspension surgery, ordered that Johnson receive one unit of packed red cells (whole blood with the plasma removed), because he was concerned that she was developing septic shock. The blood was transfused by nurses at the hospital. Dr. Dumitriu failed to obtain informed consent from Johnson, and the nurses neither obtained her consent themselves nor determined whether or not Dr. Dumitriu had done so.

A few months after surgery, Johnson developed classic hepatitis symptoms, and test results indicated that she had developed non-A, non-B hepatitis, which was probably transfusion-induced. During the next year, Johnson developed hepatic hypertension and esophageal varices, which were contributing causes of her death.

Plaintiff initially sued Sears and its construction company for personal injuries Johnson suffered in a fall at the Coronado Sears store on September 26, 1984. Later, he amended his complaint to add claims against Dr. Dumitriu, the hospital, and various blood suppliers for malpractice and negligence arising from the blood transfusion following the January 1985 surgery. Sears and its construction company were dismissed from the case. On the morning of trial, the court dismissed plaintiff's complaint against the hospital for failure to state a claim.

In his docketing statement, plaintiff characterized his claims against the hospital as including both negligence and battery claims. However, plaintiff's brief only addresses the issue of negligence. Issues raised in the docketing statement but not argued in the brief-in-chief are considered abandoned. *State v. Vogenthaler*, 89 N.M. 150, 152, 548 P.2d 112, 114 (Ct.App.1976).

Our task, in reviewing the dismissal of plaintiff's complaint for failure to state a claim upon which relief may be granted, *see* SCRA 1986, 1–012(B)(6), is to " 'accept as true all facts well pleaded and question only whether the plaintiff might prevail under any state of facts provable under the claim.' " *California First Bank v. State*, 111 N.M. 64, 66, 801 P.2d 646, 648 (1990) (quoting *Gomez v. Board of Educ.*, 85 N.M. 708, 710, 516 P.2d 679, 681 (1973)). The record indicates that by the time of the hearing, the question of the hospital's liability had narrowed to whether it owed Johnson a duty to obtain informed consent or to determine that Dr. Dumitriu had done so.

In order for plaintiff to prevail at trial against the hospital on the facts alleged in his amended complaint, he must first show that the hospital owed Johnson a duty. Negligence is predicated on the existence of a duty owed to a particular plaintiff, and the existence of a duty is a question of law for the court to decide. *Schear v. Board of County Comm'rs*, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984). The analysis of duty focuses on foreseeability, that is, whether a particular plaintiff was within the zone of danger created by the defendant's actions. *Calkins v. Cox Estates*, 110 N.M. 59, 61, 792 P.2d 36, 38 (1990).

It is undisputed that the hospital employed the nurses who performed the transfusion. Plaintiff has not alleged that the hospital employed Dr. Dumitriu. Based on facts similar to those pled in this case, this court has determined previously that the hospital had no duty to obtain Johnson's informed consent before transfusing her. *See Cooper v. Curry*, 92 N.M. 417, 420, 589 P.2d 201, 204 (Ct.App.1978). In *Cooper*, we held that a hospital had no duty to obtain a patient's informed consent to a surgical procedure ordered by a non-employee physician. We reasoned that imposing such a duty would interfere unnecessarily with the physician-patient relationship.

Plaintiff attempts to distinguish *Cooper* by arguing that in this case the nurses actually performed the transfusion and, unlike the admitting clerk in *Cooper*, had the necessary knowledge and training to ex-

plain and discuss with Johnson the risks inherent in a transfusion. While it is true that the facts of this case are distinguishable, the distinction does not alter the underlying policy of *Cooper's* holding. Placing a duty of obtaining a patient's informed consent to procedures ordered by a physician but performed by hospital staff would unnecessarily interfere with the physician-patient relationship.

Although a hospital employee has the necessary skill and expertise to perform a procedure for which the employee has been trained, the employee does not necessarily have the requisite knowledge of a particular patient's medical history, diagnosis, or other circumstances which would enable the employee to fully disclose all pertinent information to the patient. *See* SCRA 1986, 13–1104B (Repl.1991) (the standard to determine whether a patient was reasonably informed before he or she gave consent is measured by what reasonably well-qualified doctors under similar circumstances would have disclosed to a similarly situated patient). Without such knowledge, an employee's explanation of the risks and benefits of a procedure could be incomplete and might emphasize the risks inherent in any procedure without adequately describing the benefits and the specific reasons for which the physician ordered the procedure. *See Parr v. Palmyra Park Hosp., Inc.,* 139 Ga.App. 457, 228 S.E.2d 596, 598 (1976). The physician is uniquely qualified through education and training, and as a result of his or her relationship to the patient, to determine the information that the particular patient should have in order to give an informed consent. *See Kershaw v. Reichert,* 445 N.W.2d 16, 17 (N.D.1989).

Plaintiff also argues that *Cooper's* holding should be limited or overruled because it no longer reflects current informed consent law. Moreover, plaintiff contends that the applicable standard of care, as shown by the policies of similar hospitals in similar circumstances, is for hospitals to ensure that informed consent has been obtained prior to performing any procedure on a patient.

Duty is a concept that constantly changes to mirror changes in social conditions. *Wilschinsky v. Medina,* 108 N.M. 511, 513, 775 P.2d 713, 715 (1989). However, in spite of the changing nature of medical care and the changing nature of a hospital's role in providing that care, *Cooper* continues to represent the majority rule, which is that, absent special circumstances not alleged to have existed in this case, hospitals have no duty to obtain informed consent for a procedure ordered by a non-employee physician and performed by hospital employees. *See Howell v. Spokane & Inland Empire Blood Bank,* 114 Wash.2d 42, 785 P.2d 815 (1990) (en banc) (Washington's informed consent statute did not create an independent duty requiring a hospital to intervene in the physician-patient relationship and obtain its own informed consent from a patient prior to transfusing, citing *Cooper* and cases from other jurisdictions); *see also Pauscher v. Iowa Methodist Medical Ctr.,* 408 N.W.2d 355 (Iowa 1987) (directed verdict properly granted for hospital because a hospital has no duty to inform patients of matters at the heart of the doctor-patient relationship); *Kershaw v. Reichert* (a hospital generally has no duty to obtain an informed consent from a patient; court affirmed the dismissal of suit against hospital for its failure to obtain informed consent).

In addition, *Cooper* appears to have decided that if a hospital has no duty to obtain informed consent, it has no duty to ensure that someone else has done so. 92 N.M. at 419, 589 P.2d at 203. That decision makes sense, because there would be little reason to impose a duty to ensure that someone else had obtained consent if there was no corresponding duty to advise the patient of relevant, relative risks and benefits or otherwise obtain an informed consent upon determining that he or she had not yet given one. In fact, one of the cases on which plaintiff relies appears to equate the two duties. *See Campbell v. Pitt County Memorial Hosp., Inc.,* 84 N.C.App. 314, 352 S.E.2d 902 (1987), *aff'd by an equally divided court,* 321 N.C. 260, 362 S.E.2d 273 (1987) (indicating that the hospi-

tal had a duty through its nurses to obtain the informed consent of a mother to a vaginal delivery of a breech baby or to ensure that someone else had done so).

Courts in other jurisdictions, in fact, support the position this court apparently adopted in *Cooper*. They have held that, under similar circumstances, a hospital has no duty to ensure that the physician obtained an informed consent. *See, e.g., Petriello v. Kalman,* 215 Conn. 377, 576 A.2d 474 (1990) (hospital had no duty to determine whether the patient had consented to a surgical procedure; physician alone had the responsibility to obtain informed consent); *Pauscher v. Iowa Methodist Medical Ctr.* (hospital has no duty to inform patient of risks involved with surgery or to adopt policies that allow physicians to practice in hospital only if they have obtained patient's consent); *Cross v. Trapp,* 170 W.Va. 459, 294 S.E.2d 446 (1982) (hospital owes no duty to obtain consent for surgery or ensure physician has obtained consent unless treating physician is hospital's agent); *cf. Pickle v. Curns,* 106 Ill.App.3d 734, 62 Ill.Dec. 79, 435 N.E.2d 877 (1982) (hospital has no duty to ensure staff physicians always perform duty of due care to each patient).

We recognize that in some cases hospitals have been held liable for a physician's negligence under a corporate negligence theory. *See, e.g., Cooper v. Curry,* 92 N.M. at 420, 589 P.2d at 204 (corporate negligence doctrine has been basis for imposing liability on hospitals for negligence of physicians, based on hospital's own failure to properly oversee the treatment of its patients); *Darling v. Charleston Community Memorial Hosp.,* 33 Ill.2d 326, 211 N.E.2d 253 (1965) (court found that the hospital owed its patient a duty to properly oversee the work of its staff and physicians), *cert. denied,* 383 U.S. 946, 86 S.Ct. 1204, 16 L.Ed.2d 209 (1966). However, we do not understand plaintiff's amended complaint to have alleged facts that would support liability under that theory. Most jurisdictions have not imposed such a duty on similar facts. *See generally Howell v. Spokane & Inland Empire Blood Bank,* 785 P.2d at 822 (doctrine of corporate negligence does not encompass a claim for lack of informed consent absent unusual circumstances); *but cf. Magana v. Elie,* 108 Ill.App.3d 1028, 64 Ill.Dec. 511, 439 N.E.2d 1319 (1982) (under the corporate negligence doctrine a hospital may have a duty to require physician who uses its facilities to advise a patient of risks associated with a procedure). Plaintiff's reliance on *Campbell* is misplaced. *Campbell* has no precedential value under North Carolina law. *See id.,* 362 S.E.2d at 276 (the decision "stands without precedential value"). In addition, we believe Judge Orr's dissent in *Campbell* is more persuasive under North Carolina law and is more in line with our own law. *Campbell v. Pitt County Memorial Hosp., Inc.,* 352 S.E.2d at 912–14. *Magana* appears to be inconsistent with New Mexico law because it appears that the court held the existence of the duty could not be established as a matter of law. 64 Ill.Dec. at 514, 439 N.E.2d at 1322. *See generally Schear v. Board of County Comm'rs,* 101 N.M. at 672, 687 P.2d at 729 (existence of duty is a question of law, not fact).

We conclude that *Cooper* continues to reflect the majority rule and better-reasoned position on the issue of whether a hospital has a duty to ensure that someone else has obtained an informed consent, as well as the issue of whether a hospital has a duty to obtain an informed consent. We are not persuaded on these facts that *Cooper* should be limited or overruled. We hold that *Cooper* controls the disposition of this case, and we conclude that under *Cooper* the district court properly granted the hospital's motion to dismiss the amended complaint. Therefore, we affirm the district court's order dismissing plaintiff's claim against the hospital with prejudice.

IT IS SO ORDERED.

APODACA and PICKARD, JJ., concur.

832 P.2d 801

STATE of New Mexico, Plaintiff-Appellant,

v.

James RICHARDSON, Defendant-Appellee.

No. 13195.

Court of Appeals of New Mexico.

April 3, 1992.

Certiorari Denied May 13, 1992.

Tom Udall, Atty. Gen. and Joel K. Jacobsen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

A.J. Olsen, Hennighausen & Olsen, Roswell, for defendant-appellee.

OPINION

APODACA, Judge.

The state appeals the district court's order dismissing the state's complaint against defendant. Defendant was charged with driving under the influence of intoxicating liquor (a criminal charge commonly referred to by the acronym DWI, which we also use in this opinion to describe the charge) in violation of NMSA 1978, Section 66–8–102(A) (Cum.Supp.1991) (the DWI statute). The specific issue we address on appeal is whether a farm tractor with a mower attachment is a "vehicle" under the language of the DWI statute, which is a part of the Motor Vehicle Code, NMSA 1978, Sections 66–1–1 through 66–12–23 (the Code). We answer this question affirmatively and therefore reverse the district court's dismissal order.

BACKGROUND

On August 27, 1990, defendant was operating a John Deere tractor with an attached rotary mower. Defendant was mowing weeds on the south side of a non-paved roadway maintained by the county. A dispute exists with respect to whether at least one wheel of the tractor was in the traffic lane of the road, a fact we consider inconsequential to our disposition. While operating the tractor, defendant unknowingly snagged a fence, dragged it, and caused a mailbox attached to the fence to be uprooted. A short time later, defendant was stopped by a sheriff's deputy. Defendant had difficulty dismounting the tractor and had to be helped by the deputy. The deputy detected a strong odor of alcohol. Defendant told the deputy he had consumed approximately ten beers. Defendant was convicted in the magistrate court of DWI. On appeal to the district court, defendant moved for dismissal on the basis that a farm tractor is not a vehicle under the DWI statute. The district court agreed and granted defendant's motion. This appeal followed.

DISCUSSION

The DWI statute states that "[i]t is unlawful for any person who is under the influence of intoxicating liquor to drive *any vehicle* within this state." § 66–8–102(A) (emphasis added). Additionally, the Code elsewhere defines the term "vehicle" as "every device in, upon or by which any person or property is or may be transported or drawn upon a highway, including any frame, chassis or body of any vehicle or motor vehicle, except devices moved exclusively by human power or used exclusively upon stationary rails or tracks." NMSA 1978, § 66–1–4.19(B) (Cum.Supp.1991). The Code also defines the more-limited term "motor vehicle" as "every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from batteries or from overhead trolley wires, but not operated upon rails." § 66–1–4.11(I) (Cum.Supp.1991).

In addressing the question raised in this appeal, our primary focus is to give effect to the intention of the legislature. *See Arnold v. State*, 94 N.M. 381, 610 P.2d 1210 (1980). In doing so, we examine the language used in the relevant statutes. *See State v. Roland*, 90 N.M. 520, 565 P.2d 1037 (Ct.App.1977). If the language is clear and the meaning of the words used is unambiguous, then a common-sense reading of the statutes will suffice, with no construction necessary. *See State v. Jonathan M.*, 109 N.M. 789, 791 P.2d 64 (1990); *Security Escrow Corp. v. State Taxation & Revenue Dep't*, 107 N.M. 540, 760 P.2d 1306 (Ct.App.1988).

The Code defines "farm tractor" as "every *motor vehicle* designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry." § 66–1–4.6(A) (Cum. Supp.1991) (emphasis added). As noted earlier, a motor vehicle is defined as every vehicle that is self-propelled. Thus, because a farm tractor is expressly defined by the pertinent statute as a motor vehicle, it necessarily follows that it is also a vehicle (we reason that a "motor vehicle" is but a subset or subgroup of the larger category "vehicle"). Because the DWI statute's language is directed against a person driving "any *vehicle* within this state," Section 66–8–102(A) (emphasis added), it consequently follows that a farm tractor clearly falls within the language of the DWI statute. This approach is consistent with that taken in other jurisdictions. *See, e.g., Harder v. Harder*, 176 Mich.App. 589, 440 N.W.2d 53 (1989); *State v. Green*, 251 N.C. 141, 110 S.E.2d 805 (1959); *see generally* H.B. Chermside, Jr., Annotation, *What is a "Motor Vehicle" Within Statutes Making it an Offense to Drive While Intoxicated*, 66 A.L.R.2d 1146 (1959).

Defendant first argues that, because a farm tractor is used primarily for agricultural purposes off the highway, it is not a vehicle under the DWI statute. In response to this argument, we first note that applicability of the DWI statute is not expressly limited to a type of vehicle with a particular function—all vehicles are included. Nor does the prohibitive language of the statute require that the DWI incident actually occur on a highway. § 66–8–102. Because the language used is clear and unambiguous, we cannot read words into the statute that do not exist. *See Security Escrow Corp. v. State Taxation & Revenue Dep't.*

Additionally, the term "vehicle," as defined in the Code, Section 66–1–4.19(B), and as used in the DWI statute, Section 66–8–102(A), does not require that the vehicle in question be regularly used on a highway, as implicitly argued by defendant. Rather, the Code contemplates a device by which any person or property is or *may be* transported or drawn upon a highway. *See* § 66–1–4.19(B). Although the Code may not contemplate frequent highway use by farm tractors, numerous Code provisions that contemplate highway use nonetheless exist. *See, e.g.,* §§ 66–1–4.16(J) (Cum.Supp.1991); 66–3–826(B) (Repl. Pamp.1989); 66–7–412 (Repl.Pamp.1987); 66–7–413.1 (Repl.Pamp.1987); 66–7–414 (Repl.Pamp.1987).

Clearly, a farm tractor is a vehicle that is or may be used on a highway. It would be unreasonable to hold that, merely because a farm tractor is not primarily used on a

highway, it is not a "vehicle" under the DWI statute. If we adopted defendant's rationale, contrary to the clear import of Section 66–8–102(A), we would be holding that the frequency of use of a vehicle on the highway constitutes a factor in determining whether the DWI statute applies to that vehicle. We believe such reasoning would not comport with the policy behind the DWI statute, which is to prevent individuals who, either mentally or physically, or both, are unable to exercise the clear judgment and steady hand necessary to handle a vehicle with safety both to the individual and the public. *See State v. Dutchover,* 85 N.M. 72, 509 P.2d 264 (Ct. App.1973); *see also Miller v. New Mexico Dep't of Transp.,* 106 N.M. 253, 741 P.2d 1374 (1987) (court looks not only to language used in statute, but also to object legislature sought to accomplish and wrong it sought to remedy); *Griego v. Bag 'n Save Food Emporium,* 109 N.M. 287, 784 P.2d 1030 (Ct.App.1989) (statutes are to be interpreted in a way that facilitates their operation and achievement of their goals). Surely, no one would argue that a farm tractor suddenly veering into oncoming traffic on a highway would be any less dangerous than an automobile operated in the same manner. Either of these hypotheticals exemplifies the risk or danger we believe the legislature sought to prevent in enacting the DWI statute.

It is also apparent to us that farm tractors were intended to come within the provisions governing safety. *See* § 66–7–414 (implements of husbandry include farm tractors; "[a]ny person responsible for the movement of implements of husbandry ... shall comply with all safety precautions set forth in the Motor Vehicle Code and in regulations of the state highway commission."). To recognize that farm tractors are subject to the Code's safety precautions, but not to the DWI statute, would be nonsensical. *See New Mexico State Bd. of Educ. v. Board of Educ. of Alamogordo Pub. Sch. Dist. No. 1,* 95 N.M. 588, 624 P.2d 530 (1981) (legislative intent is to be given effect by adopting a construction that will not lead to unreasonable, unjust, or contradictory results).

In further support of our holding, we also consider significant the fact that the legislature expressly exempted farm tractors from some of the Code's provisions. *See, e.g.,* NMSA 1978, §§ 66–1–4.16(J) (special mobile equipment includes farm tractors); 66–1–4.11(I) (special mobile equipment not subject to Mandatory Financial Responsibility Act); 66–3–1(D) (Repl.Pamp.1989) (farm tractors exempted from the Motor Vehicle Code's registration requirements). These exemptions indicate to us that the legislature considered a farm tractor to be a "vehicle" under the Code and Section 66–8–102(A). Otherwise, the exemptions would be unnecessary and superfluous. Thus, the fact that the legislature created exceptions for farm tractors with respect to some provisions of the Code, but not with respect to the DWI provision, evidences a legislative intent to include farm tractors under the language of the DWI statute. *See State v. Powell,* 306 S.W.2d 531 (Mo.1957).

Defendant relies heavily on two New Mexico cases that previously examined whether a particular mechanical device was a "vehicle" or "motor vehicle" within the meaning of the Code. These cases are *Smith Machinery Corp. v. Hesston, Inc.,* 102 N.M. 245, 694 P.2d 501 (1985), and *State v. Eden,* 108 N.M. 737, 779 P.2d 114 (Ct.App.1989). We address defendant's reliance on *Eden* first.

There, this court interpreted the language of former Section 66–1–4(B)(74) (now Section 66–1–4.19(B)) " 'is or may be transported or drawn upon a highway' " as indicative of "a legislative intent to define a device typically and lawfully used upon a highway to transport persons and property." *State v. Eden,* 108 N.M. at 739, 779 P.2d at 116. In *Eden,* we held that, because a snowmobile could not be *lawfully* operated on public highways, it was not a vehicle under the Motor Vehicle Code. In contrast, here, the statutory scheme generally provides that tractors may be used lawfully on highways.

Defendant contends that our supreme court's holding in *Smith Machinery* requires a holding in this appeal that a farm

tractor with an attached mower is not a vehicle. In that case, the court held that a detachable windrower header unit was not a vehicle under the *Motor Vehicle Dealers Franchising Act,* NMSA 1978, Sections 57-16-1 to -16 (Repl.Pamp.1987) (Franchising Act). The supreme court adopted an *ad hoc,* case-by-case approach for determining application of the Franchising Act. *Smith Machinery,* however, is distinguishable. First, it dealt with the definition of "motor vehicle" under the Franchising Act, not with the definition contained in the Code. Second, the opinion distinguishes between windrowers and farm tractors; *Smith Machinery* does not hold that tractors are not motor vehicles under the Franchising Act or under the Code. Thus, *Smith Machinery* does not require us to hold that a tractor with an attached mower is not a vehicle.

CONCLUSION

We hold that a farm tractor with an attached mower is a "vehicle" under the DWI statute. We therefore reverse the district court's order dismissing the state's complaint and remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

I CONCUR:

DONNELLY, J., concurs.

HARTZ, J., specially concurs.

HARTZ, Judge (specially concurring).

I concur in the result and virtually all of Judge Apodaca's opinion. Judge Apodaca's opinion thoroughly examines the usage of the terms "vehicle" and "farm tractor" in the Motor Vehicle Code and establishes that the word "vehicle" encompasses "farm tractor." When the language of a statute so convincingly compels a particular construction, I do not think that we should then "throw in" a policy argument to buttress the result. In particular, I find it irrelevant whether a farm tractor veering into highway traffic would be more or less dangerous than a similarly operated automobile.

833 P.2d 222

ROBERTS OIL COMPANY, INC. and Federated Service Insurance Company, Plaintiffs–Appellants,

v.

TRANSAMERICA INSURANCE COMPANY and CNA Insurance Company, Defendants–Appellees.

Nos. 19789, 19794.

Supreme Court of New Mexico.

May 18, 1992.

Hinkle, Cox, Eaton, Coffield & Hensley, Thomas M. Hnasko, Joe W. Wood, Gary W. Larson, Santa Fe, for plaintiffs-appellants.

Civerolo, Hansen & Wolf, Terry R. Guebert, Albuquerque, Steven M. Crane, Los Angeles, Cal., for defendant-appellee Transamerica Ins. Co.

Hatch, Beitler, Allen & Shepherd, Bob Thorson, Kimberly A. Franklin, Albuquerque, for defendant-appellee CNA Ins. Co.

OPINION

MONTGOMERY, Justice.

This case, at least as argued by the parties, presents a conflict between basic principles of insurance law and the necessity for prompt remedial action to correct an instance of environmental contamination. As we view the case, these competing objectives can be harmonized by applying settled New Mexico law and fundamental concepts underlying the nature of an insurance contract.

The insurers defend two partial summary judgments relieving them of liability under their respective insurance policies for an incident of groundwater contamination that occurred several years before they were notified of the insured's claims against them and after the insured had

assumed substantial obligations and incurred significant expenses to remediate the contamination. The insured appeals from the summary judgments, arguing that, even if it breached a clause in the policies providing that it would not make such voluntary payments, the breach did not discharge the insurers absent prejudice to them. We basically agree with the insured's position (modified as discussed in this opinion), reverse the summary judgments, and remand the case for trial.

I. FACTS AND ISSUES

A. *The Leaded Gasoline Leak and the Insured's Steps to Abate It*

The contamination in question was discovered on January 21, 1985. It was occurring at a site in Albuquerque, New Mexico, which the insured, Roberts Oil Company, Inc. ("Roberts"), had leased as a Pump–N–Save filling station ("the site"). Roberts, a distributor and retailer of gasoline, had leased the site from Charles Bass in 1980, and Bass was operating the station by agreement with Roberts.

An underground transmission line running from leaded (regular) gasoline storage tanks to the dispensers at the pump islands had developed a leak sometime before January 1985, and the leaking gasoline had contaminated the groundwater beneath the site. Coincidentally, another underground gasoline leak had occurred at the site, apparently beginning sometime before 1980. This second (though earlier occurring) gasoline leak had led to the filing of a lawsuit by the Environmental Improvement Division of the New Mexico Health and Environment Department ("the EID") against Bass and Roberts in 1984. The leak which was the subject of this law suit was a release of *un*leaded gasoline that apparently occurred while Bass was operating the site as another brand of filling station. The EID's suit against Bass and Roberts was unrelated to the leaded gasoline leak discovered in January 1985, but Roberts was joined as a defendant on the theory that, by permitting the release of unleaded gasoline, Roberts was maintaining a public nuisance.

The EID suit over the unleaded gasoline leak was pending in January 1985 when the leaded gasoline leak was discovered. While responsibility for the earlier (unleaded) leak appears to have been directed primarily at Bass, the later (leaded) leak was regarded as primarily Roberts' responsibility. Roberts gave prompt notice of the leaded gasoline leak to the EID; and the EID, of course, demanded that Roberts abate the contamination resulting from the leak, under threat of litigation and sanctions pursuant to applicable statutes and regulations. Roberts also notified its then comprehensive general liability (CGL) insurer, Federated Service Insurance Company ("Federated"), which had undertaken Roberts' CGL insurance coverage effective January 1, 1985—twenty-one days before discovery of the leak. Federated began investigating the claim and designing and implementing a system to define the extent of groundwater contamination and to prevent further contamination. Roberts and Federated first notified Roberts' previous CGL carriers, Transamerica Insurance Company ("Transamerica") and CNA Insurance Company ("CNA"), of the problem on July 14, 1989. By that time Federated had spent in excess of $250,000 in abating the contamination and negotiating with the EID over the remediation project.

Meanwhile, the EID suit over the unleaded leak was settled as to Roberts in February 1986. The EID dismissed its claim against Roberts relating to the unleaded gasoline leak and agreed not to institute litigation over the leaded leak. In exchange, Roberts assumed responsibility for abating the leaded leak and agreed to undertake ongoing remedial activities at the site, including construction of wells to monitor and remove the groundwater contamination.

B. *The Insurance Policies and the Insured's Claims Against the Insurers*

As already indicated, Roberts was insured under a CGL policy issued by Federated, effective January 1, 1985. Before that date, and beginning on January 5, 1981, Roberts' operations at the site were

insured under two successive CGL policies issued by Transamerica, providing coverage during the period January 5, 1981, to January 5, 1983. From January 1, 1983, to October 5, 1984, Roberts' insurance coverage was furnished by The Home Insurance Company ("The Home"), and from October 5, 1984, to January 1, 1985, its coverage was placed with CNA. Since, as will appear shortly, Roberts and Federated's claims against The Home were settled, we are concerned here only with the policies issued by Transamerica and CNA (to whom we shall sometimes refer as "the insurers"). Each of those policies insured against liability for property damage caused by an "occurrence," and each contained the following provisions pertinent to this appeal:

Under the heading "Insured's Duties in the Event of Occurrence, Claim or Suit," the policy provided that, in the event of an occurrence, written notice with respect to the circumstances of the occurrence would be given to the company by or for the insured "as soon as practicable." The policy then continued:

> The insured shall cooperate with the company and, upon the company's request, assist in making settlements, [etc.] * * *. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

We shall refer to this clause as the "voluntary payment" clause.

Immediately after the voluntary payment clause, under the heading "Action Against Company," appears what we shall refer to as the "no action" clause. It reads in pertinent part as follows:

> No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Sometime in late 1988 or early 1989, after the contamination had been abated, Federated began investigating the possibility that the leaded gasoline leak had occurred before January 1985, during the effective dates of insurance policies issued to Roberts by other carriers. According to an affidavit filed in the proceedings below, Roberts had no independent recollection of the carriers who had provided CGL insurance during the period 1981–1984 and no knowledge that a line leak during that period might entitle it to seek benefits under insurance policies previously in effect but then expired. Nevertheless, by July 14, 1989, attorneys retained by Federated had unearthed the insurance history recited above, and on that date the attorneys notified Transamerica, CNA, and The Home of claims for indemnity and contribution with respect to amounts Federated had expended on behalf of Roberts in connection with the pollution abatement project. The insurers did not respond (at least in writing) to the notices.

C. *The Proceedings Below*

Roberts and Federated commenced this action against Transamerica, CNA, and The Home on November 15, 1989. The complaint sought a declaratory judgment that each of the defendants was obligated to indemnify Roberts and reimburse Federated for amounts expended in abating the contamination and in defending against the claims of the EID or, alternatively, for contribution to Federated's payment of such amounts.[1] Each defendant answered, denied liability, and raised various affirmative defenses.

1. Federated sought reimbursement from the other carriers on the theory that an "other insurance" clause in its policy meant that its liability to its insured, Roberts, was secondary and the liability of the others was primary. Federated's alternative claim for contribution was based on the theory that, if all carriers shared liability equally, the liability should be prorated on some basis, such as the policy limits under each carrier's policy as a proportion of the aggregate policy limits. No issue as to the type of relief to which Federated may be entitled if it prevails in this action is involved in this appeal.

After filing the complaint, Roberts and Federated continued negotiations with the EID regarding ongoing remediation at the site. Federated informed Transamerica and CNA of these negotiations, but the defendants declined to participate in them. In June 1990, Roberts and Federated executed a second agreement with the EID, under which they agreed to transfer the remediation system to the EID and to pay it $45,000 in exchange for a complete release of their environmental cleanup obligations at the site. As of that date, Federated had spent approximately $504,000 in defense and cleanup costs on behalf of Roberts.

In July 1990, Federated and Roberts settled their claims against The Home and dismissed it from the lawsuit.

On November 1, 1990, Transamerica moved for partial summary judgment, requesting an adjudication that it was not liable for any amounts expended or obligations assumed by Roberts and Federated before they provided notice to Transamerica. The motion was based on the grounds that Roberts had breached the voluntary payment and no action clauses in the Transamerica policies and that, in any event, Transamerica was not liable for any costs incurred or obligations assumed prior to notice and tender of the defense.[2] Transamerica attached to its motion affidavits and other materials setting out the history recited above and took the position (which it maintains on this appeal) that, because Roberts had breached its obligations under the voluntary payment and no action clauses, any liability that Transamerica might otherwise have under its CGL policies was discharged to the extent that such liability related to costs incurred or obligations assumed before Roberts notified it of the "occurrence" at the site and of the EID's claims.

Roberts and Federated responded to Transamerica's motion with a cross-motion for partial summary judgment, requesting an adjudication that Transamerica had "suffered no conceivable prejudice, as a matter of law," from their delay in notifying Transamerica and that the voluntary payment and no action provisions in the policies were not applicable to the case. Roberts and Federated further requested that they be permitted to proceed to trial, at which, presumably, Transamerica's liability for damages occurring during the effective dates of its policies would be established and the availability to Transamerica of any of its other defenses would be decided. Attached to this motion were various affidavits and other documents, including an affidavit from John Stevenson, the president of an environmental consulting firm, who testified that Roberts and Federated's actions in decontaminating the groundwater had been a prudent, economical, and effective response to the contamination problem resulting from the leaded gasoline leak. Stevenson's affidavit supported Roberts and Federated's position that Transamerica and CNA had suffered "no conceivable prejudice" as a result of Roberts and Federated's actions and, in fact, had benefitted significantly by their timely and prudent response to the gasoline leak.

Transamerica responded to Roberts and Federated's cross-motion with an affidavit of one of its attorneys, who averred (without establishing that he had the personal knowledge required by SCRA 1986, 1-056(E) (Cum.Supp.1991)) that, had Transamerica received earlier notice, it could have investigated the physical evidence to support its defense that the pollution exclusion in its policies applied and to determine whether any covered property damage had in fact occurred during the policy periods. The attorney also swore: "There may be other reasons why Roberts' failure to notify Transamerica was prejudicial, and discovery is necessary to determine such other further bases for prejudice."

In a letter to the parties dated January 4, 1991, the district court ruled in Transamerica's favor. The court held that Rob-

2. This latter defense was based, *inter alia,* on *State Farm Fire & Casualty Co. v. Price,* 101 N.M. 438, 443, 684 P.2d 524, 529 (Ct.App.) ("[B]efore the duty to defend arises there must be a demand."), *cert. denied,* 101 N.M. 362, 683 P.2d 44 (1984).

erts had breached the voluntary payment clause in Transamerica's policies, that this "had the effect of depriving Transamerica of its contractual right to control the defense [to the EID's claims,]" and that Roberts and Federated's claim "that Transamerica benefitted because of their efficiency in resolving the dispute [with the EID]" was speculation. The court embodied its ruling in a final judgment, entered February 18, 1991, granting Transamerica's motion for partial summary judgment; denying Roberts and Federated's cross-motion; declaring that Roberts and Federated were not entitled to recover from Transamerica any costs, expenses, or obligations incurred by them before providing notice to Transamerica; and certifying the judgment as final under SCRA 1986, 1-054(C). Roberts and Federated (to whom we shall sometimes refer as "the appellants") timely filed a notice of appeal to this Court.

As for CNA, shortly after the trial court issued its letter ruling of January 4, 1991, CNA filed its own motion for partial summary judgment, based on grounds identical to those asserted by Transamerica. After the court entered its judgment in favor of Transamerica on February 18, Roberts and Federated agreed to a stipulated partial summary judgment in favor of CNA, under which a final judgment, identical in form and substance to the judgment in favor of Transamerica, was entered in favor of CNA. The appellants filed a notice of appeal from this judgment, and we consolidated the two appeals.

D. *The Issues on Appeal*

Roberts and Federated seek to reverse the partial summary judgments against them by asserting four points: (1) The district court erred in not applying the rule requiring substantial prejudice to the insurer before the insurer can escape liability because of the insured's breach of a clause similar to the voluntary payment clause in this case; (2) Transamerica and CNA forfeited any right to deny policy benefits by failing to respond, or responding inadequately, to Roberts and Federated's notices when the notices were finally sent in mid-1989; (3) the voluntary payment clause does not apply because Roberts and Federated were not "volunteers" and because Federated's payments on behalf of Roberts were made under compulsion of law; and (4) the no action clause does not apply because the clause only prevents an action by a third-party claimant against the insurer and has no applicability to an action by the insured. In disposing of the appeal, we find it necessary to decide only the first issue, although in doing so we shall comment briefly on the applicability of the no action clause and the "voluntariness" of Federated's payments.

With respect to appellants' "forfeiture" argument—*i.e.*, that the insurers lost their right to assert various defenses when they did not respond in a timely and adequate manner to Roberts and Federated's notices [3]—we think that the appellants misapprehend the thrust of the trial court's partial summary judgments. The court's judgments do not declare complete nonliability in favor of the insurers; indeed, the extent of the insurers' liability is presumably an issue that remains open for trial, except to the extent foreclosed by the judgments. Admittedly, the judgments dispose of the lion's share of appellants' claims against the insurers, ruling as they do that "[a]ny obligation undertaken or costs incurred by [appellants] prior to providing notice to [the insurers] were voluntarily undertaken and are their own liability and are not recoverable from [the insurers]." As best we can tell, this rules out all of Federated's expenditures except the $45,000 settlement with the EID in June 1990. All other expenditures appear to have been incurred either through payments made before notice was given in July 1989 or as a result of obligations assumed in Roberts'

3. The argument is based on *State Farm Fire & Casualty Co. v. Price, supra* note 2, 101 N.M. at 445, 684 P.2d at 531 ("When an insurance company fails to defend after a demand, it suffers serious consequences. These consequences include loss of the right to claim that the insured breached policy provisions, * * * the right to claim that the insured did not cooperate, and the right to claim that the insured settled without its consent." (citations omitted)).

settlement agreement with the EID in February 1986. The court's partial summary judgments thus relate to expenses incurred or obligations assumed *before* the insured's notice to the insurers, while the appellants' forfeiture argument relates to the insurers' conduct *after* notice. We conclude, therefore, that the appellants' argument that the insurers forfeited their right to assert defenses because of their conduct after receiving notice is irrelevant to the trial court's partial summary judgments.

We also wish to make clear the narrow scope of our disposition of this appeal. Potentially, many issues could arise during the trial of this action, while the court is *en route* to an adjudication of the insurers' liability or nonliability to reimburse, or contribute to, Federated's expenditures on behalf of Roberts. The trial court's only ruling in entering its partial summary judgments was that there was no genuine issue of fact that Roberts had breached the voluntary payment clause and that, accordingly, each insurer was entitled to partial judgment as a matter of law. The correctness of that ruling is the only issue we address in this opinion. Other issues that may arise include the one alluded to above—the nature of the relief to which Federated will be entitled if the court rules in its favor: reimbursement or contribution. Another issue, mentioned in the briefs but not discussed because it was not ruled on below, is the applicability of one or more exclusions in the policies, such as the exclusion for "property damage arising out of the discharge * * * [or] release * * * of * * * contaminants or pollutants into * * * any water course or body of water." There may also be issues as to whether the leaded gasoline contamination caused "property damage," whether the gasoline leak was an "occurrence," and probably other issues not even appearing from the briefs in this still developing dispute set in a field of law that is evolving almost day by day. *See, e.g., Avondale Indus., Inc. v. Travelers Indem. Co.,* 887 F.2d 1200 (2d Cir.1989), *cert. denied,* 496 U.S. 906, 110 S.Ct. 2588, 110 L.Ed.2d 269 (1990); *Chemical Applications Co. v. Home Indem. Co.,* 425 F.Supp. 777 (D.Mass.1977); *Lido Co. v. Fireman's Fund Ins. Co.,* 574 A.2d 299 (Me.1990); *Compass Ins. Co. v. Cravens, Dargan & Co.,* 748 P.2d 724 (Wyo.1988); *see generally AIU Ins. Co. v. Superior Court,* 51 Cal.3d 807, 274 Cal.Rptr. 820, 799 P.2d 1253 (1990) (in bank) (involving coverage under CGL policy for environmental cleanup measures). Disposition of any and all such issues must await further proceedings in the trial court.

II. THE GOVERNING LEGAL PRINCIPLES

A. *The Requirement of Substantial Prejudice (Foundation Reserve v. Esquibel)*

Although no New Mexico decision has yet ruled upon the effect of a breach of a voluntary payment provision in an insurance policy, we are not without significant guidance in resolving this question. In *Foundation Reserve Insurance Co. v. Esquibel,* 94 N.M. 132, 607 P.2d 1150 (1980), we held that an insurer "must demonstrate substantial prejudice as a result of a material breach of the insurance policy by the insured before it will be relieved of its obligations under a policy." *Id.* at 134, 607 P.2d at 1152. The particular provisions in the policy at issue in *Esquibel* were clauses providing that the policy would be voided if the insured failed to notify the insurer of an accident, failed to cooperate in defending or settling a claim, or willfully concealed material facts concerning a claim. *Id.* at 133, 607 P.2d at 1151. This Court found, and apparently it was undisputed, that the insured's breach of these provisions was a substantial and material one. *Id.* Nevertheless, the Court went on to consider "whether we require that [the insurer] demonstrate substantial prejudice as a result of this material breach." *Id.* at 134, 607 P.2d at 1152. As just noted, we answered this question affirmatively, and affirmed the trial court's finding (as supported by substantial evidence) that the insurer had not been substantially prejudiced by the breach and that, accordingly, the insurer was liable to defend and indemnify the insured against a third party's

claim for damages sustained in an automobile accident.

Recognizing the precedential effect of *Esquibel,* Transamerica and CNA attempt to distinguish it on various grounds. They first seize on the following language in the opinion, which they characterize as the "underlying rationale" of the holding: "The risk-spreading theory of liability 'should operate to afford to affected members of the public—frequently innocent third persons—the maximum protection possible consonant with fairness to the insuror.'" *Id.* at 134, 607 P.2d at 1152 (quoting *Oregon Auto. Ins. Co. v. Salzberg,* 85 Wash.2d 372, 535 P.2d 816, 819 (1975)). In its letter decision informing the parties that it would grant Transamerica's motion for partial summary judgment, the trial court in the present case seized on this same language, saying that "the 'prejudice' rule would not be extended to the present dispute because no 'innocent third party' is injured."

We think that the rationale behind *Esquibel* cannot be limited so narrowly. At the beginning of that opinion, we stated the issue as follows: "Is a substantial and material breach of the insurance contract by the insured sufficient to void his policy, or must the insuror also demonstrate actual prejudice to the insuror resulting from the breach?" 94 N.M. at 132, 607 P.2d at 1150. There is no indication in the opinion, nor any in the many other cases requiring a showing of actual prejudice, that the rule operates only when an innocent third party is or has been injured. Rather, the rule implements a fundamental characteristic of all, or nearly all, insurance contracts—namely, the essential nature of the contract as a promise by the insurer to indemnify and defend the insured against certain risks, in exchange for the insured's payment of the premium. We shall return to this characteristic shortly.

B. *The Purpose of the Voluntary Payment Clause: Protection of the Insurer's Interests (Estes v. Alaska Insurance; Sanchez v. Kemper Insurance)*

Transamerica and CNA also attempt to distinguish *Esquibel* by characterizing the policy provisions at issue in that case as "cooperation" provisions and arguing that, while a showing of prejudice may be required to relieve an insurer when the insured breaches a cooperation provision, such a showing is not necessary when the insured breaches other provisions, such as the voluntary payment and no action provisions in this case. We think this distinction is one without a difference. As the Supreme Court of Alaska said recently:

> In *Zuckerman v. Transamerica Insurance Co.,* [133 Ariz. 139], 650 P.2d [441 (1982)] at 448, the Arizona Supreme Court held that a contractual modification of the statute of limitations should be enforced only 'when the reasons for its existence are thereby served.' When enforcement does not serve the reasons for the provision's inclusion in the policy, the insured's reasonable expectation that coverage will not be arbitrarily denied must be given effect. *Id.* In short, the authority of the provision is limited by the reality of the way insurance policies are bought and sold; the effect of the provision is limited by the reasonable expectations of the insured.
>
> We hold that time limit on commencement of suit clauses, notice of loss clauses, proof of loss clauses, and cooperation clauses should all be reviewed on the basis of whether their application in a particular case advances the purpose for which they were included in the policy. Only by so reviewing these clauses can courts satisfy the consumer's reasonable expectation that coverage will not be defeated on arbitrary procedural grounds.

Estes v. Alaska Ins. Guar. Ass'n, 774 P.2d 1315, 1318 (Alaska 1989).

In *Estes,* the Alaska court noted that a number of other courts, including this one, had upheld a distinction between time-to-sue clauses and notice clauses, citing this Court's decision in *Sanchez v. Kemper Insurance Cos.,* 96 N.M. 466, 632 P.2d 343 (1981). *Estes,* 774 P.2d at 1318 n. 3. In view of what we say today and our approval of the reasoning in *Estes,* the distinction in *Sanchez* between a time-to-sue limitation provision and a notice clause (and other

similar clauses as listed in *Estes*) is now open to serious question.

The court in *Estes* was correct in focusing on the purpose of the particular clause in question and inquiring whether that purpose will be advanced by applying it to the dispute in a given case. This Court in *Sanchez* undertook this same type of analysis, finding that the purpose of a cooperation clause is to prevent collusion between the insured and the injured, as well as to make possible the insurer's investigation. *Sanchez,* 96 N.M. at 468, 632 P.2d at 345. Relying on *Esquibel,* the Court continued: "Since the reason for such a clause is fear of prejudice to the insurer, it is reasonable to require a showing of prejudice." *Id.* However, the Court then went on to distinguish the policy considerations underlying a time-to-sue provision from those underlying a cooperation clause. The former set of considerations, we said, include the public interest in prompt assertion of legal claims, the possibility of fraudulent claims if a long period elapses between the occurrence and the initiation of a claim, allowing an insurer to avoid uncertainty as to the amount of its liability, and permitting stale claims to be cut off. *Id.* at 467, 632 P.2d at 344. But these considerations either duplicate those underlying a cooperation clause (preventing fraud or collusion and protecting the insurer's interests) or replicate policies behind the statute of limitations (encouraging prompt assertion of legal claims and cutting off stale claims). When a contractual modification of the statute of limitations is truly bargained for, there may be good reason to enforce the bargain; but, as several courts have noted, when such provisions appear in contracts of adhesion like insurance policies, their enforcement, as the court in *Estes* observed, will probably frustrate "the consumer's reasonable expectation that coverage will not be defeated on arbitrary procedural grounds."

Similarly, in the present case, we do not believe that the policy considerations underlying a voluntary payment provision differ significantly from the policy considerations underlying a cooperation clause. The purposes of a voluntary payment provision are to "obviate the risk of a covinous or collusive combination between the assured and the injured third party" and to "restrain the assured from voluntary action materially prejudicial to the insurer's contractual rights." *Kindervater v. Motorists Casualty Ins. Co.,* 120 N.J.L. 373, 199 A. 606, 608 (1938). *See also Augat, Inc. v. Liberty Mut. Ins. Co.,* 410 Mass. 117, 571 N.E.2d 357, 361 (1991) (purpose of voluntary payment clause is to give insurer opportunity to protect its interests); *Coil Anodizers, Inc. v. Wolverine Ins. Co.,* 120 Mich.App. 118, 327 N.W.2d 416, 418 (1982) (purpose of voluntary payment provision is to prevent collusion between the claimant and the insured and to give the insurer control over settlement negotiations). These purposes achieve the same general objectives as the purposes of a cooperation clause. *Kindervater,* 199 A. at 608. Thus, we reject Transamerica and CNA's attempt to distinguish this case from *Esquibel.*

And, while we agree with the *Sanchez* approach of focusing on the purpose of the contractual provision at issue, we question the Court's analysis of the relevant considerations underlying the respective policy provisions. The present case does not involve a time-to-sue clause, so there is no occasion to overrule *Sanchez;* but, as indicated, we think its result and some of its rationale are questionable.

C. *The "Agreed Exchange" in an Insurance Policy (Aetna Casualty v. Murphy)*

Another relatively recent case adopting the functional approach followed in *Sanchez* (though not, we have intimated, correctly applied) and in *Estes* is *Aetna Casualty & Surety Co. v. Murphy,* 206 Conn. 409, 538 A.2d 219 (1988). That case involved an insured's inexcusable and unreasonable delay in giving notice to his comprehensive liability insurer of a claim asserted by a third party. The court held that, despite the insured's delay in giving notice, the insurer was not automatically discharged from liability because:

"The purpose of a policy provision requiring the insured to give the company prompt notice of an accident or claim is to give the insurer an opportunity to make a timely and adequate investigation of all the circumstances." * * * If this legitimate purpose can be protected by something short of automatic enforcement of the notice provisions, then their strict enforcement is unwarranted.

In our judgment, a proper balance between the interests of the insurer and the insured requires a factual inquiry into whether, in the circumstances of a particular case, an insurer has been prejudiced by its insured's delay in giving notice of an event triggering insurance coverage. If it can be shown that the insurer suffered no material prejudice from the delay, the nonoccurrence of the condition of timely notice may be excused because it is not, in Restatement terms, "a material part of the agreed exchange." Literal enforcement of notice provisions when there is no prejudice is no more appropriate than literal enforcement of liquidated damages clauses when there are no damages.

Id. 538 A.2d at 223 (quoting 8 John & Jean Appleman, *Insurance Law and Practice* § 4731, at 2–5 (rev. ed. 1981), and *Restatement (Second) of Contracts* § 229 (1979)).[4]

In developing the foregoing rationale, the Supreme Court of Connecticut relied on three considerations, which it characterized as central. First, and as we have already noted, an insurance policy is a contract of adhesion; second, enforcement of a notice provision operates as a forfeiture because the insured loses his insurance coverage without regard to his dutiful payment of insurance premiums; and third, the insurer's legitimate purpose of guaranteeing itself a fair opportunity to investigate accidents and claims can be protected without the forfeiture resulting from an irrebuttable presumption that late notice invariably prejudices the insurer. *Id.* at 222. While we agree that all of these considerations are important, we are particularly struck by the second—the recognition that the insured forfeits coverage without regard to his payment of premiums even though, in the words of the *Restatement,* occurrence of the condition is not "a material part of the agreed exchange."

This consideration evokes the nature of an insurance contract as an "aleatory" contract, in which each party's promise (in the case of a bilateral contract) or the insurer's promise (in the case of a unilateral contract) is independent of, and not bargained in exchange for, the other party's promise or performance of some undertaking. We very recently considered some of the attributes of an aleatory contract in the context of a life insurance policy, *Jackson National Life Insurance Co. v. Receconi,* 113 N.M. 403, 411, 827 P.2d 118, 126 (1992); and the CGL policies issued by the insurers in this case are no different in terms of their fundamental nature as aleatory contracts. In the policies in this case, the insurers' promises, which were given in exchange for Roberts' premium payments, were to indemnify and defend the insured against liability for property damage and were conditioned on the occurrence of a fortuitous event—namely, an occurrence (or series of occurrences) that might result in Roberts' liability for causing damage to others' property. *See id.* at 410 & n. 7, 827 P.2d at 125 & n. 7.

Because the insurance contracts at issue in this case were aleatory, we regard as misplaced the insurers' insistence that Roberts' breach of the voluntary payment clauses discharged them as a matter of law. In an aleatory contract which is bilateral (in some respects at least, as when the insured promises not to voluntarily assume obligations or incur expenses), a breach by the insured of an obligation that is not, in *Restatement* terms, "a material part of the agreed exchange" will not discharge the insurer from *its* obligation (to pay and defend in the event the insured risk occurs).

4. The court in *Murphy* nevertheless upheld a summary judgment in favor of the insurer because the insured's affidavit opposing summary judgment contained no factual basis for his claim that the insurer had not been materially prejudiced by the delay in giving notice. 538 A.2d at 224.

In the context of standard-form CGL policies, offered to insureds like Roberts on a take-it-or-leave-it basis, it is absurd to assert, as Transamerica does, that Roberts' promise not to make a voluntary payment was part of the agreed exchange. The agreed exchange was Roberts' payment of the premium, for which it received Transamerica's promise to defend and indemnify it if the insured risk materialized.

If, in a bilateral aleatory contract like the CGL policies in this case, performance of the insured's promise is made an express condition to performance of the insurer's promise, then the insurer has a better argument that its duty is discharged upon the nonoccurrence of that express condition. *See Jackson,* 113 N.M. at 411, 827 P.2d at 126 (citing 3A Arthur L. Corbin, *Corbin on Contracts* § 730, at 415–16 (1960)). That appears to be one of the purposes of the no action clause relied upon by the insurers in this case—a clause which, as Transamerica argues, is "complementary" to the voluntary payment clause. The first part of the no action clause makes full compliance with all of the policy terms a condition precedent to an action against the company, and we are willing for purposes of this case to accede to the insurers' argument that the no action clause does indeed convert the voluntary payment clause from a promise by the insured to an express condition to the insurer's obligations. *See Mountainair Mun. Sch. v. United States Fidelity & Guar. Co.,* 80 N.M. 761, 764, 461 P.2d 410, 413 (1969) (no action clause made insured's compliance with all policy terms a condition precedent to any action against the insurer).

Nevertheless, while, as *Mountainair* holds and as we later discuss, the insured's failure to comply with the policy terms and the resulting nonoccurrence of a condition precedent may give rise to a presumption of prejudice to the insurer, the presumption is rebuttable. *Id.* Rebutting it can be achieved by producing evidence that the insurer was not in fact prejudiced. So we hold, applying *Esquibel* and *Mountainair,* that even when there has been a substantial and material breach of the insured's obligation and a resulting failure of a condition precedent to the insurer's liability, that breach and nonoccurrence of condition does not discharge the insurer absent a showing that the insurer has been substantially prejudiced.

D. *Lack of Genuine Issue That Insurer Was in Fact Prejudiced (Augat v. Liberty Mutual)*

The foregoing holding is to a considerable extent inconsistent with a recent ruling by the Supreme Judicial Court of Massachusetts in a case quite similar on its facts to this one, *Augat, Inc. v. Liberty Mutual Insurance Co.,* 410 Mass. 117, 571 N.E.2d 357 (1991). There, a water treatment system operated by the insured failed and released contaminated water into a sewer system and the ground at the site. The state threatened to sue the insured and seek substantial statutory penalties, and the insured signed a consent order under which it agreed to decontaminate the site at its own expense. It did so, incurring over a million dollars in cleanup costs, following which it requested reimbursement from its insurer under a CGL policy; it also requested that the insurer acknowledge liability for an additional $3.85 million in anticipated expenses. The insurer declined coverage and the insured sued. The trial court entered a summary judgment in favor of the insurer, and the supreme judicial court affirmed.

As is true in the present case, and probably for the same reason, the insurer did not rely on the policy provision requiring prompt notice of a claim; it was well established in Massachusetts, as it is in New Mexico, that a delay in giving notice of a claim is not a defense available to an insurer unless the insurer can demonstrate that it has been prejudiced by the delay. *Id.* 571 N.E.2d at 359. Instead, the insurer relied on the insured's breach of the voluntary payment clause, which was identical to the clause in this case. The insured argued (as the appellants do here) that its agreement with the state was not "voluntary" and that the insurer was required to demonstrate prejudice before it was allowed to deny coverage. *Id.* at 360.

The supreme judicial court disagreed. On the question of voluntariness, the court held that, while the insured's action was not entirely free from outside influence, it was "voluntary" in the sense of "by an act of choice," because the insured had an alternative—the right to demand that the insurer defend the state's claim and assume the obligation to pay for the cleanup. *Id.* For the same reason, we cannot hold in this case that Roberts was not acting voluntarily; we assume for purposes of this decision (though we do not decide the point) that Roberts had the same choice as the insured in *Augat*—to make demand on all its insurers from 1981 forward and let them fight out who owed what in terms of cleanup costs.[5] On the issue of whether the insurer is required to demonstrate prejudice, however, we take a different approach than that adopted by the Massachusetts court.

The court followed much of the functional analysis employed earlier in this opinion: It focused on the purpose of the voluntary payment provision, which it found was to give the insurer an opportunity to protect its interests. *Id.* at 360 n. 4, 361. The court reasoned that, as we have indicated, this purpose is shared by other similar policy provisions—notice, consent-to-settlement, and cooperation provisions—and that a violation of such a provision should bar coverage only when the breach frustrates the purpose underlying the provision. *Id.* at 361. The court also emphasized the adhesive nature of an insurance contract, which it said was "not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured." *Id.*

Nevertheless, the court ruled that the insured's breach of the voluntary payment provision undermined the purpose of the provision:

> After Augat agreed to a settlement, entered into a consent judgment, assumed the obligation to pay the entire cost of the cleanup, and in fact paid a portion of that cost, it was too late for the insurer to act to protect its interests. There was nothing left for the insurer to do but to issue a check.

Id.

We view the decision in *Augat* as resting on a holding that, on the record in that case, there was no genuine issue of fact that the insurer had suffered substantial prejudice and that, accordingly, the insurer was entitled to judgment as a matter of law. We do not regard the case as holding that, as a matter of law, the insurer invariably and inevitably suffers prejudice when the insured breaches a voluntary payment provision. The court could have done what we do in this case—reverse the summary judgment and remand the case for trial on the issue of prejudice; but apparently the court believed that the record did not give rise to an issue of fact as to whether the insurer had suffered prejudice. Here, for the reasons we shall outline below, we think the record does indeed create a genuine issue of this fact.

E. *The Presumption of Prejudice and the Burden of Proof (Rule 11-301)*

Before applying the principles discussed thus far in this opinion, we take up one issue, already alluded to, that frequently will arise when a court must decide whether an insured's breach of policy provisions like those referred to in this opinion has prejudiced the insurer. That issue is where the burden of proof lies and how the presumption of prejudice, already mentioned, affects that burden.

The courts seem fairly uniform in agreeing that when an insured breaches one of these policy provisions, a presumption of prejudice to the insurer arises. We have already cited our own *Mountainair* case in this connection. *See also, e.g., National Gypsum Co. v. Travelers Indem. Co.,* 417 So.2d 254, 256 (Fla.1982) ("When notice of a possible claim is not given to an insurance company, prejudice is presumed * * *."); *Henderson v. Hawkeye-Security*

5. This assumption would not seem to ensure a very prompt response to an instance of ongoing environmental contamination. Nevertheless, we are willing to indulge it for present purposes, because our ruling on the issue of prejudice is dispositive of this appeal.

Ins. Co., 252 Iowa 97, 106 N.W.2d 86, 91 (1960) ("[O]nce the unexcused breach has been found and not waived, prejudice should be presumed."); *Zurich Ins. Co. v. Valley Steel Erectors, Inc.*, 13 Ohio App.2d 41, 233 N.E.2d 597, 599 (1968) ("Prejudice to an insurer is presumed from unreasonable delay in giving the required notice of loss under the policy * * *." (quoting *Security Ins. Co. v. Snyder-Lynch Motors, Inc.*, 183 Cal.App.2d 574, 7 Cal.Rptr. 28 (1960)); *Ehlers v. Colonial Penn Ins. Co.*, 81 Wis.2d 64, 259 N.W.2d 718, 721 (1977) ("By placing the burden of proof upon the person claiming liability [a statute] has generally been viewed as creating a presumption of prejudice because of untimely notice.").

At the same time, while there may be near-unanimity that prejudice is presumed, there is no consensus as to where the ultimate burden of persuasion lies. *Compare Murphy*, 538 A.2d at 223 (most decisions that require showing of prejudice following breach of notice provision place burden of proof on insurer) (dictum) *and Augat*, 571 N.E.2d at 361 (insurer seeking to disclaim liability because of breach of notice, consent-to-settlement, and cooperation provisions must demonstrate that breach actually prejudiced its position) *and Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193, 198 (1977) (placing burden of showing prejudice on insurer) *with Murphy*, 538 A.2d at 224 (holding that insured must bear burden of establishing lack of prejudice) *and National Gypsum*, 417 So.2d at 256 (recovery not precluded if insured can demonstrate lack of actual prejudice) *and Zurich Ins. Co.*, 233 N.E.2d at 598 (burden rests on claimant to show absence of prejudice) *and Ehlers*, 259 N.W.2d at 721 (once insurer establishes it did not receive notice as soon as possible, burden shifts to claimant to prove insurer was not prejudiced by untimely notice).

Under our Rules of Evidence,

> a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

SCRA 1986, 11-301. This rule eliminated the "bursting bubble" theory of presumptions, and a presumption now retains evidentiary effect throughout the trial, so as to permit the fact finder to draw an inference of the presumed fact from proof of the basic or predicate fact. *See Mortgage Inv. Co. v. Griego*, 108 N.M. 240, 243-44, 771 P.2d 173, 176-77 (1989). Therefore, in the present case, proof that Roberts voluntarily assumed obligations and incurred expenses gives rise to a presumption that Transamerica and CNA were prejudiced. That presumption will permit the fact finder to infer that they were in fact prejudiced, but the burden of persuasion of that fact will remain on the party on whom it is originally cast.

On whom should the burden of persuasion to show prejudice or its absence be cast? We believe that current New Mexico law answers this question and that the answer makes sense in light of relevant policy considerations. The answer provided by *Esquibel* is:

> The weight of authority and the trend nationally is to adopt the standard of substantial prejudice to the insuror. Recent decisions hold that this prejudice may be advanced as an affirmative defense to claims by the insured or third parties, *with the burden of proof resting on the insurance company.*
>
> * * * * * *
>
> We hold that the insuror *must demonstrate* substantial prejudice as a result of a material breach of the insurance policy by the insured before it will be relieved of its obligations under a policy.

94 N.M. at 134, 607 P.2d at 1152 (emphasis added; citations omitted). *See also Worthey v. Sedillo Title Guar., Inc.*, 85 N.M. 339, 342, 512 P.2d 667, 670 (1973) (burden on title insurance company to establish actual prejudice and extent of such prejudice); *Price, supra* note 2, 101 N.M. at 444, 684 P.2d at 530 (insurance company seeking to avoid obligation under policy by claiming insured materially breached policy

provisions must demonstrate substantial prejudice as result of breach); *Yarbrough v. State Farm Ins. Co.*, 730 F.Supp. 1061, 1065 (D.N.M.1990) ("A number of courts have recently held that the burden of proof to establish prejudice is on the insurance provider.").

As indicated, we believe that this assignment of the burden of persuasion is justified from a policy standpoint. The purpose of the voluntary payment clause is to protect the insurer's interest in investigating the circumstances of the loss, directing the defense to the claim, participating in any settlement, controlling the costs in remediating the loss, etc. When that purpose is frustrated by the insured's breach of the clause, it makes sense to relieve the insurer of liability. On the other hand, when the insurer is not disadvantaged by the insured's conduct, then there is no reason to excuse the insurer from its promise to indemnify the insured against the monetary consequences of the loss and defend the insured against assertion of the claim. Since it is the insurer who is seeking to be excused from this aleatory promise, the insurer should, in the words of Rule 301, bear the "risk of nonpersuasion" that the insured's conduct prejudiced the insurer.

III. APPLICATION OF THE PRINCIPLES

The attachments to Transamerica's motion for partial summary judgment established that Roberts had voluntarily made payments, assumed obligations, and incurred expenses following its discovery of the leaded gasoline leak in January 1985 and before notice to Transamerica and CNA in July 1989. This was sufficient to give rise to a presumption that Transamerica and CNA had been prejudiced by Roberts' breach of the voluntary payment clause. That presumption imposed on Roberts and Federated the burden of producing evidence to rebut or meet it. They did this by submitting John Stevenson's affidavit that their response to the environmental contamination had been cost-effective and beneficial to the insurers. The trial court, in its letter decision to the parties, characterized this evidence as "speculation"; but it was no less speculative than Transamerica's attorney's counter-affidavit that, had Transamerica been notified earlier, it could have investigated the physical evidence to determine whether the pollution exclusion applied and whether any covered property damage had occurred during its policy period. Suffice it to say that the affidavits, together with the evidentiary effect of the presumption, combined to create factual issues that could only be resolved by a trial.

Appellants request that the trial court be reversed, not only in granting the insurers' motions for partial summary judgment, but also in denying appellants' own cross-motion for partial summary judgment. That motion, however, viewed realistically, was really more a response to the insurers' motion than a cross-motion seeking summary judgment in appellants' own favor. In light of the presumption directed against them, in light of the delay of over four years from discovery of the gasoline leak to notification of the insurers, and in light of the substantial obligations assumed and expenses incurred more than three years before the insurers were notified, appellants can hardly claim with a straight face, as they did in their cross-motion, that the insurers "suffered no conceivable prejudice, as a matter of law."

In resuming the proceedings below, the trial court will consider not only the coverage questions mentioned earlier in this opinion and the extent to which Roberts and Federated's settlement agreements with the EID either benefitted or disadvantaged the insurers, but also the question whether, and the extent to which, the appellants' early actions prevented the insurers from investigating the physical facts and defending against the EID's claims. These questions cannot be resolved as a matter of law. Even after the passage of so much time, there might be more than enough information still available for the court to determine whether, had the insurers been notified more promptly, they would have performed any differently. *Cf. Yarbrough v. State Farm Ins. Co.*, 730 F.Supp. at 1065 ("[A] more than adequate

defense might easily be provided through the use of accident reports, prior investigations, interviews and statements already taken in the progressive settlements which preceded the filing of this cause."). And the court should weigh the evidence on these points in light of the necessity for, and the public policy favoring, a prompt and effective response to an instance of environmental contamination.

The partial summary judgments are reversed, and the cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

RANSOM, C.J., and FRANCHINI, J., concur.

833 P.2d 235

In the Matter of Charles W. RAWSON An Attorney Suspended from Practice Before the Courts of the State of New Mexico.

No. 15897.

Supreme Court of New Mexico.

June 1, 1992.

Virginia L. Ferrara, Chief Disciplinary Counsel, Albuquerque, Edward L. Chavez, Asst. Disciplinary Counsel, Albuquerque, for Disciplinary Bd.

Charles W. Rawson, pro se.

OPINION

PER CURIAM.

This matter comes before the Court in two separate disciplinary proceedings conducted pursuant to the Rules Governing Discipline, SCRA 1986, 17–101 to –316 (Repl.Pamp.1991), in which attorney Charles W. Rawson was found to have committed numerous violations of the Rules of Professional Conduct, SCRA 1986, 16–101 to –805 (Repl.Pamp.1991). Pursuant to Rule 17–207(B) of the Rules Governing Discipline, on June 27, 1991, he was summarily suspended from practice, pending the outcome of the present proceedings, due to our concern that his continued practice would pose a danger to the public. We adopt the Disciplinary Board's findings of fact and conclusions of law and agree that disbarment is the appropriate sanction under the circumstances giving rise to these proceedings.

In 1985 this Court suspended Rawson from the practice of law for, *inter alia*, failure to maintain a trust account, but deferred the imposition of suspension and placed him on probation under certain terms and conditions. *Matter of Rawson*, 103 N.M. 166, 704 P.2d 78 (1985). Since it appeared from the evidence presented in that case that Rawson did not maintain a trust account, one condition of his probation was that he create and maintain such an account and submit to and bear the

expense of two audits of the account. Another condition was that he deposit $17,500, plus interest from July 10, 1981, with the Clerk of the Court for the Second Judicial District for appropriate distribution in the case *El Syd, Inc. v. Charles W. Rawson,* Cause No. CV-84-04284, in the Second Judicial District. That lawsuit was filed by Lawrence and Ruth LaVictoire, complainants in the matter giving rise to Rawson's suspension and probation.

Rawson's probation was subsequently revoked and the period of suspension imposed by this Court upon a showing that Rawson had failed to cooperate with his supervisor or to comply with other probationary conditions. *Matter of Rawson,* 104 N.M. 387, 722 P.2d 638 (1986). He was reinstated to practice on a probationary basis in 1987 after assuring the Court that he had (during the time he was on probation) created and maintained a trust account at the First National Bank in Albuquerque in a manner satisfactory to the auditor and fulfilled all of the other previously imposed probationary conditions set out in this Court's order of 1985. *Matter of Rawson,* 106 N.M. 172, 740 P.2d 1156 (1987).

In August 1990 the office of disciplinary counsel was notified by Ida Lands, Rawson's former secretary, that prior to her resignation earlier in the year she had learned that Rawson was issuing checks against insufficient funds in a trust account that he maintained at Sunwest Bank in Albuquerque. Lands also reported that several of Rawson's clients had complained to her about Rawson's failure to forward settlement proceeds to them in a prompt fashion. She further stated, while she had personally maintained records pertaining to Rawson's trust account at the First National Bank, she had not kept any records for the Sunwest trust account.

Disciplinary counsel asked Rawson to provide records pertaining to the Sunwest account and, when none were produced, issued a subpoena to the bank for their production pursuant to Rule 17-306(A)(2). Records pertaining to the account indicated it was opened in June 1985 with a deposit of $130,000 and showed numerous irregularities from that time until the account became inactive in June 1990 with a balance of $31.81. It appeared from the records that Rawson had commingled his own monies into the account, issued checks to clients or others for whom no monies were on deposit, issued checks against insufficient funds, and transferred monies from the trust account to his own accounts and/or used them to pay his personal debts. At the time the account became inactive, thousands of dollars were missing from the account with no conclusion possible except that they had been misappropriated or misapplied.

Additionally, disciplinary counsel learned from the clerk of this Court that Rawson had never reported the existence of his Sunwest account on forms filed with the Court pursuant to his obligations under Rule 17-204(A) of the Rules Governing Discipline. Upon checking with Rawson's probationary supervisors and the accountant who had been appointed to audit his trust account(s), counsel also learned that Rawson had never advised them of his Sunwest account.

Chief disciplinary counsel sent Rawson several detailed letters outlining the problems disclosed by the Sunwest records and inquiring into his apparent failure to report the existence of the account. He was asked to explain these matters and also to provide copies of all ledgers kept by him with respect to the account. He did not respond to either request.

At a hearing on the charges that were subsequently filed, Rawson produced nothing to substantiate his claim that records were in fact kept regarding the funds in the Sunwest account. His position was that since the clients themselves had not complained, the attorney-client privilege precluded his producing the records. We reject this position.

Because the purpose of Rule 17-204 is to insure that client funds are at all times protected while in an attorney's possession, to allow an attorney to claim confidentiality or the client's privilege to preclude the examination of these records would defeat

the entire purpose of the rule. Disclosure of these records is impliedly authorized for purposes of Rule 16–106 of the Rules of Professional Conduct through the express disclosure requirements of Rule 17–204. Nor do records of client funds meet the requirements of the evidentiary privilege. *See* SCRA 1986, 11–503(D)(3) (no privilege as to communication relevant to an issue of breach of duty by the lawyer). The privilege was never intended as a shield for attorneys to prevent scrutiny of those records to determine whether they are meeting their fiduciary and ethical responsibilities. *See In re Kennedy,* 442 A.2d 79, 92 (Del.1982). The committee's finding that Rawson failed to maintain records for his Sunwest trust account is supported by the record.

The hearing committee also found that Rawson had converted the funds of at least one client to his own use. This was accomplished by his paying himself $36,200 and diverting $44,700 of the client's $148,374.14 settlement check into the account of an entity known as Chapel Hill Corporation. Corporate records produced at the hearing indicate that Chapel Hill is a Rawson family-owned corporation. Chapel Hill's bank records show that Chapel Hill's checking account, upon which Rawson is the signatory, was used by Rawson primarily as a personal account. Rawson's mortgage payments were made from the Chapel Hill account, and numerous checks were made payable to Rawson personally. Although several checks were issued from the Chapel Hill account to the client in question, they in no way approached the amount deposited into the account from her funds.

Additionally, Rawson issued a check in the amount of $22,915.89 from the client's funds to an entity called Cibola Research and Development. Other evidence in the record establishes that this check was in payment of a loan from Cibola to Rawson personally. Thus, Rawson received at least $103,815.89 of the settlement proceeds.

The client claimed in her testimony that she is satisfied with the way her money was handled and that she agreed to pay Rawson a contingency fee of one-third of her settlement. She also stated, however, that she knew nothing of either Chapel Hill or Cibola Research and Development. Rawson's statement that he paid the client $111,400 cannot be reconciled with the client's statement that she agreed to pay him one-third of her settlement ($49,-458.04), as this would total $160,858.04. Neither can it be reconciled with the evidence that he actually paid himself $103,-815.89. If the client has in fact received $111,400, of which there is no evidence apart from Rawson's own testimony, the money came from sources other than her settlement check. The Sunwest bank records indicate that she was paid only $72,600 from that account, and that some of this money represented payments from funds belonging to other clients.

The hearing committee was correct in concluding that the above conduct violated Rules 16–115(A), 16–804(B), 16–804(C), and 16–804(H) of the Rules of Professional Conduct. By failing to report the existence of his Sunwest trust account and intentionally concealing it from this Court during previous reinstatement proceedings, Rawson also violated Rule 17–204(A) of the Rules Governing Discipline and Rules 16–801(B) and 16–804(D) of the Rules of Professional Conduct.

In his defense to the above findings and conclusions, Rawson points to Rule 17–303 of the Rules Governing Discipline, which directs that no complaint against an attorney shall be considered "unless a written complaint is filed with or initiated by chief disciplinary counsel in accordance with these rules within three years from the time the complainant knew or should have known the facts upon which the complaint was filed." Rawson contends that Ms. Lands was aware of his Sunwest account from the time of its inception and failed to file a complaint within the time provided by Rule 17–303, thus the Board could consider no transaction occurring before August 1987 (three years prior to the date the complaint was filed by Ms. Lands). Because of this, Rawson argues, the committee's findings based on conduct occurring prior to August 1987 should be stricken and that without these findings, the com-

mittee's conclusions that he committed acts of misconduct cannot stand. He requests that charges be dismissed on this basis. Rawson's argument fails for several reasons.

Rawson's conduct since 1987 regarding the Sunwest account warrants disciplinary action. Ms. Lands's complaint dealt only with irregularities in the account occurring in 1989 and 1990 and was filed in a timely fashion as to those irregularities. Also, while Ms. Lands may or may not have been aware of the existence of the Sunwest account for more than three years before she notified chief disciplinary counsel, she testified that she had not kept the records for that account and there is no evidence in the record that she was aware or should have been aware of any irregularities in the account prior to August 1987.[1]

In addition to the mishandling of client funds, in the first proceeding under consideration today Rawson was the subject of complaints filed by three Albuquerque physicians. The doctors had provided treatment to one of Rawson's clients based upon letters from Rawson promising they would be paid from the proceeds of any settlement or judgment received by the client. In July 1990 the client's personal injury claim was settled for $14,000. Rawson disbursed $4,666.67, one-third of the settlement, to himself as a fee and $3,362.09 to his client. One month later, he disbursed another $1,057.50 to himself as attorney fees. Despite repeated inquiries from two of the doctors, Rawson never advised them that a settlement had been received. When a third doctor called, Rawson replied that the case had been settled but that he could make no payments as the client was contemplating bankruptcy. Numerous letters of inquiry were sent to Rawson by disciplinary counsel, but he failed to address allegations that he was wrongfully refusing to honor the letters of protection he had issued on behalf of his client. At the hearing Rawson produced a copy of a letter that purportedly was sent to disciplinary counsel; the hearing committee found that the letter was never received by counsel.

Rawson filed bankruptcy for his client in March 1991, listing the doctors in question and others as creditors. There was no mention made in those pleadings of the $14,000 settlement, and Rawson and his client led the bankruptcy trustee to believe that the settlement had been for only $5,000. The trustee was advised that Rawson was still holding $2,704.61 of the settlement in trust (it is not clear from the record what became of the remainder of the settlement proceeds). Rawson successfully argued that these funds should be disbursed to his client.

Rawson now claims that the $2,704.61 was placed in trust for the three doctors, but his client changed her mind and directed that their bills not be paid. However, "once an attorney has accepted from his client an assignment of the settlement proceeds to the client's creditor, the client, as assignor, cannot cancel or modify the assignment by unilateral action without the assent of the assignee, nor may he defeat the rights of the assignee." *Romero v. Earl,* 111 N.M. 789, 791, 810 P.2d 808, 812 (1991). The attorney in such a situation is obligated to distribute the proceeds of the settlement in accordance with the promise to the creditors and, as an obligor with notice of the assignment, is required to pay the assignee. *Id.* at 790, 810 P.2d at 811.

1. We also note that chief disciplinary counsel can, indeed has a duty to, initiate a complaint when facts come to her attention which would indicate that misconduct may have occurred. *See* Rule 17-105(C)(1). In this instance, the extent of Rawson's misconduct for the first time became apparent to chief disciplinary counsel only after records pertaining to the Sunwest account were subpoenaed from the bank and examined. A second "complaint" was then initiated by chief counsel, clearly less than three years after she became aware of the facts. The rule apparently would allow a complaint to be filed by chief disciplinary counsel within three years of her becoming aware of the facts.

Reliance upon chief disciplinary counsel's knowledge may, in some instances, negate the purpose of the statute of limitations, *e.g.,* where the primary witness against the attorney has been aware of facts for more than three years and then comes to the office of chief disciplinary counsel. We need not, however, measure the statute of limitations from the date chief disciplinary counsel became aware of the facts. We would be ill disposed to do so.

While an attorney is obligated to follow a client's directives; this obligation does not extend to assisting the client in defrauding courts and creditors. Rawson's actions in this instance violated Rules 16–102(D), 16–804(C) and 16–804(H) of the Rules of Professional Conduct. Additionally, his failure to cooperate in any fashion with the investigation of the doctors' complaints was violative of Rules 16–801(B) and 16–803(D) of the Rules of Professional Conduct.

The second disciplinary proceeding considered today involves a separate set of charges filed against Rawson for misconduct with respect to the $17,500 plus interest he was to have deposited for distribution in *El Syd, Inc. v. Rawson,* pursuant to a condition of his 1985 disciplinary probation. Prior to his petition for readmission in 1987, *Matter of Rawson,* 106 N.M. 172, 740 P.2d 1156 (1987), Rawson had entered into a conditional agreement with the Disciplinary Board arising out of additional charges that had been brought against him. In the conditional agreement, which Rawson signed under oath, he stated that he had "deposited in trust with his attorney the amount of $25,000.00 to be paid as damages to his former clients the LaVictoires in the event his appeal of their jury verdict against him is unsuccessful." The *El Syd* litigation had reached its conclusion at the district court level, and a jury had entered a verdict against Rawson in favor of El Syd, Inc. The LaVictoires (controlling shareholders of El Syd, Inc.) had voluntarily withdrawn as parties to the litigation prior to jury deliberations. The fact that the LaVictoires personally did not have a verdict against Rawson was known to him but not to disciplinary counsel when he entered into the conditional agreement with the Disciplinary Board. Rawson's knowledge that the conditional agreement inadvertently referred to the LaVictoires rather than to El Syd Inc., was evidenced by a stipulation subsequently filed on his behalf in the United States Bankruptcy Court for the District of New Mexico. In that stipulation, Rawson acknowledged that the conditional agreement erroneously omitted El Syd, Inc.

Despite his knowledge that the monies on deposit with his attorney belonged to El Syd, Inc., Rawson continued to insist that the money was his and indeed asserted in an interpleader action filed by his attorney that the money belonged to him and not to El Syd on the basis that El Syd was not mentioned in the conditional agreement with the Disciplinary Board. He took the position that the LaVictoires were not entitled to the money, because they had been dismissed from the *El Syd v. Rawson* lawsuit. Rawson did not prevail in the interpleader action.

After having considered the record and argument of counsel, we agree with the Disciplinary Board that Rawson, in this instance, violated Rules 16–102(D), 16–301, 16–303(A)(1), 16–804(C), and 16–804(H) of the Rules of Professional Conduct.

Rawson is no newcomer to this Court in disciplinary matters. Despite the best efforts of this Court and the Disciplinary Board to provide Rawson with the assistance necessary to correct the problems to which he attributed his prior misconduct, his behavior has not changed for the better; if anything, it has become more egregious. When appearing before this Court in this matter, he continued to insist that his conduct was in no way violative of his ethical responsibilities. In view of Rawson's failure to recognize his wrongdoing or to express even the slightest degree of remorse, the prognosis for his rehabilitation is bleak. Nonetheless, we reject the recommendation of the hearing committee and the urging of bar counsel that his disbarment be permanent.

We also decline to direct that Rawson may not, during the period of his disbarment, accept employment as a law clerk or paralegal. We do, however, direct that he familiarize himself thoroughly with the requirements of the Rules Governing Legal Assistant Services, SCRA 1986, 20–101 to –114, and remind him that activities outside the scope of these rules could subject him to the contempt powers of this Court and his attorney-employer to possible discipline under Rules 16–503 to –505 of the Rules of Professional Conduct.

IT IS THEREFORE ORDERED that Charles W. Rawson be, and he hereby is, disbarred from the practice of law pursuant to SCRA 1986, 17-206(A)(1) effective March 4, 1992.

IT IS FURTHER ORDERED that any motion to apply for reinstatement which Rawson may file pursuant to SCRA 1986, 17-214(A) must be accompanied by a showing that he has paid the costs and restitution assessed herein.

IT IS FURTHER ORDERED that Rawson shall make restitution to the following physicians in the following amounts plus interest computed at 15% per annum from July 12, 1990, until the restitution is paid: Dr. Asja Kornfeld, $1,208.25; Dr. Federico Mora, $208; and Dr. Sanford H. Kinne, $1,129.24.

IT IS FURTHER ORDERED that Rawson's compliance with Rules 17-212 and 17-213 will not be required at this time in view of his having filed the appropriate documents at the time of his June 27, 1991, summary suspension.

IT IS FURTHER ORDERED that this opinion be published in the State Bar of New Mexico *Bar Bulletin* and the *New Mexico Reports.*

The costs of these two actions in the amount of $10,052.72 are assessed against Rawson and should be paid to the Disciplinary Board no later than June 30, 1992. Interest of 15% per annum will be assessed against any amount unpaid by that date until the costs are paid in full.

IT IS SO ORDERED.

RANSOM, C.J., specially concurs.

FROST, J., not participating.

RANSOM, Chief Justice (specially concurring).

I concur with the findings and conclusions of the Disciplinary Board, but would not adopt the recommendation that Rawson be disbarred. I believe that a three-year suspension and the assessment of costs would be appropriate discipline.

833 P.2d 240

FIRST INTERSTATE BANK OF LEA COUNTY, Plaintiff-Appellee,

v.

HERITAGE SQUARE, LTD., a New Mexico limited partnership, Lonnie A. Pierce and Eula Pierce, husband and wife, and Virgil Ford and Marie Ford, husband and wife, Defendants-Appellants,

and

Aloysuis K. Marczyk, et al., Defendants.

No. 19955.

Supreme Court of New Mexico.

June 3, 1992.

Rehearing Denied June 26, 1992.

Maddox & Saunders, Don Maddox, Gary L. Clingman, Hobbs, for defendants-appellants.

Neal & Neal, P.C., J.W. Neal, Gary Don Reagan, P.A., Gary Don Reagan, Mark Terrence Sanchez, Hobbs, for plaintiff-appellee.

OPINION

FROST, Justice.

After trial to the bench [1], judgment was entered in favor of plaintiff, First Interstate Bank of Lea County, on its complaint for foreclosure and money due against defendants Marczyk and Lombard on property leased to Heritage Square, Ltd., holder of a second mortgage on the subject prop-

1. Defendants Marczyk and Lombard failed to appear at trial to defend against the complaint and cross-claims or to prosecute their counterclaims. No testimony was presented at trial, nor were exhibits or depositions tendered by any of the parties. By stipulation of the parties, the record before this court was supplemented with the depositions of Marczyk, Lombard, and Gaylon Lovelady, a general partner of defendant Heritage Square, Ltd.

erty. Heritage appeals the judgment contending that a modification of the lease permitted it to offset an amount from each monthly payment to be applied to its debt, and that the court's judgment prejudiced its right to collect amounts due under two promissory notes. We affirm in part and reverse in part.

In 1986, Marczyk and Lombard purchased a shopping center in Hobbs, New Mexico, from Heritage whose general partners during all material times were Gaylon Lovelady, Virgil Ford, and Marie Ford. Marczyk and Lombard executed a promissory note in favor of plaintiff secured by a first mortgage on the property, and made two other notes in favor of Heritage secured by a second mortgage on the property. Heritage subsequently assigned the notes to defendants Ford and Pierce. At the same time, Marczyk and Lombard leased the property back to Heritage in a five-year master lease. Upon receipt of the monthly lease payments from Heritage, Marczyk and Lombard would pay plaintiff on its note and also pay Heritage, as agent for Ford and Pierce, on their notes.

In mid-1987, Heritage began deducting from the monthly lease payment an amount equal to the monthly payment owed on the Ford and Pierce notes. Although Marczyk and Lombard objected to Heritage's failure to pay the entire monthly lease amount and to the manner in which Heritage was paying on the Ford and Pierce notes, the offsetting continued through December 1989. During this time period, Marczyk and Lombard notified Heritage in writing that it should make full payment to them and bring the account current. In 1989, when Marczyk and Lombard defaulted on plaintiff's note, the district court, pursuant to the terms of the mortgage, appointed plaintiff the receiver of the property.

At trial, plaintiff denied any modification of the lease, based on the continuing claim by Marczyk and Lombard that payments should have been made to them according to the terms of the lease. The court, finding no written modification altering the performance of Heritage under the lease, ordered the proceeds from the sale of the property to be applied to plaintiff's debt. The court also ruled that Heritage, Ford, and Pierce were entitled to judgment against Marczyk and Lombard on their notes and were awarded attorney fees, costs, and interest, but they were not entitled to receive monies collected by the receiver under the lease.

Modification of Lease

■ Heritage, Ford, and Pierce challenge the court's finding regarding modification of the lease with respect to an offset of the monthly payment. An appellate court will not disturb the trial court's findings of fact that are supported by substantial evidence. *Cave v. Cave,* 81 N.M. 797, 799, 474 P.2d 480, 482 (1970). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* This court will indulge all reasonable inferences and resolve all disputed facts in favor of the trial court's findings. *Id.*

■ Contrary to Heritage's contention, we find substantial evidence to support the trial court's finding that the master lease had not been modified. Although the record is unclear as to the exact date of the alleged modification, it appears Heritage began to offset the monthly payment in 1987. In June 1987, Lombard specifically requested Heritage to pay immediately any amounts due under the lease. A July 1989 letter from Lombard to Heritage clearly requests that Heritage cease offsetting the monthly lease payment, comply with the written terms of the lease, and tender the full monthly payment to Marczyk and Lombard. Consistent with this correspondence is the deposition testimony of Marczyk that the monthly offset by Heritage was an absolute violation of the terms of the master lease. Finally, with reference to the provision in the lease granting a "right to offset" to either party, that right only could be exercised if the other party defaulted on an obligation. The record contains no evidence that Marczyk and Lombard were in default on the Ford and Pierce notes during the times when Heri-

tage was offsetting the monthly lease payment.

Receivership Authority

A court's authority to appoint a receiver can be derived from several sources. Court receivers are appointed by virtue of a court's equity jurisdiction or statutory authority. Receivers may be provided for in a variety of contracts. 65 Am.Jur.2d *Receivers* § 2 (1972). Receiverships are general or special depending on whether the receiver's duty is to administer all of the assets of a person or corporation or to take control of a particular property such as that subject to a mortgage. *Id.;* Ralph E. Clark, *A Treatise on the Law and Practice of Receivers* § 103 (3d ed. 1959). In the instant case, plaintiff properly is classified as a special receiver with control over only the subject property. "It is well-settled that where a Receiver is appointed under the terms contained in the mortgage, rather than under the general equity jurisdiction of the Court, in order to maintain and preserve the property income pending foreclosure, the contract terms of the mortgage will prevail." *Union Dime Savings Bank v. 522 Deauville Assocs.,* 91 Misc.2d 713, 398 N.Y.S.2d 483, 484 (1977). Thus, a special receiver may not be granted powers by the court inconsistent with the mortgage provisions under which the receiver was appointed.

Upon application of plaintiff and with consent of defendants, plaintiff was appointed receiver by the court on October 20, 1989. The authority to appoint a receiver was derived from the mortgage given to plaintiff by Marczyk and Lombard. The pertinent provision states:

> It is further agreed and stipulated that in case of a foreclosure of this Mortgage, upon the filing of the complaint for such foreclosure, a Receiver may be appointed immediately and without notice to the defendants in such proceeding, to take charge of the mortgaged premises and to hold possession of the same until the foreclosure sale thereof, or until the indebtedness hereby secured is fully paid and all the rents and profits derived from said premises, less the costs and expenses of the Receivership, shall be applied on the indebtedness secured hereby[.]

During the period when Heritage applied the offset amounts until appointment of the receiver, Ford and Pierce received $19,486.00 toward the amount owed under their notes. The district court ordered the receiver to recover these funds and to apply them to plaintiff's note. Heritage also was ordered to pay $48,777.50 in past rent unpaid from the date of the lease until June 1, 1990. Appellants contend the court exceeded its jurisdiction by ordering the receiver to recover past due rents and the offset amounts applied to the Ford and Pierce notes.

With regard to the unpaid past rents, the court evidently concluded, given the wording of the relevant provision in the mortgage, that the parties intended to grant to the receiver the power to collect past due rents. The court order authorized the receiver "to collect and receive from Heritage * * * all sums of money due and to become due as rent from the property * * *." The court's interpretation is consistent with the terms of the mortgage, which authorized the receiver to apply to the secured debt "all the rents and profits derived from said premises." The past rents, although unpaid, clearly were derived from the leased property. Accordingly, we affirm that portion of the June 19, 1990, partial judgment requiring Heritage to pay the receiver $48,777.50 in unpaid rent, most of which had become due during the term of the lease but before the appointment of the receiver. However, that part of the judgment requiring Ford and Pierce to pay the receiver the $19,486.00 in claimed offsets is reversed. The mortgage does not contain a subrogation clause, which would have allowed the receiver to assert claims on behalf of Marczyk and Lombard against Ford and Pierce. Although Marczyk and Lombard did file a cross-claim for all amounts retained as offsets against Ford and Pierce, the trial court, by the dismissal with prejudice, entered judgment on the merits against Marczyk and Lombard, which became the law of

the case regarding Marczyk and Lombard's claims against Ford and Pierce. Ford and Pierce cannot be held liable to plaintiff for the offset amounts applied to their notes prior to the appointment of the receiver. Plaintiff is entitled to any offsets paid by Heritage to Ford and Pierce on the Marczyk and Lombard notes, if any, only after the receiver's appointment since such sums would fall within the class of rents derived from the property. In addition, plaintiff also is entitled to all rents derived from the secured property, whether past due at the time of the receiver's appointment or owed subsequent to the appointment. The doctrine of the law of the case does not apply to Marczyk and Lombard's cross-claim for past due rents against Heritage because that issue was decided on plaintiff's complaint and not on the cross-claim.

Based on the foregoing, the district court's partial judgment is affirmed in part and reversed in part.

IT IS SO ORDERED.

RANSOM, C.J., and FRANCHINI, J., concur.

833 P.2d 244

STATE of New Mexico, Plaintiff–Appellee,

v.

Reyes RODRIGUEZ, Defendant–Appellant.

No. 12840.

Court of Appeals of New Mexico.

March 19, 1992.

Certiorari Denied April 30, 1992.

Tom Udall, Atty. Gen., Patricia Gandert, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Susan Gibbs, Santa Fe, for defendant-appellant.

OPINION

PICKARD, Judge.

Following an altercation at a wedding in Carlsbad, defendant threw a "Molotov cocktail" into a home occupied by twelve people who had been at the wedding. This single act served as the basis for fifteen charges against defendant, consisting of twelve counts of aggravated assault with a deadly weapon and one count each of arson, dangerous use of explosives, and possession of explosives. The jury returned guilty verdicts on all fifteen counts.

The trial court merged the explosives counts with each other and with the arson count for sentencing, but imposed sentence for each offense, running them concurrently with one another. The court also ran the sentences for those counts concurrently with the aggravated assault convictions, but imposed consecutive sentences for each assault. In addition, defendant's sentence was enhanced by one prior felony, pursuant to the Habitual Offender Act, and aggravated by the trial court, pursuant to NMSA 1978, Section 31-18-15.1 (Repl.Pamp.1987), for a total sentence of thirty-six years' imprisonment.

On appeal, defendant argues that (1) double jeopardy prevents his convictions and sentences on all counts except that of arson, contending that the explosives and aggravated assault counts merge with the arson count. He also argues that (2) the trial court erred in denying a change of venue, (3) he was denied effective assistance of counsel at trial, and (4) the state engaged in misconduct when it called a witness for the sole purpose of impeaching her with otherwise inadmissible hearsay evidence. We reverse on a portion of the first issue and affirm the remaining issues.

I. DOUBLE JEOPARDY

This case is unusual in that it involves one act, multiple victims, and one trial, which resulted in fifteen separate convictions and sentences under compound criminal statutes. As a preliminary matter, we note that the state has conceded that count three, possession of explosives, merges with count two, dangerous use of explosives, for sentencing. We are not bound by the state's concession, *State v. Maes,* 100 N.M. 78, 80, 665 P.2d 1169, 1171 (Ct. App.1983), but believe that the state is correct. *Cf. State v. Medina,* 87 N.M. 394, 534 P.2d 486 (Ct.App.1975) (possession of marijuana is lesser included offense of distribution of marijuana). Because the trial court ruled that counts two and three merged, but nevertheless imposed separate convictions for these counts, the possession conviction must be vacated. *See State v. Pierce,* 110 N.M. 76, 792 P.2d 408 (1990).

The remaining questions of whether the charge of dangerous use of explosives and the counts of aggravated assault also merge with arson are more problematic. In *Swafford v. State,* 112 N.M. 3, 810 P.2d 1223 (1991), the New Mexico Supreme Court articulated the test to be applied in "double-description" cases, *i.e.,* cases in which the defendant is charged with violations of multiple statutes that may or may not be deemed the same offense for double jeopardy purposes. *See also State v. Gonzales,* 113 N.M. 221, 824 P.2d 1023 (1992). Under *Swafford,* the conduct at issue is first examined to determine whether it is unitary. In general, conduct is unitary if (1) it violates both statutes, and (2) no time, space, or conduct

divisions exist on which to base a finding that the conduct underlying any of the charges was separate or distinct from that underlying any other charge. *Swafford,* 112 N.M. at 13–14, 810 P.2d at 1233–34. Notwithstanding the state's arguments to the contrary, we find that the defendant's conduct in throwing a Molotov cocktail was unitary. *Cf. Gonzales,* 113 N.M. at 224, 824 P.2d at 1026 (where defendant fired multiple gunshots in rapid succession, unseparated by time or space, into victim's truck, conduct was unitary).

The second part of the test examines the statutes at issue to determine whether the legislature intended to create separately punishable offenses. Absent a clear expression of legislative intent, reviewing courts must examine the elements of each statute to determine whether one statute is subsumed within the other. *Swafford,* 112 N.M. at 14, 810 P.2d at 1234 (citing *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932)). Where one statute is not subsumed within the other, a presumption arises that the legislature intended separate punishments, but that presumption "is not conclusive and * * * may be overcome by other indicia of legislative intent" and application of the canons of statutory construction. *Swafford,* 112 N.M. at 14, 810 P.2d at 1234; *see also Gonzales,* 113 N.M. at 224–25, 824 P.2d at 1026–27.

Both parties in this case rely on *Swafford,* but while *Swafford* provides guidance, as does *Gonzales,* we do not believe that by themselves they resolve the issue of how to handle the complicated problem of compound criminal statutes written in the alternative, such as those at issue here. We set forth the pertinent statutory elements of arson, dangerous use of explosives, and aggravated assault below to illustrate their compound nature:

Arson

> Arson consists of maliciously *or* willfully starting a fire *or* causing an explosion with the purpose of destroying *or* damaging any building, occupied structure *or* property of another * * * *or* with the purpose of destroying *or* damaging any property * * * to collect insurance for such loss. [Emphasis added.]

NMSA 1978, § 30–17–5(A) (Repl.Pamp.1984).

Dangerous Use of Explosives

> Dangerous use of explosives consists of maliciously exploding, attempting to explode *or* placing any explosive with the intent to injure, intimidate *or* terrify another, *or* to damage another's property. [Emphasis added.]

NMSA 1978, § 30–7–5 (Repl.Pamp.1984).

Aggravated Assault

> Aggravated assault consists of *either:*
>
> A. unlawfully assaulting *or* striking at another with a deadly weapon;
>
> B. committing assault by threatening *or* menacing another while wearing a mask, hood, robe *or* other covering upon the face, head *or* body, *or* while disguised in any manner, so as to conceal identity; *or*
>
> C. willfully and intentionally assaulting another with intent to commit any felony. [Emphasis added.]

NMSA 1978, § 30–3–2 (Repl.Pamp.1984).

To complicate matters further, the jury in this case was instructed in the alternative on the aggravated assault charges and on the charge of dangerous use of explosives. As to the aggravated assault charges, the jury was informed that defendant could be found guilty if the jury determined that, as to each victim:

> 1. The Defendant tried to burn the victim; the defendant intended to burn the victim; and the defendant acted in a rude, insolent or angry manner;
>
> OR
>
> The defendant started a fire in the [house where the victim was sleeping]; this caused the victim to believe he or she was about to be burned; and a reasonable person in the same circumstances as the victim would have had the same belief;

AND

2. The defendant used an instrument or object which, when used as a weapon, could cause death or very serious injury[.] [Emphasis added.]

See SCRA 1986, 14–306. As to the charge of dangerous use of explosives, the jury was instructed that it should determine whether defendant "detonated [an] explosive device * * * with the intent to injure, or intimidate, or terrify another person; *or,*" alternatively, that defendant did so with the intent "to damage another's property" (emphasis added). As to the arson charge, the jury was instructed in only one alternative, that defendant started a fire with the intent to destroy a house belonging to another. In keeping with the second prong of the *Swafford* test, we note that none of the statutes at issue contains a clear expression of legislative intent to create separately punishable offenses. *Swafford,* 112 N.M. at 14, 810 P.2d at 1234. We also note that the fifteen verdicts returned by the jury in this case were general verdicts and thus do not indicate the basis for the jury's determination of guilt.

In a footnote to *Swafford,* the supreme court suggests that an exception to the traditional *Blockburger* elements test, focusing on the provisions of the statute under which a defendant is charged in the indictment, may be appropriate for coping with the "complicated problem of compound and predicate offenses." *Swafford,* 112 N.M. at 8, 810 P.2d at 1228 n. 4. In that note, the court cites a federal case for the proposition that "a criminal statute written in the alternative creates a separate offense for each alternative and should therefore be treated for double jeopardy purposes as separate statutes would." *Pandelli v. United States,* 635 F.2d 533, 537 (6th Cir.1980). In *Pandelli,* the federal court determined that the defendant could not be sentenced for both transporting a female across state lines for the purpose of prostitution and for travel to promote prostitution or other crimes, even though the two statutes in question each contained an element that the other did not. *Id.* at 535–36, 539.

Analyzing statutory elements from the vantage point of the particular case before the court, as was done in *Pandelli,* enables a reviewing court to remain faithful to legislative intent to provide alternative means of prosecution against a single category of wrongdoers, and to avoid the confusion and injustice that may arise from looking at statutes in the abstract when each statute contains an element which the other does not. *See id.* at 535–38. What the *Pandelli* court did in applying the *Blockburger* test was to "go further and look to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail." *Pandelli,* 635 F.2d at 538. This approach makes sense, for, as the *Pandelli* court stated:

> [A] statute that is multi-purposed and written with many alternatives, or is vague and unspecific, may have many meanings and a wide range of deterrent possibilities.... It therefore makes more sense to ascertain the operation and deterrent purposes of such statutes for double jeopardy purposes by determining the elements—the legal theory—that constitute the criminal causes of action in the case at hand.

Id. at 538–39. Applying this analysis to the case before us, we believe that the crime of dangerous use of explosives merges into defendant's conviction for arson.

As stated above, the only theory of arson submitted to the jury was that defendant started a fire with the intent to destroy a house belonging to another. Dangerous use of explosives was submitted on two alternative theories, both requiring that defendant detonated an explosive device, defined as including a device used to start a fire. One theory required that he intended to injure, intimidate, or terrify a person; the other required that he intended to damage property. Because of the use of general verdicts in this case, we cannot ascertain on which theory of guilt the jury's verdict was based. *Cf. People v. Lowe,* 660 P.2d 1261, 1271 (Colo.1983) (approving the use of special verdicts in multiple count/alter-

native theory case because if the jury is asked only for a general verdict, there is no way to decide on appeal which alternative theory of guilt was chosen, and in such a case an error relating to either count could void the entire verdict).

The conduct forbidden and the societal evil addressed by both the arson statute itself and one of the applicable alternatives proscribing dangerous use of explosives used in this case, *see Swafford,* 112 N.M. at 14–15, 810 P.2d at 1234–35, is starting a fire to damage property. Disregarding the inapplicable alternative elements of both statutes, as suggested by *Pandelli,* the remaining elements of arson and dangerous use of explosives are identical. Therefore, unless the presence of another applicable alternative mandates a different result, defendant's separate conviction for dangerous use of explosives cannot stand, and his sentence for that crime must also be vacated. *See State v. Pierce; see also People v. Lowe.*

Because there were two alternatives of dangerous use of explosives submitted to the jury, it is possible that the jury convicted defendant pursuant to a theory (intent to injure, intimidate, or terrify a person) that does not merge. Had the state limited its theory to the intent to injure a person, or had it requested special verdict forms so that we would know whether defendant was convicted on both theories, then, for the reasons stated below, multiple punishments would have been proper. However, because the state did neither of these things, we are unable to determine whether a double jeopardy violation occurred. Under these circumstances, defendant's conviction for dangerous use of explosives must be set aside. *Cf. State v. Shade,* 104 N.M. 710, 728, 726 P.2d 864, 882 (Ct.App. 1986) (where one of two alternatives is impermissible, general verdict is set aside and case is remanded for a new trial on permissible alternative).

Similarly, defendant argues that his convictions and sentences for aggravated assault merge with those of arson and must be reversed. We disagree. Having resolved that defendant's conduct was unitary, and that the statutes do not expressly provide for multiple punishments, we must determine legislative intent by applying the *Blockburger* test to determine "whether each provision requires proof of a fact which the other does not." *Blockburger,* 284 U.S. at 304, 52 S.Ct. at 182; *see also State v. Gonzales; Swafford v. State.* Conviction of arson in this case requires proof of intent to damage property; conviction of aggravated assault in this case requires proof of use of a deadly weapon to assault or strike at another. Even having disregarded the inapplicable alternatives in each statute, *see Pandelli v. United States,* it is obvious that convictions of arson and aggravated assault do not merge because they require proof of different facts and theories.

The fact that each statute requires proof of an element absent in the other raises a presumption of legislative intent to punish each offense separately. *State v. Gonzales; Swafford v. State.* In order to rebut this presumption, there must be a showing of contrary legislative intent as evidenced by the " 'language, history and subject of the statutes[,]' " by differences in the particular evil addressed by each statute, by a showing that the statutes are usually violated together, by comparison of the punishment inflicted for violating each statute, and by other relevant factors. *Gonzales,* 113 N.M. at 224–25, 824 P.2d at 1026–27 (quoting *Swafford,* 112 N.M. at 14, 810 P.2d at 1234).

Having examined the arson and aggravated assault statutes in light of these factors, we are convinced that the legislature intended separate punishment for these crimes. The aggravated assault statute is aimed at deterring aggression against other people in which the use of deadly weapons is involved. The section of the arson statute at issue here is designed to protect property interests. Clearly, the statutes protect different interests. *See State v. Gonzales.* Furthermore, "while [these] statutes ... may be violated together, they are not necessarily violated together." *Id.,* 113 N.M. at 225, 824 P.2d at 1027. Finally, the punishments for violating the

two statutes are different, and "[p]unishment for a violation of either statute is not enhanced for a violation of the other." *Id.* We therefore find that the legislature intended separate punishment for unitary conduct violating both statutes. *See id.; Swafford v. State.*

II. CHANGE OF VENUE

Defendant argues that the trial court erred in failing to grant his motion for a change of venue and thereby violated his rights to due process and a fair trial. As defendant acknowledges, the trial court possesses broad discretion in dealing with motions for change of venue, and we will not disturb its decision on appeal absent a showing of an abuse of that discretion. *State v. Martin,* 101 N.M. 595, 607, 686 P.2d 937, 949 (1984). The trial court found that no recent publicity had been given to the case; that the publicity which had occurred over six months earlier was no greater than that given to other, similar matters; and that the issues of pretrial publicity and relationships with the victims could be adequately probed during voir dire. During voir dire, prospective jurors were questioned concerning their knowledge of the events at issue and the people involved, and none of them reported any knowledge concerning the case or potential partiality concerning the people involved. Under these circumstances, there was no abuse of discretion. *Cf. Fuson v. State,* 105 N.M. 632, 735 P.2d 1138 (1987) (new trial ordered where juror was too familiar with the individuals involved to be totally impartial).

III. INEFFECTIVE ASSISTANCE

Defendant contends that his trial attorney rendered ineffective assistance of counsel by (1) failing to adequately investigate his case, including the grounds for his change of venue motion; (2) failing to adequately prepare for trial; (3) failing to impeach a prosecution witness on the basis of his bias against defendant; (4) breaching the duty of loyalty to a client; and (5) failing to preserve defendant's claim of prosecutorial misconduct for appellate review. To show ineffective assistance of counsel, defendant must demonstrate that counsel's performance was below the level of a reasonably competent defense attorney and that such performance "prejudiced defendant in such an extreme way that the adversarial process cannot be relied on as having produced a just result." *State v. Powers,* 111 N.M. 10, 11–12, 800 P.2d 1067, 1068–69 (Ct.App.1990) (citing *State v. Talley,* 103 N.M. 33, 702 P.2d 353 (Ct.App. 1985)).

With regard to claims one through four, we have reviewed the record and have determined that it contains an insufficient factual basis for review of these claims on direct appeal. *See State v. Powers.* Therefore, we do not address them as they are more properly suited to review in a postconviction proceeding. *Id.*

In his fifth claim, defendant argues that trial counsel was ineffective in failing to object to testimony given by defendant's stepmother, Mary Duarte, and in failing to include the related issue of prosecutorial misconduct in eliciting this testimony in the docketing statement. For the reasons stated below, defendant has failed to demonstrate that he was prejudiced in such an extreme way that the adversarial process cannot be relied upon as having produced a just result. *See id.; State v. Talley.* The evidence against defendant in this case was very strong, and defendant has not shown that but for counsel's conduct concerning these matters, the result of the proceeding would have been different. *See State v. Taylor,* 107 N.M. 66, 752 P.2d 781 (1988), *overruled on other grounds, Gallegos v. Citizens Ins. Agency,* 108 N.M. 722, 779 P.2d 99 (1989).

IV. PROSECUTORIAL MISCONDUCT

Defendant complains that the prosecutor acted improperly in calling defendant's stepmother as a witness for the purpose of impeaching her when she denied having repeated certain inculpatory statements, allegedly made by defendant, to FBI agents. After her testimony, the state called the FBI agents to testify, and they stated that Mrs. Duarte had told them that

defendant admitted to starting the fire at the victims' house and said that next time he would use a machine gun.

Defendant relies on *State v. Duran,* 107 N.M. 603, 762 P.2d 890 (1988), in contending that the state's calling of Mrs. Duarte solely to impeach her was fundamental error, even though trial counsel did not object on this basis, or on the basis of hearsay or confrontation and due process. "The doctrine of fundamental error * * * will be invoked by an appellate court only when the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or when the court considers it necessary to avoid a miscarriage of justice." *State v. Ortega,* 112 N.M. 554, 566, 817 P.2d 1196, 1208 (1991).

We will not apply the doctrine of fundamental error here. The evidence against defendant included direct evidence of the altercation at the wedding and eyewitnesses seeing him drive past the victims' house shortly before the fire-bombing. There was circumstantial evidence that, before the fire-bombing, defendant purchased a glass bottle of orange juice at a convenience store because a plastic water bottle would not do. A similar glass bottle was found at the scene, and cloth diapers and a hose smelling of gasoline were found in defendant's car. Forensic analysis tied these items to the crime scene. In contrast, members of defendant's family provided defendant with an alibi. The easily discredited alibi was no match for the strong circumstantial and direct evidence against defendant. Therefore, we find that no miscarriage of justice has occurred, and we will not invoke the doctrine of fundamental error. *See id.*

CONCLUSION

Defendant's convictions for arson and aggravated assault are affirmed. His convictions for dangerous use of explosives and possession of explosives are reversed.

IT IS SO ORDERED.

MINZNER and CHAVEZ, JJ., concur.

833 P.2d 251

Carol Lynn SOUTHARD, Plaintiff-Appellee,

v.

William T. FOX, Defendant-Appellant.

No. 12117.

Court of Appeals of New Mexico.

April 21, 1992.

Charles P. Reynolds, Albuquerque, for plaintiff-appellee.

Peter H. Pierotti, John M. Wells, Wells & Mande, P.A., Albuquerque, for defendant-appellant.

William H. Carpenter, Carpenter and Goldberg, Michael B. Browde, Albuquerque, amicus curiae, New Mexico Trial Lawyers Ass'n.

OPINION

APODACA, Judge.

Defendant appeals the trial court's award of prejudgment interest in connection with a jury verdict stemming from a personal injury lawsuit. Defendant raises two issues on appeal: whether the trial court erred in (1) concluding that plaintiff's damages were subject to prejudgment interest and (2) determining that defendant was not entitled to a jury trial on the issue of prejudgment interest. We hold that the prejudgment interest statute, NMSA 1978, Section 56–8–4(B) (Repl.1986), applies to all damages and, consequently, that the trial court did not err in awarding prejudgment interest on plaintiff's damages. Additionally, because we hold that interest awarded pursuant to Section 56–8–4(B) is not awarded as an element of damages, defendant was not unconstitutionally denied a jury trial. We therefore affirm the trial court's award of prejudgment interest.

BACKGROUND

Plaintiff and defendant were involved in an automobile collision in April 1988, in which plaintiff was injured. On July 28, 1988, plaintiff filed a personal injury action against defendant for damages. Defendant answered on September 6, 1988, denying liability and demanding that the action be dismissed with prejudice. Discovery began in the fall of 1988 and continued until the fall of 1989. On September 26, 1989, defendant made his first settlement offer of $48,000. Plaintiff rejected the offer. On October 12, 1989, defendant offered $56,000, which was also rejected. On November 13, 1989, defendant admitted liability. Trial on the issue of damages began on November 20, 1989.

At trial, plaintiff presented evidence of medical expenses of more than $12,000, lost earnings of more than $5,500, and evidence of compensable injury for the nature and extent of her injuries, pain and suffering, future medical expenses, and impaired earnings capacity in the range of $284,000 to $355,000. At the close of evidence, defendant made a verbal settlement offer for $130,000.

The jury returned a verdict of $130,000 for plaintiff. Plaintiff then moved for an award of prejudgment interest. After a hearing, the trial court notified counsel that it would exercise its discretion under Section 56–8–4(B) and award plaintiff prejudgment interest at the rate of eight percent per year. In its formal findings and conclusions, the court found that defendant's offers of September 26, 1989, and October 12, 1989, were "timely but [were] not reasonable," and that defendant's offer at the close of evidence was "reasonable but was not timely." The trial court also found that plaintiff did not cause unreasonable delay in adjudicating her claims. Based on these findings, and the additional finding with respect to plaintiff's evidence on damages, the trial court concluded that an award of prejudgment interest was warranted and entered judgment. Defendant paid those portions of the judgment limited to the jury's verdict and the trial court's

award of costs, but appealed the award of prejudgment interest.

DISCUSSION

1. *Applicability of Prejudgment Statute to Tort Damages.*

Defendant's major argument (in support of his claim that the trial court erred in concluding that plaintiff's damages were subject to prejudgment interest) is that damages for bodily injury, pain and suffering, and prospective damages are not subject to prejudgment interest because they are not reasonably ascertainable before trial. We disagree with defendant's argument because it ignores the plain language of the statute governing the award of prejudgment interest.

Section 56–8–4(B) states:

> The court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant after considering among other things:
>
> (1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff's claims; and
>
> (2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff.

Where a statute is clear and unequivocal, it must be enforced as written. *State v. Elliott,* 89 N.M. 756, 557 P.2d 1105 (1977); *State v. Michael R.,* 107 N.M. 794, 765 P.2d 767 (Ct.App.1988) (where meaning of statute is plain and words are free from ambiguity, statute must be enforced as written). "The general rules of statutory construction require that words of a statute should be given their ordinary, everyday meaning, and in the absence of a clear and express legislative intention to the contrary, the language of the statute is conclusive." *State ex rel. Reynolds v. Aamodt,* 111 N.M. 4, 5, 800 P.2d 1061, 1062 (1990).

Defendant does not argue that the statute is ambiguous; therefore, we will apply the statute as written. On its face, Section 56–8–4(B) applies to *all actions* and is not limited to certain or specific actions, such as those based on contract or in which damages are ascertainable before trial. Additionally, the statute plainly gives the trial court discretion to award prejudgment interest after considering two specific factors: whether plaintiff was the cause of unreasonable delay and whether defendant had made a reasonable and timely offer of settlement. § 56–8–4(B); *State ex rel. Hooten Constr. Co. v. Borsberry Constr. Co.,* 108 N.M. 192, 196, 769 P.2d 726, 730 (1989). That the legislature did not intend to limit the application of Section 56–8–4(B) to only contract cases or cases involving ascertainable damages is supported by the fact that, before Section 56–8–4(B) was adopted, our law permitted the award of prejudgment interest in those types of cases. *See United Nuclear Corp. v. Allendale Mut. Ins. Co.,* 103 N.M. 480, 709 P.2d 649 (1985). The legislature is presumed to be aware of existing law. *Bettini v. City of Las Cruces,* 82 N.M. 633, 485 P.2d 967 (1971). "Courts assume that the legislature will not enact useless statutes or amendments." *Consolidated Freightways, Inc. v. Subsequent Injury Fund,* 110 N.M. 201, 205, 793 P.2d 1354, 1358 (Ct.App.1990). If we were to accept defendant's interpretation of Section 56–8–4(B), in effect, we would render it superfluous. We decline to do so.

We note that New Mexico has never followed as narrow a rule for the award of prejudgment interest as defendant suggests. Defendant relies on *State Trust & Savings Bank v. Hermosa Land & Cattle Co.,* 30 N.M. 566, 595, 240 P. 469, 480 (1925), for the proposition that "[a]n early New Mexico Supreme Court opinion noted that damages for personal injury were 'undoubtedly unliquidated' and generally not subject to an award of prejudgment interest." We believe defendant's reliance on *State Trust* is misplaced because, in that case, our supreme court actually questioned this proposition and concluded that "the old distinction between liquidated and unliquidated damages seems to be discredited by the weight of modern decisions and texts." *Id.* at 597, 240 P. at 481. Even at the time *State Trust* was decided, our supreme court favored a flexible rule for the awarding of prejudgment interest. *Bernhard v. Rochester German Insurance Co.,*

79 Conn. 388, 65 A. 134, 138 (1906), which the *State Trust & Savings Bank* court quoted approvingly, stated:

> Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon unliquidated damages is one well calculated to defeat that purpose in many cases, and that no right reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages.... *The determination of whether or [not] interest is to be recognized as a proper element of damage is one to be made in view of the demands of justice rather than through the application of any arbitrary rule.*

Id. (emphasis added). Although the question was not directly addressed, this court nevertheless noted in *Strickland v. Roosevelt County Rural Electric Cooperative,* 99 N.M. 335, 343, 657 P.2d 1184, 1192 (Ct.App.1982), *cert. denied,* 463 U.S. 1209, 103 S.Ct. 3540, 77 L.Ed.2d 1390 (1983), that *State Trust* "suggests that as a matter of fairness the same rule should apply in tort cases if the date of the tort is ascertainable." The question is now squarely before us, and we decline to adopt the arbitrary rule limiting the application of Section 56–8–4(B) only to liquidated or ascertainable damages, as proposed by defendant. However, we recognize that in determining the "reasonableness" of settlement offers under Section 56–8–4(B), the trial court will necessarily be making a determination of whether defendant was fairly able to "ascertain" the damages.

Defendant claims the "clear majority" of jurisdictions does not allow prejudgment interest in personal injury suits, relying on *Greater Westchester Homeowners Association v. City of Los Angeles,* 26 Cal.3d 86, 160 Cal.Rptr. 733, 603 P.2d 1329 (1979), *cert. denied,* 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d 22 (1980); *George v. Double D Foods, Inc.,* 155 Cal.App.3d 36, 201 Cal. Rptr. 870 (1984); and Restatement (Second) of Torts Section 913(2) (1979). We are not persuaded by this argument for several reasons.

First, we believe Section 56–8–4 and case law allow prejudgment interest to be awarded in tort claims. *See State Trust & Sav. Bank v. Hermosa Land & Cattle Co.; Strickland v. Roosevelt County Rural Elec. Coop.; see also North v. Public Serv. Co. of New Mexico,* 101 N.M. 222, 231, 680 P.2d 603, 612 (Ct.App.1983) (recognized that Section 56–8–4 would give the trial court the discretion to award prejudgment interest on trespass claims). Second, the California statute on which the above-noted cases relied is very different from Section 56–8–4(B). The California statute states that " '[i]n an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.' " *Greater Westchester Homeowners Ass'n v. City of Los Angeles,* 160 Cal.Rptr. at 741, 603 P.2d at 1337. The California Supreme Court noted that this statute "permits discretionary prejudgment interest for unliquidated tort claims." *Id.* However, California follows the rule that prejudgment interest is " 'awarded to compensate a party for the loss of his or her *property.*' " *Id.* (emphasis in original). Thus, the California Supreme Court limited the award of prejudgment interest to situations where the date of loss was ascertainable, *id.,* and disallowed prejudgment interest on damages for "the intangible, noneconomic aspects of mental and emotional injury." *Id.* at 1338. Section 56–8–4(B), on the other hand, indicates that its purpose is to foster settlements and prevent delays, not to compensate a plaintiff for the loss of his or her property. In light of the different purposes of the statute at issue in *Greater Westchester* and Section 56–8–4(B), we see no reason to follow the California rule.

With respect to defendant's argument that, because the exact amount of damages was not fixed until judgment, the damages were not ascertainable, our supreme court has rejected that argument. *See United Nuclear Corp. v. Allendale Mut. Ins. Co.,* 103 N.M. 480, 488, 709 P.2d 649, 657 (1985).

We thus conclude that Section 56–8–4(B) permits the award of prejudgment interest on all damages awarded in a personal injury action, including those for nonpecuniary losses.

2. *Whether Trial Court Abused Its Discretion.*

Defendant next argues that the trial court had discretion to award prejudgment interest only on those damages that were "reasonably ascertainable" before trial. In this appeal, those damages would include only plaintiff's medical expenses and lost earnings. Defendant thus reasons that the award of prejudgment interest on the total judgment was an abuse of discretion.

"An abuse of discretion ... will only be found when the district court's decision is contrary to logic and reason." *State ex rel. Hooten Constr. Co. v. Borsberry Constr. Co.,* 108 N.M. at 196, 769 P.2d at 730. In that case, our supreme court upheld the trial court's award of prejudgment interest pursuant to Section 56–8–4(B), even though the contract did not include a provision allowing for interest.

Defendant contends that *United Nuclear Corp. v. Allendale Mutual Insurance Co.* describes a hierarchy of damages subject to prejudgment interest. That case stated that, "[w]here the amount in question is fixed or liquidated, prejudgment interest should be awarded as a matter of right. Where the amount is ascertainable, prejudgment interest may be awarded at the judge's discretion." *Id.* 103 N.M. at 488, 709 P.2d at 657 (citations omitted). From this quoted statement, defendant concludes that, when the amount is neither liquidated nor ascertainable, prejudgment interest cannot be awarded at all and it is an abuse of discretion for the trial judge to do so. We disagree.

First, we note that *United Nuclear* involved the application of Section 56–8–3(A), which specifically applies to contracts. The award in this appeal involved Section 56–8–4(B), which is general in scope and thus not limited in its applicability. Second, the prejudgment interest awarded in *United Nuclear* was intended as compensation for damages flowing from a breach of contract. Therefore, it was an element of the damage award. On the other hand, Section 56–8–4, as defendant acknowledges, has the different purposes of fostering settlement and preventing delay. *See* Diane M. Allen, Annotation, *Validity and Construction of State Statute or Rule Allowing or Changing Rate of Prejudgment Interest in Tort Actions,* 40 A.L.R. 4th 147 (1985). Consequently, we conclude that the holding of *United Nuclear* does not prevent a trial judge from awarding prejudgment interest in a tort case under Section 56–8–4(B).

Defendant finally argues under this issue that *plaintiff* never made a reasonable settlement offer in this case and that this failure foreclosed the possibility of defendant's making a reasonable settlement offer. However, defendant has not demonstrated that plaintiff's rejection of his settlement offers prevented defendant from making other offers, or that plaintiff otherwise delayed prosecution of her claim. Under circumstances such as are present in this appeal, Section 56–8–4(B) does not require the trial court to consider whether plaintiff made timely and reasonable settlement offers; rather, the trial court is directed to consider whether defendant has done so. In this appeal, the trial court specifically found that defendant's offers of September 26, 1989, and October 12, 1989, were "timely but [were] not reasonable" and that the offer at the close of evidence was "reasonable but was not timely." The trial court also found that plaintiff "did not cause unreasonable delay in adjudicating her claims." Defendant did not dispute these findings. Findings not attacked on appeal are accepted by the appellate court as the basis for decision. *Cordova v. Broadbent,* 107 N.M. 215, 755 P.2d 59 (1988). Additionally, we note that the trial court did not award the maximum amount of interest permitted under the statute. *See* § 56–8–4(B). For these reasons, we conclude that the trial court properly considered the factors required by the statute in making its award of prejudgment interest and thus did not abuse its discretion in allowing the award.

3. *Denial of Right to Jury Trial.*

Defendant argues that Section 56–8–4(B) denies his right to jury trial under New Mexico Constitution Article II, Section 12.

We hold that defendant's right to jury trial was not violated.

Article II, Section 12 " 'continues the right to jury trial in that class of cases in which it existed either at *common law or by statute at the time* of the adoption of the Constitution.' " *State ex rel. Human Servs. Dep't v. Aguirre,* 110 N.M. 528, 529, 797 P.2d 317, 318 (Ct.App.1990) (emphasis in original) (quoting *State ex rel. Bliss v. Greenwood,* 63 N.M. 156, 161, 315 P.2d 223, 226 (1957)). Thus, to determine if defendant was entitled to have the jury determine whether plaintiff should receive prejudgment interest pursuant to Section 56–8–4(B), we must determine whether this was a class of case entitled to trial by jury at the time the Constitution was adopted.

Defendant relies on *Mogollon Gold & Copper Co. v. Stout,* 14 N.M. 245, 91 P. 724 (1907), and *Lewis v. Baca,* 5 N.M. 289, 21 P. 343 (1889), to argue that the award of prejudgment interest under Section 56–8–4(B) must be determined by a jury because it is a form of damages and factual determinations are required. Alternatively, defendant cites *DePalma v. Weinman,* 15 N.M. 68, 103 P. 782 (1909), for the proposition that, when the Constitution was adopted, at common law the award of prejudgment interest as an element of damages was in the discretion of the jury. Both of these arguments suffer the same flaw, which is that prejudgment interest awarded under Section 56–8–4(B) is not awarded as an element of damages. Damages are intended to compensate a plaintiff for losses associated with his or her injury. *See* SCRA 1986, 13–1802 (Repl.1991). Section 56–8–4(B) is intended to promote settlements and prevent delay. Thus, we conclude that prejudgment interest awarded under Section 56–8–4(B) is not damages that must be determined by the jury and that the legislature could properly entrust such determinations to the trial court.

4. *Motion to Strike.*

In his reply brief, defendant requests that we strike portions of plaintiff's answer brief pursuant to SCRA 1986, 12–312(D). We agree with defendant that plaintiff's statement of facts is overly detailed and lacks appropriate citation to the record. However, we did not consider the additional material to which defendant objects, and it did not affect either our analysis or disposition. Defendant's request is therefore denied.

CONCLUSION

We hold that Section 56–8–4(B) permits the trial court to award prejudgment interest on judgments for tort actions, including those amounts for nonpecuniary and unliquidated losses, and that the trial court did not abuse its discretion. We also hold that the award of prejudgment interest did not violate defendant's constitutional right to a jury trial. Defendant's motion for oral argument is denied. We affirm the trial court's order awarding prejudgment interest to plaintiff.

IT IS SO ORDERED.

PICKARD and FLORES, JJ., concur.

833 P.2d 1146

STATE of New Mexico, Plaintiff–Appellee,

v.

Edmundo OROSCO, Defendant–Appellant.

STATE of New Mexico, Plaintiff–Appellee,

v.

Juan TREVINO, Defendant–Appellant.

Edmundo OROSCO, Petitioner,

v.

STATE of New Mexico, Respondent.

Nos. 19956, 19957 and 19999.

Supreme Court of New Mexico.

Jan. 7, 1992.

Sammy J. Quintana, Chief Public Defender, Jerry Todd Wertheim, Asst. Appellate Defender, Santa Fe, for Edmundo Orosco.

Sammy J. Quintana, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for Juan Trevino.

Tom Udall, Atty. Gen., William McEuen, Patricia Gandert, Asst. Atty. Gen., Santa Fe, for State of N.M.

OPINION

MONTGOMERY, Justice.

The first two of these three cases were filed in this Court after the court of appeals issued its opinion in each defendant's appeal from his district court convictions involving criminal sexual contact of a minor (CSCM) and certain other offenses. After both defendants had filed their briefs in the court of appeals, we held in *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991), that "unlawfulness" is an element of CSCM. In light of that decision, the court of appeals certified the first two cases to us, pursuant to NMSA 1978, Section 34-5-14(C) (Repl.Pamp.1990), to answer the following question: "whether the conviction[s] of criminal sexual contact of a child under the age of thirteen must be set aside and remanded for new trial in light of" *Osborne.* The opinions of the court of appeals raising this question and recommending how the other questions raised on each defendant's appeal should be resolved will be published together with this opinion.[1] The facts in each case are set out in the applicable opinion. We accepted each certification, consolidated the two cases, and received simultaneous briefs from both sides addressing the issue certified.

Soon thereafter, each defendant applied for certiorari, requesting that we review the court of appeals' proposed disposition of the other issues discussed in the court's opinions. Although certiorari was not necessary for this Court to review these other issues, since jurisdiction over each defendant's entire case was transferred to this Court on our acceptance of the certifications,[2] we granted each petition for certiorari and consolidated the two certiorari proceedings with the two cases on certification. We have now concluded, however, that one of the issues in defendant Trevino's appeal—the attack on his convictions for contributing to the delinquency of a minor as violating principles of double jeopardy—requires further consideration and should be severed from our review of the other issues raised by the appeals and by defendant Orosco's petition for certiorari. Accordingly, we have today issued an order vacating our previous consolidation of Trevino's certiorari proceeding with the other

1. The separate opinions of Judge Hartz and Judge Chavez in *Orosco* (No. 19,956) and of Judge Donnelly in *Trevino* (No. 19,957) will also be published, along with the principal opinions of Judge Bivins (concurred in by Judge Minzner in No. 19,957) in both cases. 113 N.M. 789, 833 P.2d 1155, and 113 N.M. 804, 833 P.2d 1170.

2. *See Collins v. Tabet,* 111 N.M. 391, 404 n. 10, 806 P.2d 40, 53 n. 10 (1991) (Supreme Court jurisdiction following certification under Section 34-5-14(C) extends to entire case). Although the court of appeals indicated how it would rule on the other questions raised on appeal, by its certification the case remained undecided in that court and was transferred to this Court for decision.

cases and severing our review of Trevino's convictions for contributing to the delinquency of a minor from our review of the other issues discussed in this opinion.

We now make the following rulings in disposing of the remaining three cases: (1) We agree with Judge Bivins in *Trevino* (No. 19,957), 113 N.M. at 810, 833 P.2d at 1176, and with his implicit determination in *Orosco* (No. 19,956), 113 N.M. at 800, 833 P.2d at 1166, that the omission of an instruction on the element of unlawfulness in the offense of criminal sexual contact of a minor under age thirteen was not, under the circumstances of each case, fundamental error requiring reversal. (2) In defendant Trevino's appeal (No. 19,957), we affirm his convictions except the convictions for contributing to the delinquency of a minor, for the reasons stated in this opinion and in the court of appeals' opinion. (3) In defendant Orosco's appeal (No. 19,956), we affirm his convictions for the reasons stated in this opinion and in the court of appeals' opinion.

We turn first to an explanation of the reasons for our answer to the question certified by the court of appeals.

I. FUNDAMENTAL ERROR

In *Osborne,* we held that unlawfulness is an essential element [3] of the offense of criminal sexual contact of a minor under age thirteen and that, under the circumstances of that case, omission of the element from the jury instruction on the offense constituted fundamental error requiring reversal. While the defendants in the present cases did not raise this ground for reversal in the court of appeals (since our decision in *Osborne* was issued after the briefing there was complete) and the court of appeals raised it on its own motion, defendants now seize on the point and argue that the absence of an instruction on an element of the crime is an error which deprives the trial court of jurisdiction and requires automatic reversal. To evaluate this contention requires us to review, once again, the concept of "jurisdictional error."

Beginning apparently with *State v. Walsh,* 81 N.M. 65, 463 P.2d 41 (Ct.App. 1969), New Mexico courts have referred to a trial court's failure to instruct upon the essential elements of a crime for which a defendant has been convicted as *jurisdictional* error. *See State v. Southerland,* 100 N.M. 591, 594, 673 P.2d 1324, 1327 (Ct.App.), *cert. denied,* 100 N.M. 689, 675 P.2d 421 (1983). However, we have abandoned application of the jurisdictional error

3. We reaffirm the statements in *Osborne,* 111 N.M. at 657–61, 808 P.2d at 627–31, that unlawfulness is an *element* of the offense of CSCM and reject Judge Hartz's suggestion in *Orosco,* 113 N.M. at 801, 833 P.2d at 1167, that perhaps our discussion was really intended to mean that lawfulness is an affirmative defense, on which an instruction need be given only when the issue is raised by the defendant.

We would add (to our discussion in *Osborne*) that the soundness of the holding that unlawfulness is an element of CSCM is confirmed by the fact that this Court and the Uniform Jury Instructions Committee for Criminal Cases clearly considered unlawfulness an element of the offense at the time the CSCM instructions were adopted. Each of the various instructions on CSCM, other than the instruction at issue in *Osborne* and these cases (SCRA 1986, 14–925), includes a provision which is intended to address the issue of unlawfulness. SCRA 1986, 14–921 committee commentary; *see* SCRA 1986, 14–921 to –924 and 14–926 to –936. Provisions similar to those in the other instructions, which might have covered the element of unlawfulness in Instruction 14–925, however, were simply left out.

It is not difficult to understand why this could have occurred. While the term "unlawful" may, as the committee commentary suggests, mean "without consent," *see* SCRA 1986, 14–921 committee commentary—thus permitting a minor legally to consent to sexual contact—the legislature doubtless did not intend that one could legally engage in sexual contact with a minor under the age of thirteen if the child consented. The committee apparently so believed and, under the view that "unlawful" means "without consent," left out any provision addressing that element from Instruction 14–925.

It is for the legislature to define crimes, however; and the term "unlawful" in the CSCM statute applies to offenses against minors of all ages, not just minors over thirteen years of age. NMSA 1978, § 30–9–13 (Cum.Supp.1991). Unlawfulness is considered an element of the crime for offenses against minors over thirteen, and it must be treated as such for the offense against minors under that age as well. As we determined in *Osborne,* the element must therefore be addressed by an instruction appropriate for the offense.

rule, thereby permitting a conviction to be affirmed, in cases where an element omitted from the instructions was not factually in issue. *See State v. Hargrove,* 108 N.M. 233, 236–37, 771 P.2d 166, 169–70 (1989) (if element "was not factually in issue, then the error in the instruction would be nonjurisdictional"); *see also Ortiz v. State,* 106 N.M. 695, 698, 749 P.2d 80, 83 (1988) (claim of jurisdictional error supported since element was factually in issue); *cf. State v. Bell,* 90 N.M. 134, 140–43, 560 P.2d 925, 931–34 (1977) (error not jurisdictional where element was not factually in issue and was a subsidiary fact).

The error in the cases before us could be considered to fall within this exception to the rule of jurisdictional error. However, we decline to describe what occurred in these cases under the rubric "jurisdictional error." Some New Mexico cases, in addition to using the phrase to denote error which may be raised for the first time on appeal, have used it to indicate that a court which has failed to instruct upon an essential element lacked the competency to convict the defendant. *See Southerland,* 100 N.M. at 594, 673 P.2d at 1327; *State v. Gunzelman,* 85 N.M. 295, 300–01, 512 P.2d 55, 60–61 (1973). To the extent our cases have held or implied that this error deprived the court of competency to act, we disagree and disapprove such holdings or implications. We agree with Judge Bivins that the term "jurisdictional error" should be confined to instances in which the court was not competent to act and that it is inappropriate to equate jurisdictional error with other instances in which an error may be raised for the first time on appeal.[4]

In civil cases, a failure to state a claim upon which relief may be granted does not deprive the court of its subject matter jurisdiction. *Sundance Mechanical & Util. Corp. v. Atlas,* 109 N.M. 683, 687–90, 789 P.2d 1250, 1254–57 (1990). Of course, fundamental rights of an accused, which may not be present in the civil context, are implicated where the jury is permitted to return a conviction without having been instructed on an essential element of crime. This does not, however, diminish or eliminate the court's jurisdiction to act. We believe the principle governing failure to state a claim in a civil case applies to the deficiency in the instructions in these cases. By failing to instruct on an element of an offense, the trial court cannot really be said to have lost its competence to act in the matter. Rather, the deficiency in the instructions constitutes error, and it is the task of an appellate court to determine whether the error so undermined the reliability of the conviction or prejudiced the defendant's rights as to require reversal.

In *Osborne,* 111 N.M. at 662, 808 P.2d at 632, we determined that if the instructions omitted an element which was at issue in the case, the error could be considered fundamental: The question of guilt would be so doubtful that it would "shock the conscience" of this Court to permit the conviction to stand. In the present cases, however, the court of appeals has asked us to determine whether the rule of fundamental error applies in the opposite factual setting: "[A]bsent the essential element of 'unlawfulness' as required in Section 30–9–13, did fundamental error occur so as to require us to set aside the conviction[s]," in cases in which there was no claim or evidence that the touchings, if they occurred, were other than unlawful?

The element of unlawfulness clearly was not "in issue" in either of these cases. Defendant Orosco denied having been involved in the alleged incident. Trevino denied that the alleged incident took place. We do not look to the defendants' assertions alone, however, to reach this conclusion; we recognize that even if a defendant believed that he or she had performed an innocent or lawful touching, the defendant might prefer, as a matter of trial strategy

4. The distinction between jurisdictional and fundamental error is reflected in our Rules of Appellate Procedure. *See* SCRA 1986, 12–216(B) (appellate court may consider, even though not raised below, jurisdictional questions *or,* in its discretion, questions involving fundamental error).

or for some other reason, to deny that the incident occurred rather than attempt to establish that the touching, though it may have occurred, was lawful. The question is whether there was any evidence or suggestion in the facts, however slight, that could have put the element of unlawfulness in issue.

In neither case was there anything in the facts to suggest that the touchings, if they occurred, might have involved the provision of medical care, custodial care or affection, or any other lawful purpose. In *Orosco,* the principal (Villegas) was alleged to have fondled the child's intimate parts in the restroom of a bar. No other version of the facts relating to the manner of the touching was presented. In *Trevino,* the only evidence presented regarding the CSCM conviction at issue here (the touching of J.J.) was victim's description of an incident in which defendant fondled the 12–year-old boy's genitals for three hours in defendant's truck. In each case, either an unlawful touching occurred or it did not; in each case, the jury determined that it did.

The rule of fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done. *Osborne,* 111 N.M. at 662, 808 P.2d at 632. Clearly, when a jury's finding that a defendant committed the alleged act, under the evidence in the case, necessarily includes or amounts to a finding on an element omitted from the jury's instructions, any doubt as to the reliability of the conviction is eliminated and the error cannot be said to be fundamental. The trial court's error in failing to instruct on an essential element of a crime for which defendant has been convicted, where there can be no dispute that the element was established, therefore does not require reversal of the conviction. We have recently so held, *see State v. Ortega,* 112 N.M. 554, 568–69, 817 P.2d 1196, 1210–11 (1991) (jury verdict of guilt for conspiracy to commit murder satisfied element of intent to kill); and this rule is consistent with the view of countless other jurisdictions, including the United States Supreme Court, which have considered this and substantially related questions. *See, e.g., Rose v. Clark,* 478 U.S. 570, 579, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1986) (despite *Sandstrom*[5] error removing issue from jury deliberations, "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed."); *Willard v. People,* 812 F.2d 461, 463–65 (9th Cir.1987) (error harmless where jury could not have rendered verdict without also finding element omitted from instructions); *United States v. Hensel,* 711 F.2d 1000, 1005 (11th Cir.1983) ("When it is clear an element was not in dispute, and the transcript of the trial indicates sufficient evidence that the element was met, no prejudice results from the [removal of] the undisputed element from the jury."); *United States v. McCaskill,* 676 F.2d 995, 1002–03 (4th Cir.) ("There can be no 'fundamental error' " in failure to instruct on element when it is beyond dispute that element was met), *cert. denied* 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed.2d 513 (1982); *Olar v. United States,* 391 F.2d 773, 775 (9th Cir.1968) (important rule that failure to instruct jury on every element constitutes plain error "is not one to be applied mechanically"; error not reversible where "it was not only undisputed but indisputable" that element was established); *State v. Avila,* 147 Ariz. 330, 338, 710 P.2d 440, 448 (1985) ("failure to instruct on a necessary element of an offense is not fundamental error where there is no issue as to that element"); *People v. Esquibel,* 794 P.2d 1065, 1066 (Colo.Ct.App. 1990) (omission not plain error where element not at issue); *State v. Correa,* 5 Haw.App. 644, 650, 706 P.2d 1321, 1325 (1985) (omission harmless where there was "uncontradicted and undisputed evidence" that elements were established); *State v. Redford,* 242 Kan. 658, 671–72, 750 P.2d 1013, 1022 (1988) (error harmless where no evidence that conduct occurred other than under circumstances proscribed by omitted

5. *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

element); *State v. Cassada,* 58 Or.App. 84, 86–87, 647 P.2d 938, 939–40 (error in taking element from jury harmless where defendant conceded element), *modified on other grounds,* 59 Or.App. 482, 651 P.2d 171 (1982); *State v. Shaffer,* 18 Wash.App. 652, 653–54, 571 P.2d 220, 222 (1977) (error harmless where elements not at issue), *cert. denied,* 439 U.S. 1050, 99 S.Ct. 729, 58 L.Ed.2d 710 (1978); *cf. State v. Cawley,* 110 N.M. 705, 709–10, 799 P.2d 574, 578–79 (1990) (time not essential element of crime where "clearly established" that statute of limitations was met; failure to instruct not error); SCRA 1986, 14–902 to –962 (Orig.Pamp. & Cum.Supp.1991) (under former law, instruction that defendant was not spouse of criminal sexual contact or penetration victim not required unless sufficient evidence existed to raise issue and defendant requested instruction).

As indicated in these cases, under the rule of fundamental error reversal is required only when the interests of justice so require. A rule of automatic reversal would mandate a new trial in every instance of a failure to instruct, even though it was "not only undisputed but indisputable" that the element was met. *Olar,* 391 F.2d at 775. Such a result, in our view, "would be a perversion of justice, a classic demonstration of profoundly inequitable results that follow when the judiciary worships form and ignores substance." *Bell,* 90 N.M. at 142, 560 P.2d at 933. Applying a rule of automatic reversal is not required by the relevant constitutional principles and fails to take into account our role as an appellate tribunal.

In his special concurrence in *Orosco,* Judge Hartz argues that to affirm the convictions in the absence of an instruction on an essential element is to arrogate a function that belongs to the jury and amounts to a directed verdict with respect to that element of the offense. The error, it is maintained, therefore requires automatic reversal. While this argument has considerable appeal at first glance, we join with the numerous other courts that have dismissed similar challenges and reject it. Even if the error in the instant cases theoretically amounted to constitutional error, we believe the error does not require reversal where it is not fundamental and where there can have been no prejudice to the defendant's rights.

The reason that the burden is placed on the prosecution to prove beyond a reasonable doubt every element of the charged offense is "to ensure that only the guilty are criminally punished." *Rose,* 478 U.S. at 580, 106 S.Ct. at 3107. However, as the Court observed in *Rose,* when the verdict of guilty is correct beyond a reasonable doubt, despite an instruction which has relieved the state of this burden, "reversal of the conviction does nothing to promote the interest that the rule serves." *Id.* We agree that the purpose of the rule requiring proof beyond a reasonable doubt on each element is not served by mechanically requiring reversal even though the jury's findings, in light of the undisputed evidence in the case, necessarily establish that the element was met beyond a reasonable doubt. We therefore do not believe that affirming defendants' convictions in these cases, despite the failure to instruct on unlawfulness, offends any relevant constitutional principles.

Instructions involving *Sandstrom* error, conclusive presumptions, and misdescriptions of essential elements—like instructions that relieve the state of its burden to prove an essential element—all "deprive[ ] the jury of its fact finding role." *Carella v. California,* 491 U.S. 263, 270, 109 S.Ct. 2419, 2423, 105 L.Ed.2d 218 (1989) (Scalia, J., concurring); *see also Rose,* 478 U.S. at 582, n. 11, 106 S.Ct. at 3108, n. 11 (*Sandstrom* error, and other errors that may have affected instructions or record, "all theoretically impair the defendant's interest in having a jury decide his case"). The Supreme Court has made clear, however, that constitutional error of this type does not require reversal without regard to the evidence in the particular case and is therefore not excepted from the harmless error rule. *Carella,* 491 U.S. at 266–67, 109 S.Ct. at 2421; *Rose,* 478 U.S. at 579–84, 106 S.Ct. at 3107–09.

A rule of automatic reversal would also fail to take into account the nature of an

appellate court's role on review. Our rules authorize reversal for errors occurring at trial, even if of constitutional dimension, only when the interests of justice require or when the trial court has exceeded the scope of its powers. *See* SCRA 1986, 1–061, 12–216. While the Court in *Chapman v. California,* 386 U.S. 18, 23 & n. 8, 87 S.Ct. 824, 828 & n. 8, 17 L.Ed.2d 705 (1967), declared that some constitutional errors require reversal without regard to the evidence in the particular case, these rare exceptions are those which "necessarily render a trial fundamentally unfair." *Rose,* 478 U.S. at 577, 106 S.Ct. at 3105; *see Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (adjudication by biased judge). It cannot be said that every failure to instruct on an essential element necessarily renders a trial fundamentally unfair. We are therefore justified in examining the facts in each case to determine whether the error in the instructions rose to the level of fundamental error so as to justify reversal.

We emphasize that our holding today is narrow. In these cases, as in *Osborne,* the trial courts did not remove an issue from the jury by, in effect, granting a partial directed verdict; nor did they refuse to give a proper instruction on the element tendered by the defendant. Rather, the cases went to trial before we recognized in *Osborne* that unlawfulness was an element of CSCM, and the trial courts followed their duty to give the uniform jury instruction on the essential elements of criminal sexual contact of a minor under thirteen. *See Jackson v. State,* 100 N.M. 487, 489, 672 P.2d 660, 662 (1983) (uniform jury instruction for elements of crime generally must be used without substantive modification). This does not excuse omission of the element; reversal would be required if a defendant had been found guilty under an instruction which did not include an essential element of the crime and that element were in issue. However, the circumstances of these cases are important because they demonstrate that in neither case did the trial court improperly remove the issue of unlawfulness from the jury.

The circumstances of these cases are important also because, to the extent we affirm the convictions, we do not in effect direct a verdict for the state or make an independent finding on the element of unlawfulness. Rather, we rest our decision on the basis that, under the undisputed evidence of unlawfulness in the cases and the facts upon which the juries relied to find that defendants committed the acts, the juries themselves effectively determined the existence of the omitted element. *Cf. Rose,* 478 U.S. at 580–81, 106 S.Ct. at 3107 (affirming conviction, despite *Sandstrom* error, not equivalent to directed verdict for state; "In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause the injury.") (emphasis in original).

Our decision today preserves the fundamental right of a criminal defendant to have the jury determine whether each element of the charged offense has been proved by the state beyond a reasonable doubt, while at the same time affording a realistic and substantive rather than an emptily formalistic approach to this problem. The record as to unlawfulness in these cases was undisputed and indisputable, and no rational jury could have concluded that defendants had committed the acts without also determining that the acts were performed in the manner proscribed by law. The error in the jury instructions, therefore, was not fundamental and does not require reversing defendants' convictions.

II. OTHER ISSUES—TREVINO

Trevino's first issue on appeal relates to his convictions for contributing to the delinquency of a minor, which he asserts should be set aside on double jeopardy grounds. As stated previously, this issue will be decided after issuance of this opinion, in our decision on certiorari in Trevino's case (No. 19,997). In this opinion we dispose of all other issues raised by Trevino's appeal and by his petition for certiorari.

His principal attack on his convictions for CSCM is that the evidence was insufficient to support those convictions to the extent that they were based on his alleged use of a position of authority. He contends that evidence was lacking to establish that he actually used his position of authority as J.C.'s employer to coerce the victim into submitting to the sexual contact.

In a criminal case, we will affirm the jury's finding of guilt so long as "substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). We view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict. *Id.*

In this case, the attention of the jury clearly was directed towards the element of use of authority to coerce the child to submit. The jury was instructed that if it had a reasonable doubt as to defendant's guilt of this crime, then it must consider whether defendant was guilty of a lesser included form of CSCM, involving the use of physical force or violence to accomplish the touching. This lesser version of the offense does not refer to use of authority to coerce. Under these instructions, the jury found that defendant had used his position of authority to coerce the minor to submit to sexual contact. For the reasons set out by the court of appeals in its opinion, we believe there was substantial evidence from which the jury could so find. *See State v. Corbin,* 111 N.M. 707, 708–10, 809 P.2d 57, 58–60 (1991).

On all other issues raised in Trevino's appeal, we affirm for the reasons stated in the court of appeals' opinion.

III. OTHER ISSUES—OROSCO

A. *Accessorial Liability*

On certiorari, Orosco first challenges the "alternative theory" of accessorial liability discussed by the court of appeals as supporting his convictions as an accessory to CSCM and attempted criminal sexual penetration of a minor. Although the court explicitly declined to rely on this theory, the court explained that accessorial liability could be based upon the theory that the child's caretaker, who was present, failed to take all steps reasonably possible to protect the child from attack. *See State v. Walden,* 306 N.C. 466, 293 S.E.2d 780 (1982). Defendant argues that this theory is inconsistent with well-established New Mexico case law, which provides that mere presence, without some outward manifestation or expression of approval, is insufficient to sustain a conviction as an accessory. *See State v. Salazar,* 78 N.M. 329, 331, 431 P.2d 62, 64 (1967).

We neither approve nor disapprove of the "alternative theory" discussed in the court of appeals' opinion. Because we believe the court properly affirmed the convictions on the basis it in fact relied upon—namely, that there was substantial evidence to support the convictions under ordinary principles of accessorial liability based upon affirmative conduct—we find it unnecessary to reach the question presented by defendant regarding this alternative theory.

B. *Sufficiency of the Evidence*

This suggests our answer to the second issue we consider on certiorari, defendant's challenge to the sufficiency of the evidence supporting his convictions.[6] Defendant raises two separate arguments on this point.

First, he asserts there was insufficient evidence that he affirmatively aided or encouraged Villegas in the commission of the crimes. We have reviewed this contention and conclude that the court of appeals adequately responded to defendant's claim. As the court of appeals notes, there was direct testimony from the victim and abun-

6. Although defendant in his petition for certiorari raised the issue specifically as a challenge to the sufficiency of the evidence under the court of appeals' alternative theory, we consider defendant's point as a general challenge to the sufficiency of the evidence in support of his conviction.

dant circumstantial evidence to support the conclusion that defendant helped Villegas commit the unlawful acts. For the reasons set out in the court of appeals' opinion, therefore, we believe there was substantial evidence to support the jury's verdicts.

Second, defendant claims that the evidence itself was inadequate to support the verdicts because it consisted solely of the prior inconsistent statements of the victim. Prior inconsistent statements of a witness are, of course, admissible as substantive evidence. SCRA 1986, 11-801(D)(1)(a). However, where the trustworthiness of the prior statements is uncorroborated, they may, as a matter of due process, be insufficient as the sole basis for a conviction. *See State v. Maestas,* 92 N.M. 135, 145, 584 P.2d 182, 192 (Ct.App. 1978).

For the reasons set out in the opinion of the court of appeals, we do not believe the convictions rested entirely on the victim's prior inconsistent statements, nor was the trustworthiness of those statements uncorroborated. The circumstances surrounding the events, the statements and testimony of the victim, and the actions and statements of defendant and the victim's mother, all reinforce the trustworthiness of the victim's prior statements, and much of it constitutes independent circumstantial evidence supporting the jury's verdicts.

On all other issues raised in Orosco's appeal and summarily in his petition for certiorari, we affirm for the reasons stated in the court of appeals' opinion.

IV. DISPOSITION

For the reasons set out above, defendant Orosco's convictions are affirmed. We affirm defendant Trevino's convictions except those for contributing to the delinquency of a minor, which we shall dispose of by subsequent opinion in Cause No. 19,997.

IT IS SO ORDERED.

BACA, FRANCHINI and FROST, JJ., concur.

RANSOM, C.J., specially concurs.

RANSOM, Chief Justice (specially concurring).

I concur in the majority's affirmance of the convictions at issue. Justice Montgomery is without a worthy adversary to deny his continuing attack on the use of the term "jurisdictional error" to describe anything other than a lack of subject matter or personal jurisdiction. He would exclude from "jurisdictional error" any other lack of power, authority, or competence to act. His influence is apparent in the recent opinion authored by me in *Govich v. North American Systems, Inc.,* 112 N.M. 226, 230, 814 P.2d 94, 98 (1991) (proper to refer to mandatory appellate rules concerning the time for filing notice of appeal as "mandatory" and to discard the term "jurisdictional" that has been used over time by most federal and state courts to describe a mandatory precondition to the exercise of jurisdiction). However, as I stated in a special concurrence to *Sundance Mechanical & Utility Corp. v. Atlas,* 109 N.M. 683, 789 P.2d 1250 (1990), "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 * * *." 109 N.M. at 692, 789 P.2d at 1259 (emphasis added).

What is at issue, regardless of terminology, is whether bright-line principles of this Court are to give way to case-by-case analysis based upon principles of justice and conscience. Where this Court has decided as a policy matter to draw certain bright lines to govern the power or authority of the courts, it may be well to describe the crossing of those lines in some terminology other than "jurisdictional error"—but that is the terminology we find in the cases. As a matter of policy, we have adopted a mechanistic approach, but not one that "worships form and ignores substance."

I agree, however, "when a jury's finding that a defendant committed an alleged act, under the evidence in the case, necessarily includes or amounts to a [conscious and indisputable] finding on an element omitted

from the jury's instructions, any doubt as to the reliability of the conviction is eliminated and the error cannot be said to be fundamental." I do not agree that the rule of fundamental error in not instructing on an essential element of a crime applies "only if * * * substantial justice has not been done." The latter application of the fundamental error doctrine is an unjustified shift from the concept of "jurisdictional error" that has described the fundamental error conclusively presumed to arise from failure to instruct on an essential element that defendant has not affirmatively conceded. *See State v. Hargrove,* 108 N.M. 233, 235–36, 771 P.2d 166, 168–69 (1989) (failure to give an instruction on an essential element is jurisdictional and reversible error unless the defendant affirmatively has conceded the facts underlying the essential element). The bright line has served us well and we should go no further here than to add the "necessarily established" exception to the jurisdictional error doctrine (by whatever name) along with the "affirmative concession" exception.

833 P.2d 1155

STATE of New Mexico, Plaintiff–Appellee,

v.

Edmundo OROSCO, Defendant–Appellant.

No. 11816.

Court of Appeals of New Mexico.

July 2, 1991.

Tom Udall, Atty. Gen., Patricia Gandert, 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

BIVINS, Judge.

Convicted of attempted criminal sexual penetration of a minor as an accessory and of criminal sexual contact of a minor as an accessory, defendant appeals, raising the following issues: (1) sufficiency of the evidence to convict where defendant contends only prior inconsistent statements identified defendant as a perpetrator; (2) abuse of discretion by district court in admitting the prior inconsistent statements when child victim appeared unable to respond to cross-examination; (3) ineffective assistance of counsel based on failure to call the principal to testify and to demand disclosure of notes a witness used to testify at trial; (4) abuse of discretion by district court in determining victim competent to testify; (5) trial court error in giving improper jury instructions; (6) trial court error in allowing jury to see defendant in handcuffs; and (7) trial court error in denying defendant's motion for new trial. Issues raised in the docketing statement but not briefed are deemed abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct. App.1985). Although not raised, we also discuss a question of possible fundamental error: when defendant's conviction of criminal sexual contact of a minor under the age of 13 as an accessory must be set aside and remanded for new trial in light of our supreme court's recent decision in *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991) which was decided after the parties filed their briefs. We believe this question involves a significant question of law under the constitution of the United States and also an issue of substantial public interest that should be determined by the supreme court. *See* NMSA 1978, § 34-5-14(C)(1), (2) (Repl.Pamp.1990). We are concerned that *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973) compels a decision by this court with which the supreme court ultimately might not agree. Additionally, as our discussion points out, resolution of a part of the issue may involve a choice between what appears to be conflicting decisions by the supreme court. We first set forth the factual background, then discuss the issues defendant raises. Finally, we address the issue we certify.

FACTS

In determining whether evidence supports a criminal charge or an essential element thereof, the reviewing court 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 conviction. *State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978). While we apply that standard in reviewing the substantiality of the evidence, in order to understand defendant's challenge, it is necessary at the outset to indicate conflicts between the victim's testimony at trial and his recitation of the incident made to others before trial. The victim, age six at the time of the incidents giving rise to the charges, lived with his mother and her boyfriend, defendant Orosco. While caring for victim, defendant and his friend, Manuel Villegas, took the boy to a bar. On numerous occasions since, the victim relayed that he was sexually molested in the bathroom and elsewhere in the bar by Villegas. The victim stated that Villegas made him touch Villegas' penis with his mouth, and that Villegas touched the boy's penis. However, the victim's facts about the incident have been inconsistent regarding the role the defendant played in the molestations.

Before trial, the victim was questioned about the incident, and received counseling. At trial, three witnesses were called to relate what the victim had told them prior to trial.

The victim told Nurse Jennifer Bruce that both defendant and Villegas had laughed at him in the bathroom because of what they had made him do. The child told her he went to the bathroom with Villegas, that Villegas told him to "lick his dick," that the child did that and some sticky stuff came out of his penis. The child said Villegas then gave him a quarter and the child went out and told defendant what happened. The victim had drawn a picture of the incident for her showing defendant standing next to Villegas. The child told Bruce that he was frowning in the picture he drew because he was scared. He said defendant and Villegas were smiling because they were happy.

The victim spent five sessions with Yolanda Morales, a psychologist, learning about the truth and how to tell it. After three sessions, he told Ms. Morales that defendant had held his head in an attempt to force him to have oral sex with Villegas. He said both men may have touched his penis, and that both threatened him. Morales testified that the child stated that the events occurred in the bathroom.

After counseling with Ms. Morales, the victim told Detective Steve Gonzales that defendant pushed him into the bathroom, and both defendant and Villegas pulled down his pants. Victim said the defendant held his head while Villegas attempted to have oral sex with him.

We note that at trial the child testified that he had told the truth to the police, to Morales, and to Bruce. Moreover, the child specifically stated that he had told the truth before when he had said that defendant had helped Villegas and had himself touched the child.

However, at trial, the victim related a different story regarding the defendant's role in the incident. The victim testified that when Villegas attempted to pull down his pants at the bar, defendant tried to pull his pants up. Defendant also told Villegas to stop, and became angry with him. When asked about his prior statements, the victim stated that he had told the truth to Ms. Bruce, but that he did not remember saying that defendant had helped. He then said that he had made a mistake at an earlier interview when he said that defendant had touched him.

Additionally, the defense presented expert testimony from Dr. Luis Natalicio, who had evaluated the boy for competency. He testified that the interview techniques used by Ms. Morales caused him to lose the ability to discern the difference between truth and falsehood. According to this witness, by Ms. Morales questioning the victim repeatedly using closed questions, she signaled to him when the right answer had not been given. As a result, the interview sessions had contaminated the victim's perceptions.

Additional facts will be provided in the discussion that follows.

DISCUSSION

1. *Sufficiency of the Evidence*

Defendant claims the district court erred in refusing to grant defendant's motion to dismiss for lack of evidence. While con-

ceding that prior inconsistent statements constitute substantive evidence, *see State v. Maestas,* 92 N.M. 135, 144, 584 P.2d 182, 191 (Ct.App.1978), defendant argues that the statements alone are insufficient to support a conviction. Defendant does not challenge the admissibility of the victim's prior inconsistent statements as related by the three witnesses; rather, he claims that because the prior inconsistent statements lack corroboration they are insufficient to sustain the convictions.

We answer defendant's challenge to the sufficiency of the evidence by holding, first, there was direct testimony from the victim at trial sufficient to support the convictions and, second, to the extent that prior inconsistent statements may have been relied upon by the jury, they were sufficiently corroborated as required under *Maestas.* Additionally, we will discuss what appears to be a misconception of the law by both the state and defendant as to what is required in order to convict as an accessory.

At the trial the victim was asked by the prosecutor if he remembered telling other people that defendant helped Villegas and that defendant himself had touched the child. The victim said that he had and that this was the truth. Taken in context, "helping Villegas" refers to touching Villegas' penis with the child's mouth, and defendant touching the child refers to touching the child's penis. While there was other evidence from the victim contradicting this, it was up to the jury to resolve these conflicts. This testimony constitutes direct evidence that supports the jury's verdicts.

There were also prior inconsistent statements made by the victim to others which constituted substantive evidence to support the verdicts. Before examining the sufficiency of that evidence, we first discuss briefly the law relating to prior inconsistent statements.

Maestas implicitly holds that while prior statements may be admitted and given substantive effect, that does not mean that they suffice as the sole basis for a conviction. *Id.* at 145, 584 P.2d at 192 (citing from 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801–76.1 (1977)). That case suggests that the question of the sufficiency of the evidence remains, as the due process clause of the fourteenth amendment may require a minimal standard of evidentiary support to sustain a conviction. In *Maestas,* this court determined that corroborative evidence sufficed to provide that evidentiary support and therefore upheld the conviction.

In *Maestas,* the victim suffered aggravated battery at the hands of someone. The question was who. At trial, the victim was either unable or unwilling to identify the defendant as the assailant. Shortly after the assault, however, she had told her mother and sister that it was defendant who had beaten her. The testimony of the mother and sister was admitted and constituted substantive evidence of the prior statement of the victim. We held that those prior hearsay statements were corroborated by several additional facts, including the fact that victim lived with defendant in his home for a week; that no other person bore any unfavorable relationship with the victim that would lead to a severe beating; that defendant presented no witness nor any evidence that cast doubt upon the truth of the prior statements made; and that no evidence of defendant's good character was presented. We said these facts and circumstances corroborated the truth of the prior statements made by the victim, so that the prior statements were not the sole basis for the conviction.

In the case before us, the jury heard testimony that victim's mother learned of the incident when she and defendant were fighting. This occurred several weeks after the molestations. The mother awakened the victim to learn what occurred. As a result, she reported the crime to the police, implicating both the defendant and Villegas. Mother then ordered defendant out of the house. It was not until shortly before trial that mother resumed her relationship with defendant. She then filed an affidavit asking that the charges against defendant be dropped. At trial, the victim related the story, for the

first time, that defendant attempted to help him when Villegas lowered his pants. While the jury might have believed mother threw defendant out of the house and reported him to the police out of anger unrelated to any alleged misconduct with the child, it could also have believed she took these actions because the victim implicated defendant when questioned by his mother.

Additionally, Officer Gonzales testified that the child's mother had also told him that the child had been molested by defendant. Mother did not deny this. In addition, there are statements attributable to defendant which are incriminatory. For example, the mother testified the defendant told her that her son was "capable of doing certain things." It was this statement that led the mother to questioning her son and then calling the police. That statement by defendant seems quite inconsistent with that of a person who had tried to protect the child from sexual contact by another adult. Similarly, the mother testified on cross-examination that before the incident defendant had complained to her that the child was curious about seeing men's private parts and was always after him when he went to the bathroom. She went on to say the defendant had told her that Villegas had offered the child money to grab Villegas' private parts. Defendant did not say anything about trying to stop this. Again, the jury could find that conduct inconsistent with someone who was offended by it and tried to stop it. Also, defendant told Detective Gonzales that the child followed Villegas into the bathroom to watch him urinate and defendant went to the bathroom with them but did not touch the child or see Villegas touch the child. Thus, defendant did not tell the police the "exculpatory" story that the child told at trial. A jury can infer a consciousness of guilt from that.

Finally, we cannot ignore the surrounding circumstances of the events—the role of defendant as caretaker for the child that evening, the fact that defendant took the child to a bar, the unlikelihood that defendant could not prevent Villegas from engaging in the misconduct if defendant really wished to prevent it, and the bar environment itself. These circumstances support the version of events given by the child prior to trial and render it likely that the jury found the child's trial version to be incredible. The child's prior statements describe the events as occurring in the bathroom at the bar. His trial testimony was that the events did not occur in the bathroom but at the bar (apparently the bar counter) itself. The jury was entitled to wonder about the probability of Villegas committing the misconduct in the open part of the bar and how it could be that defendant was unable to prevent the misconduct. Indeed, the incredibility of the child's testimony at trial strongly corroborates the child's prior inconsistent statements.

In summary, there was ample direct evidence that Villegas engaged in improper sexual contact with the child at the bar in defendant's presence during a time when defendant was charged with the care of the child. Given the nature of the sexual contact, one could rationally find it highly unlikely that the contact could have occurred without the approval, even encouragement, of the child's caretaker, the defendant. In this circumstance, the victim's statements to the three outsiders and to his mother to the effect the defendant was involved in the misconduct are infinitely more credible than the astonishing trial testimony of the child to the effect that defendant actually tried unsuccessfully to prevent the misconduct. The jury could view the coincidence of the child's trial testimony with the mother's reunion with defendant as highly suspicious.

■ We now address what appears to be a misconception on the part of both sides with respect to the legal responsibility of the defendant under the circumstances of this case. While we do not rely on this alternative theory, since it was not raised or briefed, we discuss it to make clear we do not agree with the parties' view of the law.

In making his argument, defendant assumes that to be convicted as an accessory it was necessary for the state to prove defendant took an active role in the at-

tempted criminal sexual penetration and criminal sexual contact of the minor by Villegas. In other words, both the defendant and the state assume that, in order to be an accessory, defendant had to either restrain the victim as Villegas molested him or otherwise assist in the commission of those crimes or attempted crime in some direct affirmative manner. Thus, both the state and defendant seem to concede that defendant's mere presence during the molestations would not suffice to convict him as an accessory, even though defendant had charge of the care of the minor and took no steps to protect him. Although we have pointed to evidence of direct involvement by defendant, we determine if the parties' position correctly states the law.

NMSA 1978, Section 30-1-13 (Repl.Pamp.1984) provides:

> A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted, or is a child under the Children's Code[.]

The district court gave the appropriate instruction for aiding and abetting. *See* SCRA 1986, 14-2822 (1986 Recomp). Both the statute and the uniform jury instruction require, in order to convict a person as an accessory, that the state prove beyond a reasonable doubt that the defendant intended that the crime be committed, that the crime was committed and that the defendant helped, encouraged, or caused the crime to be committed.

Although SCRA 1986, 14-2823 (1986 Recomp.) provides mere presence and even mental approbation, if unaccompanied by outward manifestation or expression of approval, is insufficient to establish that the defendant aided and abetted a crime, the use note provides that no instruction on that subject shall be given. The committee commentary notes that the language of that instruction is taken from *State v. Ochoa,* 41 N.M. 589, 72 P.2d 609 (1937), but that no instruction is necessary to guide the jury because the subject is covered by the essential-elements instruction.

In *State v. Luna,* 92 N.M. 680, 594 P.2d 340 (Ct.App.1979), discussing aiding and abetting, this court said that there must be a community of purpose, a partnership in the unlawful undertaking. We added that this community of purpose may be shown by evidence of acts, conduct, words, signs, or any means sufficient to incite, encourage, or instigate the commission of the offense. Do those requirements of proof mean that a person entrusted with the care and safekeeping of a child, such as presented by the facts in the case before us, has no responsibility and cannot be held criminally liable for failure to take affirmative action reasonably necessary to prevent harm to the child? In other words, can a defendant, charged with responsibility of caring for a minor, escape criminal liability as an aider or abettor as long as he takes no direct affirmative action to incite, encourage, or instigate the commission of the offense?

It is noteworthy that none of the cases in New Mexico defining what must be proved to establish the crime of accessory involved a defendant entrusted with the care of a minor who was assaulted in the presence of that defendant. At least one case from another jurisdiction has. In *State v. Walden,* 306 N.C. 466, 293 S.E.2d 780 (1982), defendant was present when her son was assaulted in her apartment by an adult male with whom she was living. The court held defendant could be convicted as an aider and abettor solely on the basis that she failed to take reasonable steps to prevent the assault. It said that parents have an affirmative legal duty to protect and provide for their minor children. In so holding, the North Carolina Supreme Court said:

> We think that the rule we announce today is compelled by our statutes and prior cases establishing the duty of parents to provide for the safety and welfare of their children. Further, we find our holding today to be consistent with our prior cases regarding the law of aid-

> ing and abetting. It remains the law that one may not be found to be an aider and abettor, and thus guilty as a principal, solely because he is present when a crime is committed. *State v. Benton,* 276 N.C. 641, 174 S.E.2d 793 (1970). It will still be necessary, in order to have that effect, that it be shown that the defendant said or did something showing his consent to the criminal purpose and contribution to its execution. *State v. Hildreth,* 31 N.C. (9 Iredell) 440 (1849). But we hold that the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed. *Cf. State v. Haywood,* 295 N.C. 709, 249 S.E.2d 429 (1978) (When a bystander is a friend of the perpetrator and knows his presence will be regarded as encouragement, presence alone may be regarded as aiding and abetting).

Id., 306 N.C. at 472–74, 293 S.E.2d at 786–88.

While the defendant here was not the parent of the child, he stood in the position of the parent since he was charged with the care and welfare of the child. Accordingly, we see no reason why the rule announced in *State v. Walden* could not be applied to a person in defendant's position. Similarly, we think that this rule is compelled by our aiding and abetting statute as well as prior case law interpreting that statute.

Discussing the duty based upon voluntary assumption of care, Professor LaFave notes that:

> [a] more difficult problem is involved if he starts to aid the other but does not go so far as to improve the other's position, as where a good swimmer starts to swim out to a drowning bather but turns back on recognizing the bather as his enemy. Perhaps here he would be liable only if his conduct in starting to go to the other's rescue induced other prospective rescuers to forego action. *So too if one voluntarily and gratuitously assumes responsibility for a helpless person—such as for a child or an insane or infirm person—he has a duty thereafter to act to protect the other from harm.* [Emphasis added and footnote deleted.]

W. LaFave and A. Scott, *Substantive Criminal Law* § 3.3(a)(4), at 287 (1986). *See also id.* § 3.3(a)(1) (Duty Based Upon Relationship).

■ We also note a second basis for liability of defendant as an accessory. Professor Wharton, in his treatise, notes that a bystander may observe the commission of a crime with impunity and that he need not make any effort to prevent the crime or apprehend the offender. He notes that even if the bystander approves of the crime being committed he does not become liable as a principal unless he makes known to the principal that he shares his purpose, is on his side, and will assist him if it is necessary. But, "[o]f course, where the bystander is a friend of the principal in the first degree, and knows that his presence will be interpreted by the latter as encouragement and support, his presence alone may be sufficient for liability to attach." 1 C. Torcia, *Wharton's Criminal Law* § 31, at 166–67 (14th ed. 1978); *accord State v. Hargett,* 255 N.C. 412, 121 S.E.2d 589 (1961) (presence does not incite, encourage, or aid the perpetration of a crime, but when bystander is a friend of perpetrator and knows his presence will be regarded by perpetrator as encouragement and protection, presence alone may be aiding and abetting).

In the case before us, the victim testified that defendant was "there" when Villegas wanted the victim to touch Villegas' penis with his mouth and the victim did so. Even if the jury believed the victim's trial testimony that defendant at some point pulled the victim's pants up when Villegas pulled them down, there was direct evidence from which the jury could infer that Villegas succeeded in sexually contacting the victim and that defendant failed to intervene to stop it. We believe that the jury could find one in defendant's position could be criminally liable in the circumstances of this

case. Defendant's failure to act to protect the victim against harm by Villegas, defendant's friend, could be viewed by the jury as encouraging the commission of the offense. Moreover, the victim testified that either Villegas or defendant told him not to tell what happened. Defendant's failure to report this crime is a factor that may be considered in determining defendant's legal accountability as an aider and abettor. *See People v. Bailey,* 132 Ill.App.3d 399, 87 Ill.Dec. 368, 476 N.E.2d 1360 (1985).

Thus, the language of the statute as well as the uniform jury instruction on aiding and abetting could make the defendant criminally liable based upon the victim's trial testimony which seemingly attempted to exonerate defendant. While defendant's mere presence may not, under cases cited above from New Mexico, be sufficient to invoke criminal liability, his relationship to the victim coupled with his friendship with Villegas and his failure to intervene are sufficient to allow the jury to convict him as an accessory to the crimes committed.

2. *Abuse of Discretion in Admitting Prior Inconsistent Statements*

Defendant concedes the trial court did not abuse its discretion in admitting the child's prior inconsistent statements under SCRA 1986, 11–613(B). Nevertheless, defendant seems to contend that the statements could not be considered as substantive evidence because the child was unable to effectively respond to cross-examination. *See id.;* SCRA 1986, 11–801(D)(1)(a). Defendant appears to base his argument of insufficient cross-examination on the assumption that the child was incompetent to testify. As we discuss below, however, we believe the trial court did not abuse its discretion in finding the child competent to testify, therefore, defendant's argument on this point must fail.

3. *Ineffective Assistance of Counsel*

Defendant asserts two instances of ineffective assistance of counsel. The first concerns trial counsel's failure to subpoena Villegas to testify at trial. The second concerns trial counsel's failure to demand the disclosure of notes Yolanda Morales used to testify at trial. Defendant seeks to raise the matter of Ms. Morales' notes through a motion to add an issue. We grant that motion and address both instances of claimed ineffective assistance of counsel.

a. Failure to Subpoena Villegas

Trial counsel did not subpoena Villegas to testify at trial on behalf of defendant. At a motion for a new trial, trial counsel tendered Villegas' testimony. Defendant asserts that Villegas would have testified that defendant had nothing to do with the incident. The trial court indicated that Villegas' testimony might very well change the results if a new trial were granted. Nonetheless, the trial court went on to say that trial counsel failed to use due diligence in discovering the testimony because he failed to subpoena Villegas and, therefore, did not grant a new trial.

To show ineffective assistance of counsel, defendant must prove that trial counsel's actions were not those of a reasonably competent attorney and that those actions prejudiced defendant. *See State v. Talley,* 103 N.M. 33, 36, 702 P.2d 353, 356 (Ct.App.1985). This court will not attempt to second-guess tactics and strategy of trial counsel on appeal. *See State v. Dean,* 105 N.M. 5, 727 P.2d 944 (Ct.App.1986). The decision whether to call a witness is a matter of trial tactics and strategy within the control of trial counsel. *See State v. Barnes,* 83 N.M. 566, 494 P.2d 979 (Ct.App. 1972).

Defendant argues that trial counsel's motion for a new trial based on the newly discovered evidence demonstrates that not calling Villegas constituted error, not a strategy. *Cf. State v. Perez,* 95 N.M. 262, 620 P.2d 1287 (1980) (failure to subpoena a potential witness known to defendant demonstrates a lack of due diligence). We disagree. Defense counsel may well have thought during trial that the recantation by the victim created an excellent opportunity for an acquittal. To call Villegas would be a risky proposition. Even if Villegas agreed to testify, the net result of his

testimony, if he was vigorously cross-examined, could be incriminatory to defendant. The motion for a new trial was merely a recognition that, the jury having convicted defendant, testimony by Villegas could not cause any further harm. Without more facts indicating that trial counsel's actions were truly an error and not a strategy, we cannot say there was ineffective assistance of counsel on this basis. *See State v. Powers,* 111 N.M. 10, 800 P.2d 1067 (Ct.App. 1990).

b. Disclosure of Morales' Notes

Defendant also complains that his trial counsel's failure to demand disclosure of the notes used by Morales to refresh her memory during trial was ineffective assistance of counsel. Even if such action by defendant's trial counsel fell below the standard of a reasonably competent attorney, defendant still fails to show how such action prejudiced him. *See State v. Talley.* Defendant does claim he was prejudiced in two ways. We find each unpersuasive.

First, defendant contends that had trial counsel made a timely demand for the notes, trial counsel would have had a "vivid record of her suspect interview techniques." Defendant asserts the techniques were only described to trial counsel "second-hand through Dr. Natalicio's somewhat antiseptic expert testimony." We fail to see how Ms. Morales' notes of her interview techniques would have been any less "antiseptic" than Dr. Natalicio's description to trial counsel. Further, defendant has failed to show why the lack of a "vivid record" of Morales' techniques prejudiced him. We find no prejudice on this ground.

Defendant also asserts prejudice because he speculates that if the state decided to withhold the notes, some of the prior inconsistent statements of the boy would have been excluded. Speculation about what the state might have done does not demonstrate prejudice. We, therefore, reject defendant's ineffective assistance claim on this ground.

4. *Abuse of Discretion in Finding Child Competent to Testify*

Defendant argues that the trial court abused its discretion by finding the child competent to testify. Defendant points to Dr. Natalicio's testimony at the competency hearing and trial that the child was not competent to testify. Defendant also voices great concern because the trial judge did not directly observe the child before ruling him competent to testify. Defendant reasons that because the judge did not observe the child there was nothing to contradict Dr. Natalicio's testimony, and, therefore, the child should have been deemed incompetent to testify.

Expert testimony is opinion, not fact. *See State v. James,* 85 N.M. 230, 511 P.2d 556 (Ct.App.1973). The trial court, like the jury, can ignore the expert testimony. *Id.* Defendant argues that because nothing contradicts the expert opinion, the trial court is bound by it when determining competency. His argument is premised on the assumption that the trial judge must actually observe the witness with his own eyes before deciding competency. As authority, defendant cites *State v. Manlove,* 79 N.M. 189, 441 P.2d 229 (Ct.App.1968). In *Manlove,* this court quoted an early supreme court case that stated "[t]he trial court had an opportunity to examine this witness and observe his demeanor, and could judge his mental capacity from his manner of testifying." *Id.* at 191, 441 P.2d at 231, *quoting State v. Armijo,* 18 N.M. 262, 135 P. 555 (1913). From this the defendant concludes that the trial court must examine and observe the witness prior to ruling on competency.

In *Manlove,* however, this court also stated that the trial court must determine competency from inquiries into the child's capacities of observation, recollection, and communication, as well as the child's appreciation or consciousness of the duty to speak the truth. *Id.* at 192, 441 P.2d at 232. The question is, therefore, whether the steps taken by the trial court were sufficient inquiry or observation. Before determining competency, the trial court held a hearing, listened to witnesses, con-

sidered reports about the child, and listened to tapes of the child's testimony at the preliminary hearing. Moreover, the trial judge had the opportunity to observe the child testify at trial.

Under those circumstances, we conclude that the trial court met its duty of observation and inquiry. Those inquiries, we believe, provided sufficient evidence to disregard Dr. Natalicio's opinion and rely on the court's own inquiries. Further, even if the doctor's opinion was uncontradicted, the trial court was still not required to accept it as fact. *See State v. James,* 85 N.M. at 233, 511 P.2d at 559. Moreover, there was other evidence to support a determination of competency. Accordingly, we do not believe the trial court abused its discretion in finding the child competent to testify.

5. *Improper Jury Instructions*

Defendant also argues the trial court erred by giving improper jury instructions. Defendant complains that the court erred by giving an attempt instruction when all the evidence showed a completed crime. Defendant further complains that the court erred by giving accessory instructions that contained no mention of specific intent. Both issues are raised 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).

a. Attempt Instruction

Defendant failed to raise this issue in his docketing statement. He did raise a related issue arguing the trial court erred by not granting his motion for a judgment of acquittal because all of the evidence proved a completed crime rather than an attempted crime. Because the jury instruction issue was not raised in the docketing statement, we need not address it on appeal. *See State v. Hernandez,* 95 N.M. 125, 619 P.2d 570 (Ct.App.1980). Nevertheless, given the nature of the charges and the boy's young age, we believe the jury could reasonably infer that he was incapable of knowing whether the crime was completed. The jury could have found that only an attempt was committed. *See Medler v. Henry,* 44 N.M. 275, 101 P.2d 398 (1940); *State v. Chavez,* 78 N.M. 446, 432 P.2d 411 (1967). It appears the trial court may have recognized the potential inferences from the evidence and properly instructed the jury on attempt.

b. Accessory Instruction

Although defendant objected to the accessory instruction, he failed to tender what he believed to be a correct instruction on the matter of specific intent. Therefore, this issue is not preserved for review because he failed to tender a legally correct instruction. *See State v. Casteneda,* 97 N.M. 670, 642 P.2d 1129 (Ct.App. 1982). Moreover, the trial court did instruct on the issue of specific intent, although it was in an instruction separate from the accessory instruction. Therefore, there was no error. *See State v. Puga,* 85 N.M. 204, 510 P.2d 1075 (Ct.App.1973).

6. *Handcuffs Issue*

Pursuant to *State v. Franklin* and *State v. Boyer,* defendant argues the trial court erred in not granting a mistrial because the jury saw defendant in handcuffs. The trial court denied the motion for mistrial. Before ruling on the motion, the court pointed out that certain jurors saw defendant in handcuffs at 6:10 when the jury was released for dinner, that the jury returned at 7:10, and that defendant moved for a mistrial at 9:20 just before the jury was about to return its verdict. The state asserts the court denied the motion as untimely although the court never explicitly gave timeliness as its basis for denying the motion. The trial court could have also concluded that the jury's inadvertent view of defendant after being released for dinner did not warrant a mistrial. *See State v. Gomez,* 82 N.M. 333, 481 P.2d 412 (Ct. App.1971). In either event, we conclude that the court did not abuse its discretion in denying the motion.

7. *New Trial*

Also pursuant to *Franklin* and *Boyer,* defendant argues the trial court

erred in denying his motion for new trial on the basis of newly discovered evidence that Villegas had been acquitted, that the victim had testified about a second day at the bar during Villegas' trial, and that Ms. Bruce revealed she had tape recorded a session she had with the victim. A motion for new trial will not be granted unless the newly discovered evidence fulfills the following 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 prior to 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. *See State v. Volpato,* 102 N.M. 383, 696 P.2d 471 (1985).

With regard to Villegas' acquittal, an accessory may be convicted even though the principal is acquitted. *State v. Ochoa,* 41 N.M. 589, 72 P.2d 609 (1937). Therefore, the acquittal of Villegas was irrelevant to defendant's case. The child's testimony at Villegas' trial regarding a second day at the bar would have only impeached or contradicted his testimony at defendant's trial. *See State v. Volpato.* Moreover, in light of the child's difficulty in accurately recalling events, we do not believe the result would change at a new trial if the evidence was introduced. Finally, with regard to Ms. Bruce's tape recording, defendant has not demonstrated how he would have benefitted from the introduction of the tape. Absent evidence the tape differed from Ms. Bruce's report of the session, we do not believe the outcome of a new trial would change. Accordingly, for the foregoing reasons, we hold the trial court did not err in denying defendant's motion for a new trial.

8. *Fundamental Error*

While this case was pending the supreme court decided *State v. Osborne* which also involved criminal sexual contact of a minor. The court held in that case that "unlawfulness" was an essential element of the offense and failure to instruct the jury on that element constitutes fundamental error. The court indicated, however, that instructions which describe the impermissible nature of the act adequately differentiate lawful from unlawful conduct and, therefore, satisfy the element of unlawfulness.

As noted at the outset, defendant was convicted of criminal sexual contact of a minor as an accessory. This was count four of the information. The district court instructed the jury on this count as follows:

> For you to find the defendant guilty as an accessory of criminal sexual contact of a child under the age of 13 as charged in Count 4, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. Manuel Villegas caused Daniel Lopez to touch the penis of Manuel Villegas, and the defendant Edmundo Orosco acted as an accessory to this;
>
> 2. Daniel Lopez was 12 years of age or younger;
>
> 3. This happened in New Mexico sometime between December 5, 1987 and December 19, 1987.

This instruction, as with the instruction in *Osborne,* does not contain the element of "unlawfulness." *Osborne* holds that failure to instruct in that element constitutes fundamental error requiring a new trial.

Because of uncertainty as to whether *Osborne* applies to cases in which the state proves beyond a reasonable doubt the element of unlawfulness, and defendant does not raise the issue, we certified today *State v. Trevino,* 113 N.M. 804, 833 P.2d 1170 (1991). For the same reasons we certify this case.

Like *Trevino* the unlawfulness of the touching by the principal, Manuel Villegas, was established beyond a reasonable doubt, never called into question by defendant and, also like *Trevino,* the defendant here primarily attempted to discredit the victim's testimony.

CONCLUSION

For the reason stated, we would affirm defendant's convictions; however, because of the uncertainty as to the proper resolution of the criminal sexual contact of a

minor under age 13 as an accessory conviction, we certify the case for resolution.

IT IS SO ORDERED.

HARTZ, J. (specially concurring).

CHAVEZ, J. (concurring in part, dissenting in part).

HARTZ, Judge (Specially Concurring).

I join in all of Judge Bivins' opinion except the discussion of the impact of *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991). I do, however, concur in the certification.

In my view, if "unlawfulness" is an essential element of the offense, in the ordinary meaning of that phrase, then there is no way to save the conviction—defendant is entitled to a new trial. When the jury has not been instructed on an essential element of the offense, it is beyond the power of an appellate court to affirm the conviction on the ground that the facts at trial presented no real issue on that element. For an appellate court to make that determination is to arrogate a function that belongs to the jury. Such an act by an appellate court would be the equivalent of a court's directing a verdict of guilty with respect to an element of the offense. Yet only a jury can decide whether the facts establish each element of the offense. *See Carella v. California,* 491 U.S. 263, 267, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (Scalia, J., concurring). I suspect that an error of this nature would require setting aside the conviction not only on direct appeal but also on collateral attack through habeas corpus proceedings.

Perhaps when *Osborne* stated that unlawfulness is an element of the offense, it did not mean "element of the offense" in the usual sense. Perhaps "unlawfulness" is an element that must be proved only in certain circumstances. It is not at all uncommon for the state to be required to prove certain facts beyond a reasonable doubt only when the matter is raised by the defendant. *See, e.g., State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977) (question of whether victim was wife of defendant in rape case); *State v. Lopez,* 109 N.M. 578, 787 P.2d 1261 (Ct.App.1990) (intent-to-return defense to charge of receiving stolen property); SCRA 1986, 14–5101 (uniform jury instruction on insanity defense). The absence of any reference to "unlawfulness" in SCRA 1986, 14–925, the uniform jury instruction for the elements of criminal sexual contact of a minor under thirteen, suggests that our supreme court, at least at one time, viewed lawfulness as an issue to be raised by the defendant. Yet when a fact (such as the sanity of the defendant) must be proved only when the issue is raised by the defendant, the fact is ordinarily denominated as a matter of affirmative defense. *Osborne* explicitly states that lawfulness is not an exception or defense. Moreover, affirmative defenses, almost by definition, can be waived by a defendant. In *Osborne* our supreme court held that it was error not to instruct the jury on unlawfulness even though the defendant specifically objected to an instruction on the matter. Thus, *Osborne* appears to use the phrase "element of the offense" in its customary sense.

In short, it appears to me that *Osborne* compels reversal in this case and will probably require setting aside (either on direct appeal or habeas corpus) a significant portion of the convictions heretofore entered in New Mexico for criminal sexual offenses against children under thirteen. Because of the importance of the issue, however, certification to our supreme court is appropriate.

CHAVEZ, Judge. (concurring in part and dissenting in part).

I concur in certifying this case, but would reverse the ruling that there was sufficient evidence to convict because only prior inconsistent uncorroborated statements were used to prove the charges. Defendant contends that the prior inconsistent statements alone are insufficient evidence for convictions. The state argues that there is independent corroborative evidence that, combined with the prior inconsistent statements, amounts to sufficient evidence to allow the jury to convict. Both parties' arguments rely on *State v. Maes-*

tas, 92 N.M. 135, 584 P.2d 182 (Ct.App. 1978).

In *Maestas,* the defendant was convicted of aggravated battery. *Id.* at 137, 584 P.2d at 184. At trial, the victim refused to identify the defendant as the man who beat her. *Id.* at 138–39, 584 P.2d at 185–86. The prosecution, therefore, elicited prior inconsistent statements of the victim from three other witnesses. *Id.* Each witness testified that the victim had said the defendant was the man who beat her. *Id.* The prior out of court statements were the only evidence identifying the defendant as the perpetrator. On appeal, the defendant argued there was insufficient evidence to convict him because only prior inconsistent statements linked him to the crime. *Id.* at 145, 584 P.2d at 190.

The *Maestas* court distinguished between evidence proving the "corpus delicti" (the substance of the crime) and evidence proving the identity of the perpetrator of the crime. *Id.* The court noted that the substance of the crime, aggravated battery, was properly proved by circumstantial evidence. *Id.* The sole issue for the court was whether prior inconsistent statements alone were sufficient evidence to establish the identity of the defendant. *Id.* The court found that there was corroborative evidence of the prior inconsistent statements. *Id.*

The corroborative evidence listed by the court was that 1) the victim lived with the defendant in his home for a week, 2) *no other person bore an unfavorable relationship with the victim that would lead to a severe beating,* 3) *defendant presented no evidence to cast doubt upon the truth of the prior inconsistent statements,* and 4) no evidence of defendant's good character was presented. *Id.* The court concluded that the above evidence corroborated the truth of the prior statements made by the victim. *Id.* Accordingly, there was sufficient evidence to prove the defendant was the perpetrator because the prior inconsistent statements were not the "sole basis for a conviction." *Id.*

This court's holding in *Maestas* implied that prior inconsistent statements, without corroboration, are insufficient evidence upon which to base a conviction. Consequently, in this case we must decide if prior inconsistent statements were the sole basis for convicting defendant as an accessory to attempted CSPM and CSCM. The accessory statute provides that a person may be convicted of a crime as an accessory "if he procures, counsels, aids or abets in its commission." NMSA 1978, § 30–1–13 (Repl.Pamp.1984). The question is, therefore, whether there is corroborative evidence of the boy's prior inconsistent statements that defendant helped Villegas to commit the crimes. The state argues there is corroborative evidence of the prior statements. I disagree.

The boy's prior statements were not inconsistent regarding defendant's presence at the bar or whether Villegas tried to sexually assault the boy. Rather, the inconsistency arose from the boy's subsequent denial at trial that defendant helped Villegas. I fail to see how the evidence pointed to by the state corroborates the truth of the prior inconsistent statements. I do not read *Maestas* to mean any evidence that corroborates that the declarant was telling the truth as to *any fact* in the past is sufficient corroborative evidence to support the conviction. The corroboration must go to the prior inconsistent statements themselves and not simply to prior consistent statements.

A close examination of the facts excluding the prior inconsistent statements discloses that those facts do not corroborate the commission of the crime. There is nothing that would corroborate defendant's helping Villegas commit the offenses. The fact that the evidence shows that the boy was in the custody of defendant, that defendant took the boy to the bar, and that defendant told the boy's mother about the incident between Villegas and the boy do not corroborate the commission of the crime by defendant. Unlike *Maestas,* there was another person who committed the crime and there was evidence to cast doubt upon the truth of the prior inconsistent statements. For example, Dr. Luis Natalicio testified for the defense. He stated

that the interview techniques used by Yolanda Morales, a counselor at Border Area Mental Health, caused the boy to lose any ability to discern the difference between truth and falsehood. Dr. Natalicio further testified that the interview hopelessly contaminated the boy's testimony. Although the jury was entitled to disregard Dr. Natalicio's expert opinion, *see State v. James,* 85 N.M. 230, 511 P.2d 556 (Ct.App.1973), as the court in *Maestas* recognized, the doubt created by the doctor's testimony was an added reason not to accept the prior inconsistent statements made by the boy as the sole basis for convicting defendant as an accessory. In fact, there was evidence that defendant prevented Villegas from committing the crime.

The state is correct when it asserts that this court must review the evidence in the light most favorable to the verdict, resolving all conflicts therein and indulging all permissible inferences in favor of the verdict. *See State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978). However, as the supreme court also declared, where "the evidence must be buttressed by surmise and conjecture, rather than logical inference in order to support a conviction, this Court, as the final arbiter charged with the protection of civil liberties, cannot allow such conviction to stand." *State v. Vigil,* 87 N.M. 345, 349, 533 P.2d 578, 582 (1975). In accepting the evidence offered by the state as corroborative of the truth of the prior inconsistent statements, the majority opinion is resorting to impermissible surmise and conjecture rather than logical inference. Evidence that the declarant was telling the truth about prior statements consistent with his trial testimony does not provide a logical basis to infer that the prior inconsistent statements must also be true.

In addition, the majority takes victim's statements out of context. The majority opinion stated that "[a]t the trial the victim was asked by the prosecutor if he remembered telling other people that defendant helped Villegas and that defendant himself had touched the child. The victim said that he had and that this was the truth." This statement, taken out of context, is then used to prove that there was direct evidence that supports the jury verdict. However, the victim qualified his statement by stating that he did not remember saying that defendant had helped Villegas, and that he made a mistake at an earlier interview when he said that defendant had touched him.

I do not believe *Maestas,* or this case, should be read to mean that prior inconsistent statements can never be sufficient evidence standing alone. However, the emphasis on corroboration demonstrates that the prior inconsistent statements must be trustworthy. *Maestas* and the lack of corroboration in this case makes the prior inconsistent statements untrustworthy and, therefore, insufficient evidence as a sole basis for conviction.

Without the prior inconsistent statements, there is no other evidence to show that defendant was an accessory to CSCM or attempted CSPM. At most, the evidence shows that defendant was present when Villegas committed the acts in question. Mere presence, without some outward manifestation or expression of approval, is insufficient to sustain a conviction as an accessory. *See State v. Luna,* 92 N.M. 680, 594 P.2d 340 (Ct.App.1979). Because presence alone is not enough, the prior inconsistent statements are necessary to the state's case against defendant as an accessory.

The majority opinion cites a North Carolina case for the proposition that a parent of a child should be convicted as an aider and abettor solely on the basis that the parent failed to take reasonable steps to protect the child. The majority then extends this out-of-state case to include other guardians or baby-sitters who are charged with the care of the child. The majority then proposes to incorporate this proposition into New Mexico's accessory statute. I do not believe our legislature intended such an extension. Penal statutes must be strictly construed, and any doubts about their construction must be resolved in favor of lenity. *State v. Bybee,* 109 N.M. 44, 781 P.2d 316 (Ct.App.1989). Further, the

majority opinion makes unreasonable leaps in logic. It states:

> Even if the jury believed the victim's trial testimony that defendant at some point pulled the victim's pants up when Villegas pulled them down, there was direct evidence from which the jury could infer that Villegas succeeded in sexually contacting the victim and that defendant failed to intervene to stop it. We believe that the jury could find one in defendant's position could be criminally liable in the circumstances of the case.

There is an illogical jump from holding defendant responsible for standing by idly to the majority arguing that defendant must be successful in preventing the abuse. Also, as stated above, untrustworthy prior inconsistent statements alone are insufficient evidence upon which to base a conviction. *See also United States v. Orrico,* 599 F.2d 113 (6th Cir.1979) (prior inconsistent statements as sole support for central element of a crime are insufficient evidence to prove guilt beyond a reasonable doubt). Therefore, I respectfully dissent and would reverse defendant's convictions.

833 P.2d 1170

STATE of New Mexico, Plaintiff–Appellee,

v.

Juan TREVINO, Defendant–Appellant.

No. 12375.

Court of Appeals of New Mexico.

July 2, 1991.

Tom Udall, Atty. Gen., William McEuen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

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

OPINION

BIVINS, Judge.

Defendant appeals his convictions on four counts of criminal sexual contact of a minor (criminal sexual contact), NMSA 1978, § 30–9–13 (Cum.Supp.1990), and two counts of contributing to the delinquency of a minor (contributing), NMSA 1978, § 30–6–3 (Repl.Pamp.1984). On appeal, defendant argues (1) insufficient evidence of use of authority under Section 30–9–13(A)(2)(a); (2) merger of the contributing counts and the criminal sexual contact counts; (3) error in the admission of evidence of other uncharged acts; (4) error in refusing his request to exclude a testifying police officer from the courtroom; (5) prosecutorial misconduct; (6) failure to give requested jury instructions; (7) violation of his right to counsel; and (8) unconstitutional denial of trial tapes on appeal. We address issues (1) and (2) thoroughly and the remaining issues summarily, indicating how we would rule on these issues but for the following question. Although not raised, we also discuss a question of possible fundamental error: whether the conviction of criminal sexual contact of a child under the age of 13 must be set aside and remanded for new trial in light of our supreme court's recent decision in *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991), which was decided after the parties filed their briefs. We believe this question involves a significant question of law under the constitution of the United States and also an issue of substantial public interest that should be determined by the supreme court. *See* NMSA 1978, § 34–5–14(C)(1) & (2) (Repl.Pamp.1990). We are concerned that *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973) compels a decision by this court with which the supreme court ultimately might not agree. Additionally, as our discussion points out, resolution of a part of the issue may involve a choice between what appears to be conflicting decisions by the supreme court. Therefore, we certify the case to the New Mexico supreme court. We first discuss the factual background, then we discuss issues (1) and (2), followed by a summary discussion of issues (3) through (8). Finally, we address the issue we certify.

FACTS

Defendant operated a go-cart track in Roswell, New Mexico. He employed J.C., age fourteen, and permitted J.J., age twelve, to "help out" at the track in exchange for free rides. J.C.'s principal duties included operation of the ticket booth, while J.J. usually retrieved used go-carts. According to testimony at trial, defendant fondled the genitals of both boys on several occasions during their tenure at the track. Defendant was thereafter charged and convicted of one count of criminal sexual contact of J.J., three counts of criminal sexual contact of J.C., and two counts of contributing.

DISCUSSION

I. Use of Authority

Defendant challenges the sufficiency of the evidence with respect to the requirement in Section 30–9–13(A)(2)(a) that he used his position of authority to coerce one of the boys, J.C., to submit to criminal sexual contact. Section 30–9–13 states, in relevant part:

> A. Criminal sexual contact of a minor in the third degree consists of all criminal sexual contact of a minor perpetrated:
>
> * * * * * *

(2) on a child thirteen to eighteen years of age when:

* * * * * *

(a) the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit[.]

Cf. § 30–9–13(B) (fourth degree felony where use of authority not charged). Here, there is no dispute that defendant's status as employer placed him in a position of authority. *See* NMSA 1978, § 30–9–10(D) (Repl.Pamp.1984). Rather, we are asked to review the evidence to determine whether defendant *used* his position as employer in a manner contemplated by Section 30–9–13(A)(2)(a).

On appeal, we view the evidence in the light most favorable to the jury verdict, resolving all conflicts and indulging all reasonable inferences in support thereof. *See State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984). Use of a position of authority to coerce sexual contact may be proven inferentially. *See State v. Gillette,* 102 N.M. 695, 699 P.2d 626 (Ct.App.1985). In *State v. Corbin,* 111 N.M. 707, 809 P.2d 57 (Ct. App.1991), we recently addressed the issue of what constitutes "use of authority" in an employer/employee context. We stated that an authority figure uses his position to coerce a child where the child's submission is the result of undue influence or external forces. *Id.* Significantly, we held that sufficient evidence exists where a defendant's position of authority plays at least a partial role in the coercion. *Id.* In other words, the state does not have to prove that the coercion was exclusively the result of a defendant's exercise of authority over the child.

Here, there were several facts from which we believe the jury could infer coercion resulting from the employment relationship. First, the sexual contact took place on a job site owned by defendant, who had sole supervisory control not only over the premises but also over the victim. Second, and somewhat related to the first fact, defendant assigned J.C. to a small ticket booth where all of the incidents of sexual contact took place. That booth could only hold two or three people and it had a single entrance opposite the ticket window. J.C. testified that on the first incident, defendant came up behind him and began to fondle him sexually as he tended the booth. This continued on several separate occasions. J.C. did not tell others of the incident because he was scared and "didn't know how to handle it then." J.C. testified that on the final incident, defendant came up behind him, pulled both of their pants down, and apparently attempted anal penetration. J.C. then called his mother and tearfully told her what had happened while she drove him home. In light of defendant's ability to place J.C. in a confined, private workstation and J.C.'s testimony that he was scared, we believe the jury could infer that defendant used his position of authority to coerce J.C. to submit to the sexual contact. *See State v. Corbin; State v. Gillette.*

Defendant would have us disregard the realities of the situation by adopting a requirement that the state must prove employment coercion by direct evidence such as a direct threat of loss of a job if the victim did not submit, promise of a raise in exchange for sexual contact, or similar inducements related to the employment. We reject such a stringent requirement. It overlooks the nature of a minor. Common sense and experience teaches us that children generally yield to the wishes of adults. This is particularly true where an adult, such as an employer, has supervisory control. This is not to say that the position of employer in and of itself necessarily establishes the use of that position as coercion; however, where there exists sufficient connection between the employment and the sexual contact, as in the case before us, we hold that the jury can appropriately infer that the employer used coercion, as was done here.

II. Merger

Defendant makes two arguments under this point. First, he contends that because criminal sexual contact with a minor cannot be committed without also contributing to the delinquency of the minor, the latter must merge with the former.

Second, defendant claims that the district court erred in enhancing both contributing convictions under the mandatory habitual statute because contributing is subsumed within the criminal sexual contact convictions. Because we reject defendant's merger argument and hold that the two offenses do not merge, it follows that the district court could enhance the contributing convictions.

The United States Supreme Court, in *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) said: "[t]he Double Jeopardy Clause embodies three protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Id.* at 516, 110 S.Ct. at 2090, 109 L.Ed.2d at 561 (quoting *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (footnotes omitted)); *see also State v. Ellenberger,* 96 N.M. 287, 629 P.2d 1216 (1981). We are concerned here with the third protection.

The critical question for us to determine is whether the legislature intended to authorize multiple punishments for the same offense. *State v. Tsethlikai,* 109 N.M. 371, 785 P.2d 282 (Ct.App.1989); *State v. Edwards,* 102 N.M. 413, 696 P.2d 1006 (Ct. App.1984).

In recognizing contributing to the delinquency of a minor as a crime separate and distinct from any underlying violation of the law, the New Mexico Supreme Court in *State v. Cuevas,* 94 N.M. 792, 617 P.2d 1307 (1980), said that to hold otherwise would mean repealing the contributing statute. Further, we have no difficulty in discerning separate purposes for punishing the crimes of contributing and criminal sexual contact.

The courts have long recognized the legislative intent in enacting the contributing statute was to extend the broadest possible protection to children, recognizing that they may be led astray in innumerable ways. *State v. Pitts,* 103 N.M. 778, 780, 714 P.2d 582, 584 (1986). In contrast, recognizing the crime of criminal sexual contact protects the bodily integrity and personal safety of an individual. *State v. Williams,* 105 N.M. 214, 217, 730 P.2d 1196, 1199 (Ct.App.1986).

Almost sixty years ago the United States Supreme Court announced the test for answering the question as to whether the legislature intended multiple punishments for the same offense. In *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the Court said:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. at 304, 52 S.Ct. at 182 (citation omitted). The test has been most recently reaffirmed and applied by the Supreme Court in *Grady v. Corbin.* As *Grady* points out, "The *Blockburger* test is simply a 'rule of statutory construction,' a guide to determining whether the legislature intended multiple punishments." *Id.* at 517, 110 S.Ct. at 2091, 109 L.Ed.2d at 561–62 (quoting *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983)).

Applying the *Blockburger* test, we must conclude that, although both the crimes of criminal sexual contact and contributing were violated by the unlawful and intentional touching of the minor's genitals, two offenses were committed. In *Blockburger,* a sale of one package of illicit drugs violated two separate sections of the statute, in which one section prohibited the sale of the drug except in or from the original stamped package. The other section prohibited the sale of the drug not in pursuance of a written order from the purchaser. In that case, there was only one sale.

To be sure, proof of the unlawful and intentional touching of the minor's intimate parts constituted the act which would tend to cause or encourage the delinquency of the minor; however, contributing to the

delinquency of a minor requires proof of that additional element of "tends to cause or encourage," which is not required under criminal sexual contact. The jury instructions included the element that the touching of each minor's intimate parts "caused or encouraged [the minor] to conduct himself in a manner injurious to the morals of [the minor]." Defendant does not challenge the sufficiency of the evidence establishing that additional element.

In *Albernaz v. United States,* 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), concerning the question of cumulative punishment, the Court treated *Blockburger* as only a method for ascertaining legislative intent when nothing more concrete was available. It was said that "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." *Id.* at 344, 101 S.Ct. at 1145; *see also* 2 W. LaFave & J. Israel, *Criminal Procedure* § 17.4(b) at 388–89 (1984). In the case before us, while we conclude that legislative intent is clear from the different purposes of the two crimes, application of the *Blockburger* test also leads to that conclusion.

We believe the analysis applied and the result reached comports with the New Mexico supreme court's decision in *Swafford v. State,* 112 N.M. 3, 810 P.2d 1223 (1991) which considered whether separate consecutive sentences for incest and criminal sexual penetration violate the double jeopardy prohibition against multiple punishments. The court held it did not. Applying the same rationale, we hold there was no double jeopardy violation.

We are concerned, however, that the present uniform jury instruction, *see* SCRA 1986, 14–601, permits the jury to find that defendant was guilty of contributing to the delinquency of a minor if defendant conducted himself "in a manner injurious to [the child's] (morals) (health) [or] (welfare)." This alternative, which is based on a decision of the court of appeals, *see State v. Leyba,* 80 N.M. 190, 453 P.2d 211 (Ct.App.1969), may not clearly tell the jury that it must determine that the defendant's acts must have tended to or encouraged the child to conduct himself in a manner injurious to his morals, health or welfare. *Id.* As a result, the jury may equate the offense of contributing and the offense of criminal sexual contact. Under these circumstances, the test outlined in *Swafford* may not provide adequate protection against double punishment. We think the uniform jury instruction with respect to contributing should be revisited in connection with the *Swafford* holding.

III. Additional Issues Answered Summarily

Defendant raises six additional issues, which we dispose of summarily. First, defendant contends that it was reversible error to admit J.J.'s testimony concerning a separate incident of alleged criminal sexual contact of a minor. With respect to sex crimes, we have long recognized an exception to the general prohibition against using evidence of collateral crimes to prove the specific crime charged; evidence of similar sex offenses committed by a defendant with a prosecuting witness is admissible as corroborating evidence. *State v. Mankiller,* 104 N.M. 461, 722 P.2d 1183 (Ct.App.1986); *State v. Minns,* 80 N.M. 269, 454 P.2d 355 (Ct.App.1969). We decline defendant's invitation to revisit *Mankiller* and *Minns.*

Second, defendant argues that the trial judge erred in denying his request to exclude a testifying police officer from the courtroom pursuant to SCRA 1986, 11–615. Trial courts have broad discretion under Rule 11–615. *See State ex rel. State Highway Dep't v. First Nat'l Bank,* 91 N.M. 240, 572 P.2d 1248 (1977). The purpose of the rule is to prevent witnesses from tailoring their testimony to that of another witness and to allow inconsistencies in the testimony to be exposed. *State v. Simon-*

son, 100 N.M. 297, 669 P.2d 1092 (1983); *see also State v. Reynolds,* 111 N.M. 263, 804 P.2d 1082 (Ct.App.1990). Here, the officer was ordered not to talk to other witnesses. Moreover, he testified regarding a very narrow issue, chain of custody. We therefore hold that the trial judge properly exercised his discretion to allow the officer to remain in the courtroom throughout the trial. *See State v. Chavez,* 100 N.M. 730, 676 P.2d 257 (Ct.App.1983).

Third, defendant contends that prosecutorial misconduct requires reversal. During closing argument, the prosecutor said, "He [J.J.] was working where no twelve-year-old boy should be working." Defense counsel requested and received an instruction to the jury that child labor was not an issue in the case. Defendant did not ask for a mistrial. Defendant may not complain on appeal when the specific relief requested was granted. *State v. Peterson,* 103 N.M. 638, 642, 711 P.2d 915, 919 (Ct. App.1985), *cert. denied,* 475 U.S. 1052, 106 S.Ct. 1279, 89 L.Ed.2d 586 (1986).

Fourth, defendant argues that jury instructions on battery should have been given on the theory that the jury could have found that the victims' sexual areas were not touched. A trial court should not give an instruction on a lesser offense unless there was evidence that the lesser offense was the highest degree of the crime committed. *See State v. Martinez,* 98 N.M. 27, 644 P.2d 541 (Ct.App. 1982). Here, the only evidence presented was that defendant touched areas prohibited under the criminal sexual contact statute. Since there was no evidence that tended to show that battery was the highest offense committed, the trial court properly refused defendant's request.

Fifth, defendant asserts that his right to counsel was violated by the police when they videotaped calls he made while in jail. Defendant provides no evidence that the persons called from jail took any other action in the conversation other than to listen. Since the telephone call recipients did not actively engage defendant in a manner likely to elicit incriminating statements, defendant's sixth amendment rights to counsel were not violated. *See State v. Aragon,* 109 N.M. 632, 788 P.2d 932 (Ct.App.1990). As observed in Annotation, *Admissibility, in Criminal Prosecution, of Evidence Obtained by Electronic Surveillance of Prisoner,* 57 A.L.R.3d 172 (1974), the courts have generally upheld the admissibility of evidence marshalled by means of prison surveillance. Inmates of a jail or prison have a limited expectation of privacy. *See State v. Ferguson,* 106 N.M. 357, 743 P.2d 113 (1987). Moreover, defendant has raised no issue concerning the applicability of NMSA 1978, Section 30–12–8 (Repl.Pamp.1984) in the instant case.

Finally, defendant argues that he was unconstitutionally denied access to the trial tapes for preparation of his case on appeal. As defendant concedes, this issue is moot because appellate counsel received the tapes when this case was assigned to the general calendar.

IV. Fundamental Error

While this case was pending the supreme court decided *Osborne,* which also involved criminal sexual contact of a minor. The court held in that case that "unlawfulness" was an essential element of the offense and failure to instruct the jury on that element constitutes fundamental error. The court indicated, however, that instructions which describe the impermissible nature of the act adequately differentiate lawful from unlawful conduct and, therefore, satisfy the element of unlawfulness.

As noted at the outset, defendant was convicted on four counts of criminal sexual contact of a minor. The instructions for counts 2, 4 and 5 each contain a description of the wrongful manner adequate to satisfy the element of "unlawfulness." Each of those instructions required the state to prove, beyond a reasonable doubt, that "de-

fendant was a person who by reason of his relationship to [the victim] was able to exercise undue influence over [the victim] and used his authority to coerce him to submit to sexual contact." Under *Osborne,* therefore, these instructions were adequate, and the criminal sexual contact convictions of J.C. should be affirmed.

The instruction for count 1, like the instruction in *Osborne,* tracked SCRA 1986, 14-925. It charged the jury:

> For you to find the defendant guilty of criminal sexual contact of a child under the age of 13 as charged in Count 1, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant touched or applied force to the penis of J.J.;
>
> 2. J.J. was 12 years of age or younger;
>
> 3. This happened in New Mexico on or about the 28th day of June, 1989.

Thus, this case squarely presents the same issue raised in *Osborne:* absent the essential element of "unlawfulness" as required in Section 30-9-13, did fundamental error occur so as to require us to set aside the conviction on count 1 and remand for a new trial on that count? We are not certain.

In *Osborne,* the defendant did not recall ever touching the minor's buttocks, but rather, contended that if he did, it would not have been in an inappropriate manner or with an inappropriate intent. In the case before us, defendant did not put at issue the manner of touching. His defense was primarily that the touching never occurred. However, if *Osborne* is intended to require inclusion of the element of unlawfulness even when the manner of touching is not at issue and, as here, the state proves beyond a reasonable doubt it was unlawful, then reversal and remand for a new trial is mandated. Supporting that view is the supreme court's rejection of the state's argument in *Osborne* that the use of the term "unlawfully" in the definition of criminal sexual contact of a minor merely establishes an exception or defense to the offense. In doing so, the court looked to the language of the statute itself and concluded the statute required unlawfulness as an element. If this view prevails, defendant's conviction on count 1 should be reversed.

We cannot overlook, however, the fact that *Osborne* did not involve a case, such as before us, where the state proves unlawfulness and defendant does not put that element at issue. Further, we are concerned with prior supreme court precedents that could be viewed as holding contrary to *Osborne* but which were not expressly overruled by that case.

As examples of the latter, we have cases such as *State v. Melton,* 90 N.M. 188, 561 P.2d 461 (1977), which hold failure to instruct the jury it must find the victim was not defendant's wife in order to convict for rape does not constitute jurisdictional error where there was no evidence whatsoever that victim was the spouse of the defendant. *See State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977) (same); *Kendall v. State,* 90 N.M. 191, 561 P.2d 464 (1977) (same). Other courts have reached the same result. *See, e.g., United States v. McCaskill,* 676 F.2d 995 (4th Cir.1982) (failure to instruct that government must prove knowledge by aider and abettor that actual perpetrators were armed not reversible error where no question defendant had requisite knowledge and, in any event, absent proper and timely objection there was no manifest injustice constituting plain error); *United States v. Hensel,* 711 F.2d 1000 (11th Cir. 1983) (failure to charge jury on element of crime, nexus between vessel injured and commerce, held not plain error, where element not in dispute, proof of element met, and no other prejudice shown). *Cf. United States v. Brooksby,* 668 F.2d 1102 (9th Cir.1982) (reversible error not to instruct on element of "willfully" when "willfulness" was only element of offense defendant challenged).

Similarly, the supreme court's decision in *Osborne,* holding that unlawfulness is an

element of criminal sexual contact, is analogous to its decision in *Reese v. State,* 106 N.M. 498, 745 P.2d 1146 (1987), holding that knowledge that the victim is a peace officer constitutes an element of peace officer assault and battery. In *State v. Hilliard,* 107 N.M. 506, 760 P.2d 799 (Ct.App. 1988), we held that, if the facts of a particular case do not raise a factual issue as to an element not in a uniform jury instruction, there is no jurisdictional error for failure to instruct on that element. Although we called knowledge a defense in *Hilliard,* the supreme court repeatedly said it was an element in *Reese.*

Further, the supreme court's careful avoidance of reliance on a theory of "jurisdictional" error in *Osborne* suggests that the approach to take in cases like this is to inquire whether fundamental error occurred. As Justice Montgomery, the author of *Osborne,* noted in *Sundance Mechanical & Utility Corp. v. Atlas,* 109 N.M. 683, 789 P.2d 1250 (1990), "jurisdictional" has two meanings: the first indicates the trial proceedings are void and the second simply indicates error that may be raised for the first time on appeal. To complicate matters, in criminal cases to which the writ of habeas corpus was applicable, the term "jurisdiction" was expanded to include any problems in the proceedings that would warrant habeas relief. *McClesky v. Zant,* — U.S. ——, 111 S.Ct. 1454, 1461–62, 113 L.Ed.2d 517 (1991). Although this fiction of jurisdiction was discarded by the Supreme Court in 1942, *id.,* our New Mexico cases continued to follow the Supreme Court's concept of jurisdiction after that Court discarded it. *See Orosco v. Cox,* 75 N.M. 431, 405 P.2d 668 (1965) (relying on *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), a pre–1942 case); *State v. Foster,* 87 N.M. 155, 530 P.2d 949 (Ct.App.1974) (relying on *Orosco*'s concept of jurisdiction in a non-habeas case).

The history of the concept of jurisdictional error in jury instructions was explained in *State v. Southerland,* 100 N.M. 591, 673 P.2d 1324 (Ct.App.1983). Although we there said a court would lack jurisdiction to sentence someone who had not been convicted based on jury instructions including all elements of the crime, we acknowledged that *State v. Walsh,* 81 N.M. 65, 463 P.2d 41 (Ct.App.1969), was the originator of the concept of jurisdictional error in jury instructions. *Walsh,* in turn, relied on *Screws v. United States,* 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945), containing language about "error * * * so fundamental." Perhaps the phrase jurisdictional error can be limited and thus distinguished from the phrase fundamental error.

We are supported in this, not only by *Osborne,* but also by recent changes in the wording of SCRA 1986, 12–216. After 1986, that rule separated jurisdictional questions from questions involving general public interest, fundamental error, and fundamental rights. As to the former, the rule requiring preservation of error does not apply at all, indicating that the court must reach questions alleging lack of jurisdiction. As to the latter, the matter is in the appellate court's discretion, indicating that issues of fundamental error do not go to the jurisdiction of the court to act. Thus, we believe the term 'jurisdictional error' should be confined to instances in which the court where the error occurred was not competent to act and that it is inappropriate to equate jurisdictional error with all instances in which error may be raised for the first time on appeal.

Addressing the issue as possible fundamental error, the type of fundamental error at issue is the same as in *State v. DeSantos,* 89 N.M. 458, 553 P.2d 1265 (1976), and *State v. Buhr,* 82 N.M. 371, 482 P.2d 74 (Ct.App.1971). In both those cases, the problems with the instructions were such that the verdict of guilty was rendered virtually meaningless. To a like effect in *Osborne,* the verdict was meaningless because the instructions would have allowed a conviction for an act defendant admitted committing, touching the child on

the buttocks while he was hugging her, when such an act without more is not criminal. In *Osborne,* the supreme court concluded, "The instructions failed to require the jury to resolve the issue, *raised in the evidence at trial,* of whether defendant's touching was done innocently as a mere affectionate pat or rub of M.C.'s bottom, or whether it was done in a sexual or other improper manner." 111 N.M. at 663, 808 P.2d at 633 (emphasis added).

Thus, the inquiry in *Osborne* was similar to the inquiry in *Hilliard:* did the evidence in the case raise an issue concerning the "element" which the uniform jury instructions failed to cover? If so, the verdict would be meaningless, and fundamental error would be present. If not, reversible error would not be present. If we were to apply these standards to this case, we would be confident no fundamental error occurred. The criminal sexual contact, if it took place in this case, was unquestionably sexual in nature. There was never any contention that the touching was lawful. The jury's verdict resolved the basic issue in the case, the question of whether the touching occurred. Under these circumstances, only the broader view of the doctrine of jurisdictional error would call for a reversal. Accordingly, we would not exercise our discretion, *see* Rule 12–216, to find fundamental error here. For these reasons, we also believe that the doctrine of jurisdictional error as explained in *Southerland* should not be followed, at least regarding crimes covered by uniform jury instructions.

If the broader view prevails, that is, reversal is required regardless of whether the manner of touching is put at issue, it will have far-reaching effects on every criminal sexual contact of a minor conviction obtained since adoption of chapter 9 of the Uniform Jury Instructions in 1977. For this reason and because of the uncertainty that exists, we certify the question.

IV. Conclusion

For the reasons stated, we would affirm defendant's convictions of criminal sexual contact by a person in position of authority and contributing to the delinquency of a minor, including the accompanying habitual offender enhancement. However, because of our uncertainty as to the proper resolution of the conviction for criminal sexual contact of a child under 13, we certify this case for resolution.

IT IS SO ORDERED.

MINZNER, J., concurs.

DONNELLY, J., specially concurs.

DONNELLY, Judge (Specially Concurring).

I join in certification of this case and in the discussion as to the sufficiency of the evidence, merger, and each of the issues discussed summarily. I agree also, as stated in *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991), and as applicable to the instant case, that where the jury instructions, taken as a whole, otherwise sufficiently specify the nature of the criminal conduct so as to indicate its unlawful nature, the instructions properly supply the element of "unlawfulness" required in *Osborne.* Although I concur in certification of this cause, I disagree with the rationale relied upon as the basis for certification.

The majority indicates that in interpreting *Osborne,* a question exists as to whether "inclusion of the element of unlawfulness [is required in instructing as to the crime of criminal sexual contact of a minor (CSCM)] even when the manner of touching is not at issue and * * * the state proves beyond a reasonable doubt it was unlawful * * *." *Osborne* discussed the issue of whether "unlawfulness" was an essential element of the charge of CSCM as defined in NMSA 1978, Section 30–9–13 (Cum.Supp.1990), and held: "[U]nlawfulness is an essential element of the offense of CSCM ... [and] the failure to instruct the jury on the essential elements of an offense constitutes fundamental error." *Id.* at 662, 808 P.2d at 632. Thus, *Osborne* addresses the basic question of whether

SCRA 1986, 14–925 has been effectively modified so as to require inclusion of an additional essential element. Additionally, SCRA 1986, 5–608(A) provides that "[t]he court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury." *See also State v. Bender,* 91 N.M. 670, 579 P.2d 796 (1978) (failure to instruct on all of the essential elements of the crime charged is jurisdictional); *State v. Cole,* 153 Ariz. 86, 734 P.2d 1042 (App.Ct.1987) (fundamental error involving a jury instruction is one that goes to the foundation of the case or takes from defendant a right essential to his defense).

In view of the holding in *Osborne* that "unlawfulness" is an essential element of the offense of CSCM, it seems clear that it is not incumbent on an individual charged with CSCM to put at issue the manner of the alleged touching where he has entered a plea of not guilty to such charge. *See* SCRA 1986, 14–102; *see also State v. Chouinard,* 96 N.M. 658, 634 P.2d 680 (1981) (burden of proof rests on state to prove each element of the charged offense beyond a reasonable doubt), *cert. denied,* 456 U.S. 930, 102 S.Ct. 1980, 72 L.Ed.2d 447 (1982).

I join in certification of this case, however, on a different ground: whether, in light of the fact that the trial court herein instructed the jury as to the offense of CSCM using UJI Crim. 14–925 as approved by the supreme court, the decision in *Osborne* should be given prospective effect or retroactive effect.

The trial court in the present case was under a duty to give uniform criminal jury instruction 14–925, in the form prescribed at the time of trial. *State v. Isiah,* 109 N.M. 21, 781 P.2d 293 (1989). The trial court followed this requirement. Since the decision in *Osborne* determined that an additional element should be included in the jury instruction setting out the elements of CSCM and this decision was handed down after the trial in the instant case, a substantial question of law now exists as to whether the result in *Osborne* should be applied retroactively or only prospectively. In *Huffman v. State,* 775 S.W.2d 653 (Tex. Ct.App.1989), the court addressed an issue involving whether a decision declaring an instruction unconstitutional should be applied retroactively. The court held that the decision would not be given retroactive application to a case tried before the issuance of the decision. The *Huffman* court observed, "retroactive application of a judicial decision is not mandated by either the United States or Texas Constitutions. *See e.g. Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) (exclusionary rule); *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) (limiting retroactivity of *Escobedo* and *Miranda* rights); *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (limiting the *Katz* doctrine to prospective application)." 775 S.W.2d at 663.

If the decision in *Osborne* was intended to have retroactive application, does the ruling have retroactive application to cases, including the case at bar, which were pending on direct review at the time of the decision in *Osborne? See Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); *Huffman v. State; see also James B. Beam Distilling Co. v. Georgia,* — U.S. —, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991).

[redacted]